Z 1
1:975/2B

PROPERTY OF
GOVERNOR'S OFFICE

PROPERTY OF
GOVERNOR'S OFFICE

THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through the Session Laws of 1973, Second Session

---

Prepared under the Supervision of the Department of Justice of the State of North Carolina

---

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of

W. M. Willson, J. H. Vaughan, Sylvia Faulkner and Elizabeth E. Pincus

---

PROPERTY OF
GOVERNOR'S OFFICE

Volume 2B

1975 Replacement Volume

The Michie Company, Law Publishers
Charlottesville, Va.
1975

Copyright 1944, 1950, 1960, 1965, 1975
by
The Michie Company

Scope of Volume

Statutes:

Full text of Chapters 53 through 62 of the General Statutes of North Carolina, including all enactments through the Session Laws of 1973, First and Second Sessions, heretofore contained in 1965 Replacement Volume 2B of the General Statutes of North Carolina and the 1974 Cumulative Supplement thereto.

Annotations:

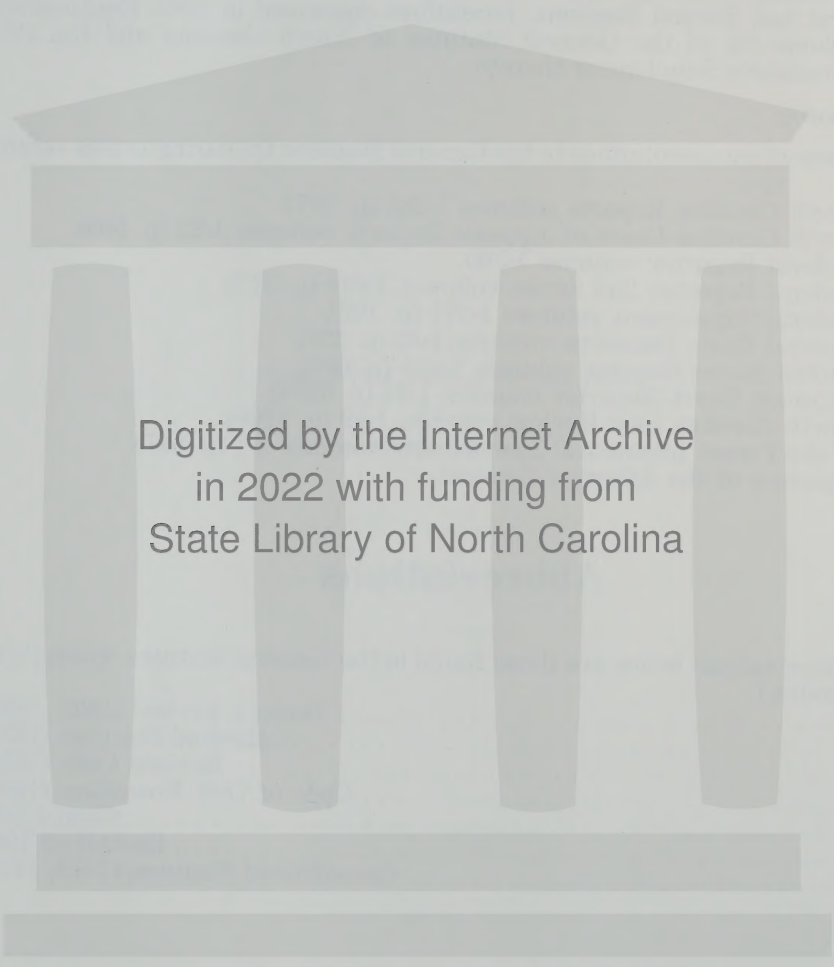
Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports volumes 1-285 (p. 597).
North Carolina Court of Appeals Reports volumes 1-22 (p. 508).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-498 (p. 912).
Federal Supplement volumes 1-377 (p. 192).
Federal Rules Decisions volumes 1-63 (p. 229).
United States Reports volumes 1-415 (p. 604).
Supreme Court Reporter volumes 1-94 (p. 3234).
North Carolina Law Review volumes 1-49 (p. 1006).
Wake Forest Intramural Law Review volumes 2-7 (p. 697).
Opinions of the Attorney General.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R. . . . . Potter's Revisal (1821, 1827)
R. S. . . . . Revised Statutes (1837)
R. C. . . . . Revised Code (1854)
C. C. P. . . . . Code of Civil Procedure (1868)
Code . . . . . Code (1883)
Rev. . . . . Revisal of 1905
C. S. . . . . Consolidated Statutes (1919, 1924)



Digitized by the Internet Archive
in 2022 with funding from
State Library of North Carolina

https://archive.org/details/generalstatuteso02nort_10

Preface

Volume 2B, last replaced in 1965, accumulated a supplement nearly equalling the bound volume in size and including, among other things, extensive changes in the chapters relating to banks, corporations and insurance. This 1975 Replacement Volume is issued to incorporate the new material in the bound volume and to eliminate what is obsolete.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

RUFUS L. EDMISTEN
Attorney General

March 1, 1975

Table of Contents

VOLUME 1A.

Chapter 1. Civil Procedure.
Chapter 1A. Rules of Civil Procedure.
Chapter 1B. Contribution.

VOLUME 1B.

Chapter 2. Clerk of Superior Court.
Chapter 3. Commissioners of Affidavits and Deeds [Repealed].
Chapter 4. Common Law.
Chapter 5. Contempt.
Chapter 6. Liability for Court Costs.
Chapter 7. Courts.
Chapter 7A. Judicial Department.
Chapter 8. Evidence.
Chapter 8A. Interpreters for Deaf Persons.
Chapter 9. Jurors.
Chapter 10. Notaries.
Chapter 11. Oaths.
Chapter 12. Statutory Construction.
Chapter 13. Citizenship Restored.
Chapter 14. Criminal Law.

VOLUME 1C.

Chapter 15. Criminal Procedure.
Chapter 15A. Criminal Procedure Act.
Chapter 16. Gaming Contracts and Futures.
Chapter 17. Habeas Corpus.
Chapter 17A. Law-Enforcement Officers.
Chapter 17B. North Carolina Criminal Justice Education and Training System.
Chapter 18. Regulation of Intoxicating Liquors [Repealed].
Chapter 18A. Regulation of Intoxicating Liquors.
Chapter 19. Offenses against Public Morals.
Chapter 19A. Protection of Animals.
Chapter 20. Motor Vehicles.

VOLUME 1D.

Chapter 21. Bills of Lading.
Chapter 22. Contracts Requiring Writing.
Chapter 23. Debtor and Creditor.
Chapter 24. Interest.
Chapter 25. Uniform Commercial Code.
Chapter 25A. Retail Installment Sales Act.
Chapter 25B. Credit.
Chapter 26. Suretyship.
Chapter 27. Warehouse Receipts.

VOLUME 2A.

Chapter 28. Administration [Repealed].
Chapter 28A. Administration of Decedents' Estates.
Chapter 28B. Estates of Absentees in Military Service.
Chapter 28C. Estates of Missing Persons.
Chapter 29. Intestate Succession.
Chapter 30. Surviving Spouses.
Chapter 31. Wills.
Chapter 31A. Acts Barring Property Rights.
Chapter 32. Fiduciaries.
Chapter 33. Guardian and Ward.
Chapter 34. Veterans' Guardianship Act.
Chapter 35. Persons with Mental Diseases and Incompetents.
Chapter 36. Trusts and Trustees.
Chapter 37. Allocation of Principal and Income.
Chapter 38. Boundaries.
Chapter 39. Conveyances.
Chapter 40. Eminent Domain.
Chapter 41. Estates.
Chapter 42. Landlord and Tenant.
Chapter 43. Land Registration.
Chapter 44. Liens.
Chapter 44A. Statutory Liens and Charges.
Chapter 45. Mortgages and Deeds of Trust.
Chapter 46. Partition.
Chapter 47. Probate and Registration.
Chapter 47A. Unit Ownership Act.
Chapter 47B. Real Property Marketable Title Act.
Chapter 48. Adoptions.
Chapter 48A. Minors.
Chapter 49. Bastardy.
Chapter 49A. Rights of Children.
Chapter 50. Divorce and Alimony.
Chapter 51. Marriage.
Chapter 52. Powers and Liabilities of Married Persons.
Chapter 52A. Uniform Reciprocal Enforcement of Support Act.

VOLUME 2B.

PAGE
CHAPTER 53. BANKS 1
Art. 1. Definitions 4
Art. 2. Creation 5
Art. 3. Dissolution and Liquidation 12
Art. 4. Reopening of Closed Banks 27
Art. 5. Stockholders 28
Art. 6. Powers and Duties 30
Art. 7. Officers and Directors 55
Art. 8. Commissioner of Banks and Banking Department 60
Art. 9. Bank Examiners 68
Art. 10. Penalties 71
Art. 11. Industrial Banks 77
Art. 12. Joint Deposits 80
Art. 13. Conservation of Bank Assets and Issuance of Preferred Stock 81
Art. 14. Banks Acting in a Fiduciary Capacity 84

PAGE
Art. 15. North Carolina Consumer Finance Act 85
Art. 16. Sale of Checks Act 99

CHAPTER 53A. BUSINESS DEVELOPMENT CORPORATIONS 103

CHAPTER 54. COOPERATIVE ORGANIZATIONS 114
Art. 1. Organization 117
Art. 2. Shares and Shareholders 126
Art. 2A. Savings Accounts 128
Art. 3. Loans 129
Art. 4. Under Control of Administrator of the Savings and Loan Division 134
Art. 5. Foreign Associations 138
Art. 5A. Reserves 140
Art. 6. Withdrawals 141
Art. 7. Statements of Financial Condition of Associations 142
Art. 7A. Mutual Deposit Guaranty Associations 142
Art. 8. Organization and Powers 145
Art. 9. Credit Union Division; Administrator of Credit Unions 151
Art. 10. Incorporation of Credit Unions 154
Art. 11. Powers of Credit Unions 157
Art. 12. Shares in the Corporation 163
Art. 13. Members and Officers 164
Art. 14. Supervision and Control 167
Art. 15. Central Associations 169
Art. 16. Organization of Associations 170
Art. 17. Stockholders and Officers 173
Art. 18. Powers and Duties 174
Art. 19. Purpose and Organization 175
Art. 20. Members and Officers 181
Art. 21. Powers, Duties, and Liabilities 183
Art. 22. Merger, Consolidation and Other Fundamental Changes 188

CHAPTER 55. BUSINESS CORPORATION ACT 194
Art. 1. General Provisions 196
Art. 2. Execution and Filing of Certain Corporate Documents 200
Art. 3. Formation, Name and Registered Office 201
Art. 4. Powers and Management 208
Art. 5. Corporate Finance 232
Art. 6. Shareholders 250
Art. 7. Uniform Stock Transfer Act [Repealed] 269
Art. 8. Fundamental Changes 269
Art. 9. Dissolution and Liquidation 284
Art. 10. Foreign Corporations 294
Art. 11. Fees and Taxes 324
Art. 12. Curative Provisions 326
Art. 13. Miscellaneous Provisions 328

CHAPTER 55A. NONPROFIT CORPORATION ACT 331
Art. 1. General Provisions 332
Art. 2. Execution and Filing of Certain Corporate Documents 333
Art. 3. Formation, Name and Registered Office 335
Art. 4. Powers and Management 339
Art. 5. Members 346
Art. 6. Fundamental Changes 347
Art. 7. Dissolution and Liquidation 352
Art. 8. Foreign Corporations 357
Art. 9. Fees and Taxes 364
Art. 10. Miscellaneous Provisions 366
Art. 11. Curative Provisions 368

PAGE

CHAPTER 55B. PROFESSIONAL CORPORATION ACT 369

CHAPTER 56. ELECTRIC, TELEGRAPH AND POWER COMPANIES [REPEALED] 374

CHAPTER 57. HOSPITAL, MEDICAL AND DENTAL SERVICE CORPORATIONS 375

CHAPTER 58. INSURANCE 391
Art. 1. Title and Definitions 402
Art. 2. Commissioner of Insurance 403
Art. 3. General Regulations for Insurance 416
Art. 3A. Unfair Trade Practices 448
Art. 3B. Unauthorized Insurers False Advertising Process Act . 455
Art. 3C. Unauthorized Insurers 457
Art. 3D. Unauthorized Insurance by Domestic Companies 461
Art. 4. Insurance Premium Financing 462
Art. 4A. Insurance Business through Credit Cards Prohibited .. 471
Art. 5. License Fees and Taxes 472
Art. 6. General Domestic Companies 474
Art. 6A. Exchange of Stock 509
Art. 7. Guaranty Fund for Domestic Companies 513
Art. 8. Mutual Insurance Companies 515
Art. 9. Conversion of Stock Corporations into Mutual Corporations 520
Art. 10. Assessment Companies 522
Art. 11. Fidelity Insurance Companies [Repealed] 524
Art. 12. Promoting and Holding Companies 524
Art. 12A. Insurer Holding Registration and Disclosure Act 526
Art. 13. Fire Insurance Rating Bureau 531
Art. 13A. Casualty Insurance Rating Regulations 539
Art. 13B. Rate Regulation of Miscellaneous Lines 544
Art. 14. Real Estate Title Insurance Companies 545
Art. 15. Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates 548
Art. 16. Reciprocal or Interinsurance Exchanges 550
Art. 16A. "Lloyds" Insurance Associations 552
Art. 17. Foreign or Alien Insurance Companies 553
Art. 17A. Mergers, Rehabilitation and Liquidation of Insurance Companies 560
Art. 17B. Postassessment Insurance Guaranty Association 571
Art. 17C. Life and Accident and Health Insurance Guaranty Association 578
Art. 18. General Regulations of Business 589
Art. 18A. Fire and Extended Coverage for Beach Area Property . 595
Art. 18B. Fair Access to Insurance Requirements 599
Art. 19. Fire Insurance Policies 603
Art. 20. Deposits by Insurance Companies 619
Art. 21. Insuring State Property 625
Art. 22. General Regulations of Business 628
Art. 23. Registered Policies 652
Art. 24. Mutual Burial Associations 654
Art. 25. Regulation of Automobile Liability Insurance Rates ... 668
Art. 25A. North Carolina Motor Vehicle Reinsurance Facility ... 677
Art. 26. Nature of Policies 684
Art. 26A. Joint Action to Insure Elderly 700
Art. 27. General Regulations 702
Art. 27A. Health Insurance Advisory Board 706
Art. 28. Fraternal Orders 708
Art. 29. Whole Family Protection 726

PAGE
Art. 30. General Provisions for Societies 728
Art. 31. Nonprofit Life Benefit Association [Repealed] 729

CHAPTER 59. PARTNERSHIP 730
Art. 1. Uniform Limited Partnership Act 731
Art. 2. Uniform Partnership Act 738
Art. 3. Surviving Partners 754
Art. 4. Business under Assumed Name Regulated [Transferred] 760

CHAPTER 60. RAILROADS AND OTHER CARRIERS [REPEALED AND TRANSFERRED] 761

CHAPTER 61. RELIGIOUS SOCIETIES 762

CHAPTER 62. PUBLIC UTILITIES 767
Art. 1. General Provisions 771
Art. 2. Organization of Utilities Commission 777
Art. 3. Powers and Duties of Utilities Commission 782
Art. 4. Procedure before the Commission 794
Art. 5. Review and Enforcement of Orders 807
Art. 6. The Utility Franchise 817
Art. 6A. Radio Common Carriers 834
Art. 7. Rates of Public Utilities 835
Art. 8. Securities Regulation 873
Art. 9. Acquisition and Condemnation of Property 876
Art. 10. Transportation in General 883
Art. 11. Railroads 896
Art. 12. Motor Carriers 926
Art. 13. Reorganization of Public Utilities 946
Art. 14. Fees and Charges 948
Art. 15. Penalties and Actions 950

VOLUME 2C.

Chapter 63. Aeronautics.
Chapter 64. Aliens.
Chapter 65. Cemeteries.
Chapter 66. Commerce and Business.
Chapter 67. Dogs.
Chapter 68. Fences and Stock Law.
Chapter 69. Fire Protection.
Chapter 70. Indian Antiquities.
Chapter 71. Indians.
Chapter 72. Inns, Hotels and Restaurants.
Chapter 73. Mills.
Chapter 74. Mines and Quarries.
Chapter 74A. Company Police.
Chapter 74B. Private Protective Services Act.
Chapter 75. Monopolies, Trusts and Consumer Protection.
Chapter 75A. Boating and Water Safety.
Chapter 76. Navigation.
Chapter 77. Rivers and Creeks.
Chapter 78. Securities Law [Repealed].
Chapter 78A. North Carolina Securities Act.
Chapter 79. Strays.
Chapter 80. Trademarks, Brands, etc.
Chapter 81. Weights and Measures.
Chapter 82. Wrecks [Repealed].
Chapter 83. Architects.

Chapter 84. Attorneys at Law.
Chapter 85. Auctions and Auctioneers [Repealed].
Chapter 85A. Bail Bondsmen and Runners.
Chapter 85B. Auctions and Auctioneers.
Chapter 86. Barbers.
Chapter 87. Contractors.
Chapter 88. Cosmetic Art.
Chapter 89. Engineering and Land Surveying.
Chapter 89A. Landscape Architects.
Chapter 90. Medicine and Allied Occupations.
Chapter 90A. Sanitarians and Water and Wastewater Treatment Facility Operators.
Chapter 91. Pawnbrokers.
Chapter 92. Photographers [Deleted].
Chapter 93. Public Accountants.
Chapter 93A. Real Estate Brokers and Salesmen.
Chapter 93B. Occupational Licensing Boards.
Chapter 93C. Watchmakers.
Chapter 93D. North Carolina State Hearing Aid Dealers and Fitters Board.
Chapter 94. Apprenticeship.
Chapter 95. Department of Labor and Labor Regulations.
Chapter 96. Employment Security.

VOLUME 2D.

Chapter 97. Workmen's Compensation Act.
Chapter 98. Burnt and Lost Records.
Chapter 99. Libel and Slander.
Chapter 99A. Civil Remedies for Criminal Actions.
Chapter 100. Monuments, Memorials and Parks.
Chapter 101. Names of Persons.
Chapter 102. Official Survey Base.
Chapter 103. Sundays, Holidays and Special Days.
Chapter 104. United States Lands.
Chapter 104A. Degrees of Kinship.
Chapter 104B. Hurricanes or Other Acts of Nature.
Chapter 104C. Atomic Energy, Radioactivity and Ionizing Radiation.
Chapter 104D. Southern Interstate Nuclear Compact.
Chapter 105. Taxation.

VOLUME 3A.

Chapter 106. Agriculture.
Chapter 107. Agricultural Development Districts [Repealed].
Chapter 108. Social Services.
Chapter 109. Bonds.
Chapter 110. Child Welfare.
Chapter 111. Aid to the Blind.
Chapter 112. Confederate Homes and Pensions.
Chapter 113. Conservation and Development.
Chapter 113A. Pollution Control and Environment.
Chapter 114. Department of Justice.
Chapter 115. Elementary and Secondary Education.
Chapter 115A. Community Colleges, Technical Institutes, and Industrial Education Centers.
Chapter 116. Higher Education.
Chapter 116A. Escheats and Abandoned Property.

VOLUME 3B.

Chapter 117. Electrification.
Chapter 118. Firemen's Relief Fund.
Chapter 118A. Firemen's Death Benefit Act [Repealed].
Chapter 118B. Members of a Rescue Squad Death Benefit Act [Repealed].
Chapter 119. Gasoline and Oil Inspection and Regulation.
Chapter 120. General Assembly.
Chapter 121. Archives and History.
Chapter 122. Hospitals for the Mentally Disordered.
Chapter 122A. North Carolina Housing Finance Agency.
Chapter 123. Impeachment.
Chapter 123A. Industrial Development.
Chapter 124. Internal Improvements.
Chapter 125. Libraries.
Chapter 126. State Personnel System.
Chapter 127. Militia.
Chapter 128. Offices and Public Officers.
Chapter 129. Public Buildings and Grounds.
Chapter 130. Public Health.
Chapter 131. Public Hospitals.
Chapter 132. Public Records.
Chapter 133. Public Works.
Chapter 134. Youth Development.
Chapter 135. Retirement System for Teachers and State Employees; Social Security.
Chapter 136. Roads and Highways.

VOLUME 3C.

Chapter 137. Rural Rehabilitation.
Chapter 138. Salaries, Fees and Allowances.
Chapter 139. Soil and Water Conservation Districts.
Chapter 140. State Art Museum; Symphony and Art Societies.
Chapter 140A. State Awards System.
Chapter 141. State Boundaries.
Chapter 142. State Debt.
Chapter 143. State Departments, Institutions, and Commissions.
Chapter 143A. State Government Reorganization.
Chapter 143B. Executive Organization Act of 1973.
Chapter 144. State Flag, Motto and Colors.
Chapter 145. State Flower, Bird, Tree, Shell, Mammal, Fish, Insect and Stone.
Chapter 146. State Lands.
Chapter 147. State Officers.
Chapter 148. State Prison System.
Chapter 149. State Song and Toast.
Chapter 150. Uniform Revocation of Licenses [Repealed].
Chapter 150A. Administrative Procedure Act.
Chapter 151. Constables [Repealed].
Chapter 152. Coroners.
Chapter 152A. County Medical Examiner [Repealed].
Chapter 153. Counties and County Commissioners [Repealed].
Chapter 153A. Counties.
Chapter 154. County Surveyor [Repealed].
Chapter 155. County Treasurer [Repealed].
Chapter 156. Drainage.

VOLUME 3D.

Chapter 157. Housing Authorities and Projects.
Chapter 157A. Historic Properties Commissions [Transferred].
Chapter 158. Local Development.
Chapter 159. Local Government Finance.
Chapter 159A. Pollution Abatement and Industrial Facilities Financing Act.
Chapter 160. Municipal Corporations.
Chapter 160A. Cities and Towns.
Chapter 160B. Consolidated City-County Act.
Chapter 161. Register of Deeds.
Chapter 162. Sheriff.
Chapter 162A. Water and Sewer Systems.
Chapter 162B. Continuity of Local Government in Emergency.
Chapter 163. Elections and Election Laws.
Chapter 164. Concerning the General Statutes of North Carolina.
Chapter 165. Veterans.
Chapter 166. Civil Defense Agencies.
Chapter 167. State Civil Air Patrol.
Chapter 168. Handicapped Persons.

VOLUME 4A.

Constitution of North Carolina.
Constitution of the United States.
Appendix.
- Rules of Court.
- Removal of Causes.
- Authentication of Records.
- Extradition.
- Rules, Regulations and Organization of the North Carolina State Bar.
- Code of Professional Responsibility of the North Carolina State Bar.
- Code of Judicial Conduct.
- Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases.
- Rules Governing Admission to Practice of Law.
- Rules Governing Practical Training of Law Students.
- North Carolina Supreme Court Library Rules.
- Tables.

VOLUME 4B.

Index (Letters A-E).

VOLUME 4C.

Index (Letters F-O).

VOLUME 4D.

Index (Letters P-Z).

Chapter 53.

Banks.

Article 1.

Definitions.

Sec.
53-1. "Bank," "surplus," "undivided profits," and other words defined.

Article 2.

Creation.

53-2. How incorporated.
53-3. Certificate of incorporation; how signed, proved and filed.
53-4. Examination by Commissioner; when certification to be refused; review by Commission.
53-5. Certificate of incorporation, when certified.
53-6. Payment of capital stock.
53-7. Statement filed before beginning business.
53-8. Authorized to begin business.
53-9. Transactions preliminary to beginning business.
53-10. Increase of capital stock.
53-11. Decrease of capital stock.
53-12. Consolidation of banks.
53-13. Consolidated banks deemed one bank.
53-14. Reorganization.
53-15. [Repealed.]
53-16. Consolidation, conversion or merger of State banks or trust companies with national banks.
53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities.

Article 3.

Dissolution and Liquidation.

53-18. Voluntary liquidation.
53-19. When Commissioner of Banks may take charge.
53-20. Liquidation of banks.
53-21. Sale of stocks of defunct banks validated.
53-22. Statute relating to receivers applicable to insolvent banks.
53-23. Disposition of books, records, etc.
53-24. Destruction of records of liquidated insolvent banks.
53-25. Trust terminated on insolvency of trustee bank.
53-26. Petition for new trustee; service upon parties interested.
53-27. Publication and contents of notice.
53-28. Appointment where no objection made.
53-29. Hearing where objection made; appeal from order.
53-30. Registration of final order.
53-31. Petition and order applicable to all instruments involved.
Sec.
53-32. Additional remedy.
53-33. Validation of acts of officers of insolvent banks as trustees in deeds of trust.
53-34. Validation of sales by Commissioner of Banks under mortgages, etc., giving banks power of sale.
53-35. Foreclosures and execution of deeds by Commissioner of Banks validated.
53-36. Commissioner to report to Secretary of State certain matters relative to liquidation of closed banks; publication.

Article 4.

Reopening of Closed Banks.

53-37. Conditions under which banks may reopen.
53-38. Certain contracts not affected.

Article 5.

Stockholders.

53-39. New State banks to set up surplus fund.
53-40. Executors, trustees, etc., not personally liable.
53-41. Stock sold if subscription unpaid.
53-42. Impairment of capital; assessments, etc.
53-42.1. Report of changes in ownership or management.

Article 6.

Powers and Duties.

53-43. General powers.
53-43.1. Obligations of agencies supervised by Farm Credit Administration as securities for deposits of public funds.
53-43.2. Obligations of agencies supervised by Federal Home Loan Bank Board as securities for deposits of public funds.
53-43.3. Officers and employees; share purchase and option plans.
53-43.4. Issuance of capital notes and debentures.
53-43.5. Minors' deposits and safe-deposit agreements.
53-43.6. School thrift or savings plan.
53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats.
53-44. Investment in bonds guaranteed by United States.
53-44.1. Investments in obligations of agencies supervised by Farm Credit Administration.
53-44.2. Investments in obligations of agencies supervised by Federal Home Loan Bank Board.

Sec.
53-45. Banks, fiduciaries, etc., authorized to invest in securities approved by the Secretary of Housing and Urban Development, Federal Housing Administration, Veterans Administration, etc.
53-46. Limitations on investments in securities.
53-47. Limitations on investment in stocks.
53-48. Limitations of loans.
53-49. Suspension of investment and loan limitation.
53-50. Requirement of reserve fund.
53-51. Reserve and cash defined.
53-52. Payment of forged check.
53-53. Payment of deposit in the name of minor.
53-54. Transactions not performed during banking hours.
53-55. Commercial and business paper defined.
53-56. Bank acceptances defined.
53-57, 53-58. [Repealed.]
53-59. Payment of deposits in trust.
53-60. Authorized investment in farm loan bonds.
53-61. Authority to join federal reserve bank.
53-62. Establishment of branches or tellers' windows.
53-63. Unlawful issuing of certificate of deposit.
53-64. Unlawful to loan on bank's own stock.
53-65. Deposits payable on demand.
53-66. Savings deposits.
53-67. Banks controlled by boards of directors.
53-68. Statements showing deposits of State and State officials.
53-69. [Repealed.]
53-70. No fees on remittances covering checks.
53-71. Checks payable in exchange.
53-72. [Repealed.]
53-73. Checks exempted.
53-74. [Repealed.]
53-75. Statement of account from bank to depositor deemed final adjustment if not objected to within five years.
53-76. Depositor not relieved from exercising diligence as to errors.
53-77. Governor empowered to proclaim banking holidays.
53-77.1. Operation of banks on five-day week basis.
53-77.2. [Repealed.]
53-77.3. Banks suspending business during an emergency.

Article 7.

Officers and Directors.

53-78. Appointment of executive and loan committees by directors.
53-79. Minutes of meetings of directors and executive and loan committees.
53-80. Qualifications of directors.
53-81. Directors shall take oath.
53-82. Liability of directors.
53-83. Examining committee of directors.
53-84. Depositories designated by directors.
53-85. Stockholders' book.
53-86. Directors, officers, etc., accepting fees, etc.
53-87. Directors may declare dividends.
53-88. Use of surplus.
53-89. Overdrafts, payment by officer, etc.
53-90. Officers and employees shall give bond.
53-91. When officers and employees may borrow.

Article 8.

Commissioner of Banks and State Banking Commission.

53-92. Appointment of Commissioner of Banks; State Banking Commission.
53-92.1. Commission bound by requirements imposed on Commissioner as to certification of new banks, establishment of branches, etc.
53-93. Powers and duties of Commissioner.
53-93.1. Deputy commissioner.
53-94. Right to sue and defend in actions involving banks; liability to suit.
53-95. Commissioner to exercise powers under supervision of Banking Commission.
53-96. Salary of Commissioner; legal assistance and compensation.
53-97. Vacancy appointments and removal.
53-98. Seal of office of Commissioner; certification of documents.
53-99. Official records.
53-100. General or special investigations of insolvent banks.
53-101. Clerical help.
53-102. Offices.
53-103. [Repealed.]
53-104. Commissioner of Banks shall have supervision over, etc.
53-105. Reports of condition.
53-106. Special reports.
53-107. Penalty for failure to make report.
53-108. List of stockholders to be kept.
53-109. Official communications of Commissioner of Banks.
53-110. Banking Commission to prescribe books, records, etc.; retention, reproduction and disposition of records.
53-111. When reserve below legal requirement.
53-112. Appraisal of assets of doubtful value.
53-113. Certified copies of records as evidence.
53-114. Other powers of State Banking Commission.
53-115. State Banking Commission to make rules and regulations.
53-116. Commissioner need not take over banks failing to meet deposit demands.

Article 9.

Bank Examiners.

Sec.
53-117. Appointment by Commissioner of Banks.
53-118. Duties and powers.
53-119. Removal of officers and employees.
53-120. Examiners may administer oaths; summoning witnesses.
53-121. Examiners may make arrest.
53-122. Fees for examinations and other services.
53-123. Examiners shall make report.

Article 10.

Penalties.

53-124. Examiner making false report.
53-125. Examiners disclosing confidential information.
53-126. Loans or gratuities forbidden.
53-127. Use of "bank," "banking," or "trust" in corporate name.
53-128. Willfully and maliciously making derogatory reports.
53-129. Misapplication, embezzlement of funds, etc.
53-130. Making false entries in banking accounts; misrepresenting assets and liabilities of banks.
53-131. False certification of a check.
53-132. Receiving deposits in insolvent banks.
53-133. Advertising larger amount than that paid in capital stock.
53-134. Offenses declared misdemeanors; prosecution; employment of counsel; punishment.
53-135. General corporation law to apply.

Article 11.

Industrial Banks.

53-136. Industrial bank defined.
53-137. Manner of organization.
53-138. Corporate title.
53-139. Capital stock.
53-140. Sales of capital stock; accounting; fees.
53-141. Powers.
53-142. Restriction on powers.
53-143. Investments; securities; loans; limitations.
53-144. Supervision and examination.
53-145. Sections of general law applicable.

Article 12.

Joint Deposits.

53-146. Deposits in two names.
53-147. [Repealed.]

Article 13.

Conservation of Bank Assets and Issuance of Preferred Stock.

Sec.
53-148. Provision for bank conservators; duties and powers.
53-149. Examination of bank.
53-150. Termination of conservatorship.
53-151. Special funds for paying depositors and creditors ratably; new deposits.
53-152. Reorganization on agreement of depositors and stockholders.
53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers.
53-154. Issuance of preferred stock.
53-155. Rights and liabilities of preferred stockholders.
53-156. Term "stock" not to include preferred stock; latter not to be used as collateral for loans.
53-157. Rights and liabilities of conservator.
53-158. Naming of conservator not liquidation.

Article 14.

Banks Acting in a Fiduciary Capacity.

53-159. Banks may act as fiduciary.
53-159.1. Power of fiduciary or custodian to deposit securities in a clearing corporation.
53-160. License to do business.
53-161. Examination as to solvency.
53-162. Certificate of solvency.
53-163. Clerk of superior court notified of license and revocation.

Article 15.

North Carolina Consumer Finance Act.

53-164. Title.
53-165. Definitions.
53-166. Scope of Article; evasions; penalties; loans in violation of Article void.
53-167. Expenses of supervision.
53-168. License required; showing of convenience, advantage and financial responsibility; investigation of applicants; hearings; existing businesses; contents of license; transfer; posting.
53-169. Application for license.
53-170. Locations; change of ownership or management.
53-171. Revocation, suspension or surrender of license.
53-172. Conduct of other business in same office.
53-173. Maximum rate of charge; computation of charges; limitation on interest after judgment; limitation on interest after maturity of the loan; inapplicability of other sections.

Sec.
53-173.1. Computations; other procedures.
53-173.2. Special rate.
53-174. Refund.
53-175. Default charge.
53-176. Optional rates, maturities and amounts.
53-176.1. Motor vehicle lenders.
53-177. Recording fees.
53-178. No further charges; no splitting contracts; certain contracts void.
53-179. Multiple-office loan limitations.
53-180. Limitations and prohibitions on practices and agreements.
53-181. Statements and information to be furnished to borrowers; power of attorney or confession of judgment prohibited.
53-182. Payment of loans; receipts.
53-183. Advertising, broadcasting, etc., false or misleading statements.
53-184. Securing of information; records and reports; allocations of expense.
53-185. Rules and regulations by Banking Commission and Commissioner.
53-186. Commissioner to issue subpoenas, conduct hearings, give publicity to investigations, etc.
53-187. Injunctive powers; receivers.
53-188. Review of regulations, order or act of Commission or Commissioner.
53-189. Insurance.
53-190. Loans made elsewhere.
53-191. Businesses exempted.

Article 16.

Sale of Checks Act.

Sec.
53-192. Citation of Article.
53-193. Definitions.
53-194. License required to sell or issue checks; exception.
53-195. Exemptions.
53-196. Form and contents of license applications.
53-197. Investigation fee.
53-198. Approved applicants to furnish surety bonds; lists of locations; cancellation of bonds.
53-199. Requiring additional bonds; deposits in lieu of bonds.
53-200. Investigation of applicants; issuance of licenses.
53-201. Minimum net worth of licensees.
53-202. License fees.
53-203. More than one location authorized; employees, agents and representatives.
53-204. Annual lists of locations and agents; annual financial statements; audits.
53-205. Exempt agents need not be listed.
53-206. Notice of denial or revocation of license; hearing; appeal.
53-207. Grounds for revoking licenses.
53-208. Violation a misdemeanor.

ARTICLE 1.

Definitions.

§ 53-1. "Bank," "surplus," "undivided profits," and other words defined. — The following definitions shall be applied to the terms used in this Chapter:

(1) Bank. — The term "bank" shall be construed to mean any corporation, other than building and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business.

(2) Demand Deposits. — The term "demand deposits" means all deposits, the payment of which can be legally required within 30 days.

(3) Insolvency. — The term "insolvency" means:

a. When a bank cannot meet its deposit liabilities as they become due in the regular course of business;

b. When the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors;

c. When its reserve shall fall under the amount required by this Chapter, and it shall fail to make good such reserve within 30 days after being required to do so by the Commissioner of Banks;

d. Whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created.

(4) Net Earnings. — The term "net earnings" means the excess of the gross earnings of any bank over the expenses and losses chargeable against such earnings during any dividend period.

(5) Practical Banker. — The term "practical banker" means an officer or employee of a bank actively engaged in performing duties in managing or supervising or assisting in managing or supervising the conducting of a banking business, including any such banker who is in a retired status from such duties.

(6) Surplus. — The term "surplus" means a fund created pursuant to the provisions of this Chapter by a bank from payments by stockholders or from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.

(7) Time Deposits. — The term "time deposits" means all deposits, the payment of which cannot be legally required within 30 days.

(8) Undivided Profits. — The term "undivided profits" means the credit balance of the profit and loss account of any bank. (1921, c. 4, s. 1; C. S., s. 216(a); 1927, c. 47, s. 1; 1931, c. 243, s. 5; 1945, c. 743, s. 1; 1967, c. 789, s. 21.)

Cross References. — As to definitions of "commercial and business paper" and "trade acceptance," see § 53-55. As to definition of "bank acceptances," see § 53-56. As to definition of "goods," see § 53-56. As to definition of "reserve," see § 53-51. As to definition of "Federal Reserve Act," "Federal Reserve Board," "federal reserve banks," and "member banks," see § 53-61. As to definition of "bank" as used in the Uniform Commercial Code, see § 25-1-201. As to demand deposits, see § 53-65.

Editor's Note. — In 1921 the General Assembly passed an act which enlarged the former Corporation Commission's powers of supervision over banks and made more specific regulations for the business of banking. See Litchfield v. Roper, 192 N.C. 202, 134 S.E. 651 (1926). By Public Laws 1931, c. 243, all the powers vested in the Corporation Commission with respect to banks were transferred to the Commissioner of Banks, and former laws relating to banks and banking were conformably amended. Blades v. Hood, 203 N.C. 56, 164 S.E. 828 (1932). See § 53-92 et seq.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

The definition of "insolvency" as set forth in this section is correct. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

ARTICLE 2.

Creation.

§ 53-2. How incorporated. — Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, or engaging in the business of establishing, maintaining, and operating offices of loan and deposits to be known as savings banks, or of establishing, maintaining, and operating banks having departments for both classes of business, or operating banks engaged in doing a trust and fiduciary business, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

(1) The name of the corporation; no name shall be used already in use by another existing corporation organized under the laws of this State or of the Congress, or so nearly similar thereto as to lead to uncertainty or confusion.

(2) The location of its principal office in this State.

(3) The nature of its business, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all of such classes of business.

(4) The amount of its authorized capital stock, the number of shares into which it is divided, the par value of each share; the amount of capital stock with which it will commence business, which shall not be less than one hundred thousand dollars ($100,000) in cities or towns of 3000 population and under; one hundred fifty thousand dollars ($150,000) in cities or towns of more than 3000 population and less than 10,000 population; two hundred thousand dollars ($200,000) in cities or towns of more than 10,000 population and less than 25,000 population; two hundred fifty thousand dollars ($250,000) in cities or towns or more than 25,000 population and less than 50,000 population; or three hundred thousand dollars ($300,000) in cities or towns of more than 50,000 population; and in addition shall have a paid-in surplus of at least fifty percent (50%) of the authorized capital stock, as hereinbefore set out; the population to be ascertained by the last preceding national census: Provided, that this subdivision shall not apply to banks organized and doing business prior to its adoption. Provided, further, that fractional shares may be issued for the purpose of complying with the requirements of G.S. 53-88. The Banking Commission is hereby authorized and directed to adopt rules and regulations to keep such original required minimum capital funds intact to the end that they remain in and with the bank as a protection for depositors.

(5) The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital with which the company will commence business.

(6) Period, if any, limited for the duration of the company. (1921, c. 4, s. 2; C. S., s. 217(a); 1927, c. 47, s. 2; 1929, c. 72, s. 1; 1947, c. 781; 1953, c. 1209, s. 3; 1963, c. 793, s. 2; 1967, c. 789, s. 1.)

Cross Reference. — As to provision for branch banks, see § 53-62.

A banking corporation is wholly a creature of statute, doing business by legislative grace, and the right to carry on a banking business through the agency of a corporation is a franchise which is dependent on a grant of corporate powers by the State. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Cited in Cocke v. Hood, 205 N.C. 832, 170 S.E. 637 (1933).

§ 53-3. Certificate of incorporation; how signed, proved and filed. — The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved or acknowledged before an officer duly authorized under the laws of this State to take proof or acknowledgment of deeds, and shall be filed in the office of the Secretary of State. The Secretary of State shall forthwith transmit to the Commissioner of Banks a copy of said certificate of incorporation, and shall not issue or record the same until duly authorized so to do by the Commissioner of Banks as hereinafter provided. (1921, c. 4, s. 3; C. S., s. 217(b); 1931, c. 243, s. 5.)

Suit upon Refusal to Issue Charter. — Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with the statutes, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

Cited in Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

§ 53-4. Examination by Commissioner; when certification to be refused; review by Commission. — Upon receipt of a copy of the certificate of incorporation of the proposed bank, the Commissioner of Banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the Commissioner of Banks shall so certify to the Secretary of State, unless upon examination and investigation he finds that

(1) The proposed corporation is formed for any other than legitimate banking business; or

(2) That the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation and directors, officers, and other managerial officials are not such as to command the confidence of the community in which said bank is proposed to be located; or

(3) That the probable volume of business and reasonable public demand in such community is not sufficient to assure and maintain the solvency of the new bank and of the then existing bank or banks in said community; or

(4) That the name of the proposed corporation is likely to mislead the public as to its character or purpose; or

(5) That the proposed name is the same as the one already adopted or appropriated by an existing bank in this State, or so similar thereto as to be likely to mislead the public.

Upon such certification the Secretary of State shall issue and record such certificate of incorporation.

Notwithstanding any other provisions of this section, the Commissioner of Banks shall not make the certification to the Secretary of State described above until he shall have ascertained that the establishment of such bank will meet the needs and promote the convenience of the community to be served by the bank. Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 4; Ex. Sess. 1921, c. 56, s. 1; C. S., s. 217(c); 1931, c. 243, s. 5; 1953, c. 1209, s. 1; 1963, c. 793, s. 1; 1967, c. 789, s. 2.)

This section and § 53-92 are construed in pari materia. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Duty and Discretion of Commissioner. — This section was complete in every respect when it left the hands of the legislature, and the duty imposed upon and the discretion vested in the Commissioner of Banks bears only upon the question whether certain conditions exist justifying the creation of the proposed bank under the terms and procedure laid down in the statute. His action and the certificate issued thereon merely constitute the prescribed procedure to determine whether the franchise applied for was grantable under the law. Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

Basis for Refusal to Issue Certificate. — If the certificate of incorporation complies with statutory requirements in all other respects, the authority of the Commissioner of Banks to refuse to issue such certificate to the Secretary of State must be based on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in this section. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Review by State Banking Commission. — Any decision made by the Commissioner of Banks in the exercise of the responsibility and authority conferred upon him by this section is subject to review by the State Banking Commission upon application by any adversely affected interested person. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Review Based on Legislative Standards. — However, upon review of a decision of the Commissioner of Banks, with reference to a certificate of incorporation of a proposed banking corporation otherwise in compliance with the statutory requirements, the Commission has no authority to direct the Commissioner of Banks to refuse to issue a certificate of approval, ex-

cept on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in this section. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-5. Certificate of incorporation, when certified. — Upon receipt of such certificate from the Commissioner of Banks, the Secretary of State shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the register of deeds of the county where the principal office of said corporation in this State shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the Commissioner of Banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State or the register of deeds of the county in which the same is recorded, or by the Commissioner of Banks, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the Secretary of State shall be void: Provided, however, the Commissioner of Banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; C. S., s. 217(d); 1931, c. 243, s. 5; 1967, c. 823, s. 3.)

Editor's Note. — Session Laws 1967, c. 823, which substituted "register of deeds" for "clerk of the superior court" in this section, provides, in s. 34: "It is the intent of this act to establish the office of the register of deeds as the filing office for all of the corporate and related documents now required to be filed with the clerk of the superior court and to transfer all of the duties relating thereto from the clerk of the superior court to the register of deeds. To this end, all relevant sections of the General Statutes of North Carolina not specifically amended by sections 1 through 33 of this act are hereby amended to the same effect."

Only State May Take Advantage of Defect in Organization. — A defect in the organization of a bank because of failure to begin business within the specified time can be taken advantage of only by a direct proceeding by the State for that purpose. Boyd v. Redd, 120 N.C. 335, 27 S.E. 35 (1897).

The limitation set out in the last sentence of this section applies only in the event the "said persons" have become "a body politic and corporate" and the certificate of incorporation has been recorded and issued. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

§ 53-6. Payment of capital stock. — The capital stock of every bank shall be fully paid in, in cash, before it shall be authorized by the Commissioner of Banks to commence business and the full payment in cash of the capital stock shall be certified to the Commissioner of Banks under oath by the president and cashier of the said bank. Provided, that the stock sold by any bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The Commissioner of Banks shall refuse authority to commence business to any bank if commissions or fees have been paid, or have been contracted to be paid by it, or by anyone in its behalf, to any person, association, or corporation for

securing subscriptions for or selling stock in such bank. (1921, c. 4, s. 6; C. S., s. 217(e); 1927, c. 47, s. 3; 1931; c. 243, s. 5.)

Cross Reference. — As to the similar provision relating to industrial banks, see § 53-140.

Capital Stock Required. — Domestic banks must have, by express provision of this section, capital stock. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-7. Statement filed before beginning business. — Before such company shall begin the business of banking, banking and trust, fiduciary, or surety business, there shall be filed with the Commissioner of Banks a statement under oath by the president or cashier, containing the names of all the directors and officers, with the date of their election or appointment, term of office, residence, and post-office address of each, the amount of capital stock of which each is the owner in good faith and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. (1921, c. 4, s. 7; C. S., s. 217(f); 1931, c. 243, s. 5.)

§ 53-8. Authorized to begin business. — Upon filing of such statement, the Commissioner of Banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination it appears to the Commissioner of Banks that it is lawfully entitled to commence the business of banking, banking and trust, fiduciary, or surety business, he shall give to such corporation a certificate signed by the Commissioner of Banks, that such corporation has complied with all the provisions of the law required to be complied with, before commencing the business of banking, and that such corporation is authorized to commence business. (1921, c. 4, s. 8; C. S., s. 217(g); 1931, c. 243, s. 5.)

§ 53-9. Transactions preliminary to beginning business. — No such corporation shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized to do so by the Commissioner of Banks. (1921, c. 4, s. 9; C. S., s. 217(h); 1931, c. 243, s. 5.)

§ 53-10. Increase of capital stock. — (a) A corporation doing business under the provisions of this Chapter may increase its capital stock as provided by law for other corporations.

(b) A bank may, with the approval of the Commissioner of Banks and by the vote of the holders of at least two thirds of the stock of the particular class or classes of stock entitled to vote on such proposal, amend its charter to authorize an increase in the common stock of the bank in the category of authorized but unissued stock in an amount not to exceed ten percent (10%) of the outstanding shares of such class or classes of stock and shares so authorized shall be deemed released from preemptive rights. Such authorized but unissued stock may be issued from time to time to officers or employees of the bank pursuant to a stock option or stock purchase plan adopted in accordance with this Chapter. (1921, c. 4, s. 10; C. S., s. 217(i); 1965, c. 1032; 1967, c. 789, s. 3.)

§ 53-11. Decrease of capital stock. — A corporation doing business under the provisions of this Chapter may reduce its capital stock in the manner provided for other corporations upon a vote in favor of the decrease of two thirds in interest of each class of stockholders with voting powers: Provided, that no bank shall reduce its capital stock to an amount less than the minimum required by law. Such reduction shall not be valid or warrant the cancellation of stock

certificates until it has been approved by the Commissioner of Banks. Such approval shall not be given except upon a finding by the Commissioner of Banks that the security of existing creditors of the corporation will not be impaired. (1921, c. 4, s. 11; C. S., s. 217(j); 1931, c. 243, s. 5.)

§ 53-12. Consolidation of banks. — A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer shall file, or cause to be filed, with the Commissioner of Banks, certified copies of all proceedings had by its directors and stockholders, which said stockholders' proceedings shall set forth that holders of at least two thirds of the stock voted in the affirmative on the proposition of consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such consolidation or transfer. Upon the filing of such stockholders' and directors' proceedings as aforesaid, the Commissioner of Banks shall cause to be made an investigation of each bank to determine whether the interests of the depositors, creditors, and stockholders of each bank are protected, and find such consolidation is in the public interest, and that such consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such consolidation or transfer shall be based upon such investigation. No such consolidation or transfer shall be made without the consent of the Commissioner of Banks. The expense of such investigation shall be paid by such banks. Notice of such consolidation or transfer shall be published for four weeks before or after the same is to become effective, at the discretion of the Commissioner of Banks, in a newspaper published in a city, town, or county in which each of said banks is located, and a certified copy thereof shall be filed with the Commissioner of Banks. In case of either transfer or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years. (1921, c. 4, s. 12; C. S., s. 217(k); 1931, c. 243, s. 5; 1967, c. 789, s. 4.)

Cross References. — As to merger of corporations generally, see § 55-107 et seq. As to liquidation of banks, see § 53-20 and note.

Presumption of Approval of Transaction. — Where under the provisions of this section a State bank transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it was presumed that the former Corporation Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved the transaction. Corporation Comm'n v. Stockholders, 199 N.C. 586, 155 S.E. 445 (1930).

§ 53-13. Consolidated banks deemed one bank. — In case of consolidation when the agreement of consolidation is made, and a duly certified copy thereof is filed with the Secretary of State, together with a certified copy of the approval of the Commissioner of Banks to such consolidation, the banks, parties thereto, shall be held to be one company, possessed of the rights, privileges, powers, and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such new company, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; C. S., s. 217(l); 1931, c. 243, s. 5.)

Cross References. — As to substitution of a consolidated bank as executor or trustee under will, see § 31-19. As to fiduciary powers and liabilities of merged banks, see § 53-17.

§ 53-14. Reorganization. — Whenever any bank under the laws of this State or of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon authority in writing of the owners of two thirds of its capital stock, with the approval of the Commissioner of Banks, to execute articles of incorporation as provided in this Chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such national bank or State bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this State, and thereupon all assets, real and personal, of the dissolved national or State bank shall by operation of law be vested in and become the property of such State bank, subject to all liabilities of such national or State bank not liquidated under the laws of the United States or this State before such reorganization. (1921, c. 4, s. 14; C. S., s. 217(m); 1931, c. 243, s. 5.)

§ 53-15: Repealed by Session Laws 1947, c. 696.

§ 53-16. Consolidation, conversion or merger of State banks or trust companies with national banks. — (a) Nothing in the law of this State shall restrict the right of a State bank or trust company to consolidate, convert into, or merge with a national bank. The action to be taken by such consolidating, converting, or merging State bank and its rights and liability and those of its stockholders shall be the same as those prescribed by the law of the United States for national banks at the time of the action, except that a vote of the holders of two thirds of each class of voting stock of a State bank shall be required for the consolidation, conversion, or merger and that upon consolidation, conversion, or merger by a State bank with or into a national bank the rights of dissenting stockholders shall be those hereinafter specified.

(b) Upon consolidation, conversion, or merger the resulting national bank shall be the same business as each consolidating, converting, or merging bank with all the property rights, powers, and duties of each consolidating, converting, or merging bank, except as affected by the law of the United States and by the charter and bylaws of the resulting bank, and any reference to a consolidating, converting, or merging bank in any writing, whether executed or taking effect before or after the consolidation, conversion, or merger, shall be deemed and taken a reference to the resulting bank if not inconsistent with the other provisions of such writing.

(c) The holders of shares of the stock of a State bank which were voted against a consolidation, conversion, or merger into a national bank shall be entitled to receive their value in cash, if and when the consolidation, conversion, or merger becomes effective, upon written demand, made to the resulting national bank at any time within 30 days after the effective date of the consolidation, conversion, or merger accompanied by the surrender of the stock certificate or certificates. The value of such shares shall be determined as of the date of the stockholders' meeting approving the consolidation, conversion, or merger, by three appraisers, one to be selected by the owners of two thirds of the dissenting shares involved, one by the board of directors of the resulting national bank and the third by the two so chosen. The valuation agreed upon by any two appraisers shall govern. If the appraisal is not completed within 90 days after the consolidation, conversion, or merger becomes effective, the Comptroller of the Currency shall cause an appraisal to be made.

(d) The amount fixed as the value of the shares of stock of the consolidating, converting, or merging bank at the time of the stockholders' meeting approving the consolidation, conversion, or merger and the amount fixed by the appraisal as hereinbefore provided, where the fixed value is not accepted, shall constitute a debt of the resulting national bank.

(e) Upon the completion of the consolidation, conversion, or merger the permit to operate of any consolidating, converting, or merging State bank shall automatically terminate. (1929, c. 148, s. 1; 1951, c. 1129, s. 1.)

§ 53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities. — Whenever any bank or trust company, organized under the laws of North Carolina or the acts of Congress, and doing business in this State, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank or trust company doing business in this State, as provided by the laws of North Carolina or the acts of Congress, all the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring bank or banks and/or trust companies, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee bank or the consolidated or merged bank or trust company, and such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the transferring bank or trust company. (1931, c. 207; 1941, c. 80.)

Editor's Note. — For notes dealing with sale and transfer of assets, see 9 N.C.L. Rev. 398 and 19 N.C.L. Rev. 457.

A distinction is drawn between "consolidation" and "merger." Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

Consolidated Bank Succeeds to Power as Trustee under Deed of Trust. — A bank, created as a result of a consolidation of several State banks, may properly exercise the power of sale contained in a deed of trust in which one of its constituent banks was named trustee, upon default by the trustor, since under this section the consolidated bank succeeds to such power. Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

Amendment of Other Sections — Retrospective Operation. — This section, although in form an independent statute, was in reality an amendment of Public Laws 1925, c. 77, codified as § 53-15 (now repealed) and former §§ 55-165 through 55-170, and was therefore applicable to a deed of trust executed prior to the enactment of this section and subsequent to the effective date of the 1925 act. Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

ARTICLE 3.

Dissolution and Liquidation.

§ 53-18. Voluntary liquidation. — A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this State by the affirmative votes of its stockholders owning two thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence 10 days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the Commissioner of Banks for his approval. If the Commissioner of Banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the Commissioner of Banks until said Commissioner of Banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the Commissioner of Banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and

business, and hold the same and liquidate said bank in the manner provided in this Chapter. When the Commissioner of Banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the city, town, or county in which such bank is located, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the Commissioner of Banks, and shall furnish such reports from time to time as may be called for by the Commissioner of Banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of this Chapter as hereinafter provided. Whenever the Commissioner of Banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and approved by the Commissioner of Banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract of sale and transfer, shall be filed with the Commissioner of Banks. Whenever voluntary liquidation shall be approved by the Commissioner of Banks or the sale and transfer of the assets of any bank shall be approved by the Commissioner of Banks, a certified copy of such approval under seal of the Commissioner of Banks, filed in the office of the Secretary of State, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this Chapter and the general law relative to corporations. (1921, c. 4, s. 15; C. S., s. 218(a); 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5.)

Cross Reference. — As to voluntary dissolution of corporations generally, see § 55-114 et seq.

Editor's Note. — For article discussing the statutory changes made in the North Carolina banking law, see 11 N.C.L. Rev. 194.

Approval of Stockholders Not Necessary for Sale of Assets. — For a valid sale of assets to another bank the approval of the stockholders of the selling bank is not required by this section, and the section is not invalid for that reason. Planters' Sav. Bank v. Earley, 204 N.C. 297, 168 S.E. 225 (1933).

As to enforcement of former statutory liability of stockholders by purchasing bank, see Peoples Bank & Trust Co. ex rel. Wayne Nat'l Bank v. Roscower, 199 N.C. 653, 155 S.E. 560 (1930).

Applied in Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

Cited in In re Lafayette Bank & Trust Co., 198 N.C. 783, 153 S.E. 452 (1930).

§ 53-19. When Commissioner of Banks may take charge. — The Commissioner of Banks may forthwith take possession of the business and property of any bank to which this Chapter is applicable whenever it shall appear that such bank:

(1) Has violated its charter or any laws applicable thereto;
(2) Is conducting its business in an unauthorized or unsafe manner;
(3) Is in an unsafe or unsound condition to transact its business;
(4) Has an impairment of its capital stock;
(5) Has refused to pay its depositors in accordance with the terms on which such deposits were received, or has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtedness or investment were sold;
(6) Has become otherwise insolvent;
(7) Has neglected or refused to comply with the terms of a duly issued lawful order of the Commissioner of Banks;
(8) Has refused, upon proper demand, to submit its records, affairs, and concerns for inspection and examination of a duly appointed or authorized examiner of the Commissioner of Banks;
(9) Its officers have refused to be examined upon oath regarding its affairs;

(10) Has made a voluntary assignment of its assets to trustees.

Such banks may resume business as provided in G.S. 53-37. (1911, c. 25, s. 4; 1921, c. 4, s. 16; C. S., ss. 218(b), 242; 1931, c. 243, s. 5.)

Editor's Note. — For discussion of section, see 3 N.C.L. Rev. 79.

Restraining Commissioner from Taking Over Assigned Assets Sufficient to Pay Creditors. — A bank assigned all its assets to another bank under an agreement, approved by the Commissioner of Banks, that the latter bank should pay all depositors and creditors of the former. Before the assignee bank had fully discharged the agreement it became insolvent and was taken over by the Commissioner. It was held that, upon a showing that the assets of the assignor bank are sufficient to pay in full all its depositors and creditors, the assignor bank, its depositors and creditors may restrain the Commissioner from taking possession of the assigned assets, and, pending the trial of the issue involving the value of the assigned assets, they may restrain the Commissioner from levying upon and collecting the statutory liability of the stockholders of the assignor bank. Stanly Bank & Trust Co. v. Hood, 206 N.C. 543, 174 S.E. 503 (1934).

There Is Presumption That Bank Complied with Prerequisites before Resuming Operation. People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933).

§ 53-20. Liquidation of banks. — (a) When Commissioner of Banks to Take Possession. — Whenever any State bank shall neglect or refuse for a period of 60 days to make a report to the Commissioner of Banks, as he may demand, or shall, after demand under seal of the Commissioner of Banks, fail, neglect or refuse to comply with any of the rules, regulations or requirements of the State Banking Commission, or the provisions of the banking law, or if at any time the Commissioner of Banks shall find a bank subject to the supervision of the Commissioner of Banks, in an insolvent, unsafe or unsound condition to transact the business for which it was organized, or in an unsafe, or unsound condition to continue its business, or if such institution shall neglect or refuse to correct any irregularity which may be called to the attention of the president, cashier or board of directors, by the Commissioner of Banks, or any of his assistants, then, in either of such events, the Commissioner of Banks, or any duly authorized agent of the Commissioner of Banks appointed under seal of the Commissioner of Banks, shall forthwith take possession of such bank, and all of its assets and business and shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business, or its affairs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered under order of a judge of the superior court under the provisions of this section.

(b) Directors May Act. — Any bank may place its assets and business under the control of the Commissioner of Banks for liquidation by a resolution of a majority of its directors upon notice to the said Commissioner of Banks, and, upon taking possession of said bank, the Commissioner of Banks, or duly appointed agent, shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business or until the affairs of said bank shall be fully liquidated as herein provided, and no bank shall make any general assignment for the benefit of its creditors save and except by surrendering possession of its assets to the Commissioner of Banks, as herein provided. Whenever any bank for any reason shall suspend operations for any length of time, said bank shall, immediately upon such suspension of operations, be deemed in the possession of the Commissioner of Banks and subject to liquidation hereunder.

(c) Notice of Seizure to Court Bar to Attachment, etc.; Transfers Void. — When the Commissioner of Banks, or duly appointed agent, shall take possession of any bank under subsections (a) or (b) hereof he shall, within 48 hours, file with the clerk of the superior court in the county where said bank is located, a notice of his action which shall state the reason therefor; and such notice shall

be deemed the equivalent of a summons and complaint against said bank in an action in the superior court except that it shall not be necessary to make service thereof, and the taking possession of any bank shall thereupon date from the time when such authority was exercised and from and after such time all assets and property of such bank, of whatever nature shall be deemed to be in possession of the Commissioner of Banks, and the exercise of such authority shall operate as a bar to any attachment, or other legal proceeding, against such bank or its assets and, after such exercise of authority, no lien shall be acquired, in any manner binding or affecting any of the assets of such bank and every transfer or assignment made thereafter by such bank, or by its authority, of the whole or any part of its assets, shall be null and void; and the Commissioner of Banks shall be substituted in place of the bank in all actions in the State or federal courts, pending at the time of the exercise of such authority.

(d) Notice to Banks; Corporations and Persons Holding Assets; Liens Not to Accrue. — On taking possession of the assets and business of any bank, the Commissioner of Banks, or duly appointed agent, shall forthwith give notice, by mail or otherwise, of such action to all banks or other persons or corporations holding, or having in possession, any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance or clearance made, or liability incurred against any of the assets of said bank after possession has been taken as provided under this section, except as hereinafter provided.

(e) Permission to Resume Business. — After the Commissioner of Banks has taken possession of any bank, such bank may resume business as provided in G.S. 53-37.

(f) Remedy by Bank for Seizure; Answer to Notice; Injunction, etc.; Appeal. — Whenever any bank, of whose assets and business the Commissioner of Banks has taken possession as aforesaid, except where possession is taken under subsection (b) hereof, shall deem itself aggrieved thereby, it may, at any time within 10 days after the filing of the notice with the clerk of the superior court, file an answer to said notice and may also upon notice to the Commissioner of Banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said Commissioner of Banks, and the said judge may cite the said Commissioner of Banks to show cause within 10 days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the Commissioner of Banks. If the judge shall enjoin further action of the Commissioner of Banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the Commissioner of Banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(g) Collection of Debts and Claims; Sale or Compromise of Debts and Claims; Commissioner Succeeds to All Property of Bank. — Upon taking possession of the assets and business of any bank by the Commissioner of Banks, the Commissioner of Banks, or the duly appointed agent, is authorized to collect all money due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner of Banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide

or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority.

Upon taking possession of any bank under this section, the Commissioner of Banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in action, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said Commisssioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested. The powers granted by the second preceding sentence shall be in addition to and not in derogation of any existing acts ratified at the 1931 session of the General Assembly.

The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina Commissioner of Banks, and/or the duly appointed liquidating agent.

(h) Bond of Commissioner of Banks; Surety; Condition; Minimum Penalty. — Upon taking possession of any bank, the Commissioner of Banks, or the duly appointed agent, shall execute and file a bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the superior court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said Commissioner of Banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank, the penal sum of said bond to be fixed by order of the Commissioner of Banks, which in no case shall be less than five thousand dollars ($5,000). Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the Commissioner of Banks, he may, in his discretion with the approval of the State Banking Commission, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America which is established for the purposes for which the said Federal Deposit Insurance Corporation was created under the Banking Act of 1933, enacted by Congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the Commissioner of Banks, may serve as such agent without giving the bond required under all other circumstances in this subsection.

(i) Inventory Necessary. — Within 30 days after the filing of the notice of the taking possession of any bank in the office of the clerk of the superior court, the Commissioner of Banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the superior court in the pending action and shall keep one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(j) Notice and Time for Filing Claims; Copies Mailed. — Notice shall be given by advertisement for four weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims against the bank to present the same to the Commissioner of Banks at the office of the bank, and within the time to be specified in the notice, not less, however, than 90 days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the Commissioner of Banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(k) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim. — If the Commissioner of Banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the clerk of the superior court in the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the Commissioner of Banks in the proper court of the county in which the bank is located within 90 days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the Commissioner of Banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the Commissioner of Banks, or duly appointed agent, and the Commissioner of Banks or duly appointed agent, after investigation, shall either allow such objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the Commissioner of Banks or the duly appointed agent, shall file a notice to this effect in the pending action; and within 10 days thereafter, the person filing objection by motion in the pending action, a copy of which notice shall be served upon the person whose claim or deposit is objected to, may present to the court the question of the validity of said claim or deposit; and the questions of law and issues of fact shall thereupon be determined as in other civil actions.

(l) List of Claims Presented and Deposits; Copies; Proviso. — Upon the expiration of the time fixed for presentation of claims, the Commissioner of Banks, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the State Treasurer. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the Commissioner of Banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(m) Declaration of Dividends; Order of Preference in Distribution. — At any time after the expiration of the date fixed by the Commissioner of Banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the Commissioner of Banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten per centum (10%) of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder:

(1) Taxes and fees due the Commissioner of Banks for examination or other services;
(2) Wages and salaries due officers and employees of the bank, for a period of not more than four months;
(3) Expenses of liquidation;
(4) Certified checks and cashier's checks in the hands of a third party as a holder for value and the amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank;
(5) Amounts due creditors other than stockholders.

The word "asset" used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the superior court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(n) Deposit of Funds Collected. — All funds collected by the Commissioner of Banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the Commissioner of Banks. The payment of interest on the net average of such sums on deposit shall be controlled by the Governor and Council of State, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(o) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation. — The Commissioner of Banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the resident or presiding judge in the pending action at such time as the same may be

reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(p) Unclaimed Dividends Held in Trust. — The unclaimed dividends remaining in the hands of the Commissioner of Banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the Commissioner of Banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the Commissioner of Banks. After the Commissioner of Banks has held the unclaimed dividends held in trust by him under the provisions of this statute for the several depositors and creditors of the liquidated bank for a period of 10 years, he is hereby given the authority to pay the principal amount of such unclaimed dividends to the State Treasurer, to be held by the State Treasurer without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. Upon payment of the said unclaimed dividends to the State Treasurer, the Commissioner of Banks shall be fully discharged from all further liability therefor.

(q) Report by Commissioner of Banks. — If the assets of any bank when fully collected by the Commissioner of Banks are not more than sufficient to pay the depositors and creditors of said bank, the Commissioner of Banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the clerk of the superior court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank.

(r) Action by Commissioner of Banks after Full Settlement. — Whenever the Commissioner of Banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have in hand other assets of said bank, he shall call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank. Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the Commissioner of Banks all the assets of said bank then remaining in his hands; and the Commissioner of Banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The Commissioner of Banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the assets of said bank

so transferred, together with the name of the agent or agents receipting for the same; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Said agent, or agents, shall file semiannually a report of all transactions with the superior court of the county in which the bank is located, and with the Commissioner of Banks, and shall be allowed for such services such fees not in excess of five percent (5%), as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the Commissioner of Banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders of said bank, all the remaining assets of the bank, file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of court or by action of the stockholders, distribution shall be provided for.

(s) Annual Report of Commissioner of Banks; Items in Report of. — The Commissioner of Banks shall file, as a part of his annual report to the Governor, a list of the names of the banks so taken possession of and liquidated; and the Commissioner of Banks shall, from time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the Commissioner of Banks shall show the sum of unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the Commissioner of Banks under the provisions of this section.

(t) Compensation of Commissioner of Banks. — The Commissioner of Banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the Commissioner of Banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the Commissioner of Banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(u) Exclusive Methods of Liquidation. — No bank created under the Banking Act or the Industrial Banking Act, and under the supervision of the Commissioner of Banks, shall be liquidated in any other way or manner than that provided herein.

(v) Application of Act. — The applicable provisions of this section as enacted by Chapter 113 of the Public Laws of 1927 shall apply to all banks which on March 7, 1927, have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(w) Liquidation by Commissioner of Banks of All Banks in Receivership Required. — On and after the first day of January, 1936, the provisions of this section shall apply to all banks included in the definition or classification of banking institutions under this Chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts; and the said banks shall be liquidated exclusively in accordance with the provisions of this section and by said Banking Commissioner. The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection (o) of this section shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated. (1921, c. 4, s. 17; C. S., s. 218(c); 1927, c. 113; 1931, c. 243, s. 5, cc. 385, 405; 1933, c. 175, s. 2, c. 546; 1935, c. 81, s. 4, c. 231, s. 1, c. 277; 1939, c. 91; 1947, c. 621, s. 1; 1971, c. 1135, s. 4.)

I. General Consideration.
II. Collection and Sale of Assets.
III. Claims against Bank.
IV. Distribution of Assets and Preferences.
V. Actions.

I. GENERAL CONSIDERATION.

Local Modification. — Buncombe: 1933, c. 27; Rutherford: 1933, c. 567.

Cross References. — As to conditions upon which closed banks may reopen, see § 53-37. As to escheats generally, see § 116A-1 et seq.

Editor's Note. — For brief discussion of the 1947 amendment, which added the last two sentences to subsection (p), and other provisions relating to escheats, see 25 N.C.L. Rev. 421. See also 26 N.C.L. Rev. 110.

For comment on escheat of intangible property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

The functions of the Commissioner of Banks are not limited to the provisions of this section, and the courts of equity have inherent power to permit him to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. Blades v. Hood, 203 N.C. 56, 164 S.E. 828 (1932).

Commissioner as Representative of Bank. — Although the ultimate purpose of the collection of assets is for the benefit of the creditors and others entitled to final distribution, and in this sense the Commissioner undoubtedly represents them, yet, in the collection of specific items of debt, in a more technical sense he must be held to represent the bank to whose rights and privileges he has succeeded and which he exercises. He can assert no greater right than that of the bank against any debtor, nor can he avoid any defense which might not be made against the bank. In this respect, he is pro hac vice the bank. The payment by him of a judgment against the bank, out of its funds, has the same effect as it would have had if paid by the bank, and an assignment to him has the force and effect of an assignment to the bank. Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939).

The Commissioner acts in a capacity equivalent to a receiver in taking over the assets of an insolvent bank, and in such capacity he represents the depositors and other creditors in the collection and distribution of the assets of the bank. Hood v. North Carolina Bank & Trust Co., 209 N.C. 367, 184 S.E. 51 (1936).

But Only in Matters Not Provided in Statutes. — The Commissioner acts as a receiver under the inherent power of the court only in matters which are not provided for by statute, and his powers and duties in the collection and distribution of the assets of an insolvent bank are derived from the statute. Hoft v. Mohn, 215 N.C. 397, 2 S.E.2d 23 (1939).

A bank taken over by the Commissioner continues as a legal entity. It is not dissolved and does not cease to exist, but its powers are exercised by the Commissioner for the purpose of converting the assets, paying its liabilities, and distributing the surplus, if any, among the stockholders. People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933).

Section Does Not Affect Jurisdiction to Restrain Commissioner. — The jurisdiction of the superior courts of this State, in a proper case, to restrain the Commissioner of Banks, is not affected by the provisions of this section. The Commissioner is an administrative officer of the State, and in the performance of his duties as prescribed by statute, is subject to the jurisdiction of the superior courts, in the exercise of their equitable jurisdiction. Stanly Bank & Trust Co. v. Hood, 206 N.C. 543, 174 S.E. 503 (1934); Hood v. Burrus, 207 N.C. 560, 178 S.E. 362 (1935).

Allowing Bank Officers to Continue Management. — Among other powers conferred by statute, the Corporation Commission (now Commissioner of Banks) may, without taking possession of the business and property of a State bank, upon its appearing to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus, upon the banks complying therewith, avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924), cited in People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933).

Applied in In re Hood, 208 N.C. 509, 181 S.E. 621 (1935); Hood v. Hewitt, 209 N.C. 810, 185 S.E. 161 (1936).

Cited in Underwood v. Hood, 205 N.C. 399, 171 S.E. 364 (1933); State v. Davidson, 205 N.C. 735, 172 S.E. 489 (1934); Pritchard v. Hood, 205 N.C. 790, 172 S.E. 485 (1934); Edgerton v. Hood, 205 N.C. 816, 172 S.E. 481 (1934); In re Central Bank & Trust Co., 205 N.C. 822, 172 S.E. 484 (1934); In re Bank of Murphy, 205 N.C. 840, 172 S.E. 181 (1934); Hood v. Mitchell, 206 N.C. 156, 173 S.E. 61 (1934); Hood v. Johnson, 208 N.C. 77, 178 S.E. 855 (1935); Hood v. Elder Motor Co., 209 N.C. 303, 183 S.E. 529 (1936); In re United Bank & Trust Co., 209 N.C. 389, 184 S.E. 64 (1936); Hood v. Clark, 211 N.C. 693, 191 S.E. 732 (1937); Windley v. Lupton, 212 N.C. 167, 193 S.E. 213 (1937); Briley v. Crouch, 115 F.2d 443 (4th Cir. 1940).

II. COLLECTION AND SALE OF ASSETS.

"Assets" Defined. — The term "assets" is broad enough to cover anything available to pay

the bank's creditors. Hill v. Smathers, 173 N.C. 642, 92 S.E. 607 (1917).

Title to Assets. — Upon the appointment of a receiver under the statute, whether voluntary or by act of the Corporation Commission (now the Commissioner of Banks), the title to all the bank's assets vests in the receiver to be administered for the benefit of its depositors, etc., alike. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

Right of Action against Officers and Directors as Asset. — The right of action by the receiver of an insolvent bank for loss or depreciation of the bank's assets, due to the willful or negligent failure of its officers and directors to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and such liability of the officers and directors is an asset of the bank. Corporation Comm'n v. Merchants Bank & Trust Co., 193 N.C. 113, 136 S.E. 362 (1927).

Recoverable Damages as Assets. — Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank. Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926), citing Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

Proceeds of Sale of Bank's Property Cannot Be Paid to New Bank. — The court having jurisdiction is without power to authorize the sale of an insolvent bank's property in bulk to purchasers under an agreement that they organize another bank and pay to it the purchase price for distribution to the creditors and depositors, and thus relieve the Corporation Commission (now Commissioner of Banks) of the duty to collect and distribute the assets. In re LaFayette Bank & Trust Co., 198 N.C. 783, 153 S.E. 452 (1930), raising but not deciding the question whether the court could authorize the sale of the assets in bulk.

An order authorizing the Commissioner to sell a stock assessment, judgment affected only the Commissioner and whoever purchases by virtue thereof, and so far as the stockholder was concerned, the order was res inter alios acta. In re Hood, 208 N.C. 509, 181 S.E. 621 (1935).

III. CLAIMS AGAINST BANK.

As to preferred claims, see paragraphs under the next succeeding analysis line of this note.

Claim for Bonds Held for Safekeeping Not Barred by Failure to Institute Suit in 90 Days. — In an action against the statutory receiver of an insolvent bank to recover bonds held by the bank for safekeeping, it appeared that the agent of the receiver advised plaintiffs that no claim was necessary for the bonds. Defendant contended that, under this section, the claim was barred for failure to bring suit within 90 days after the time designated for presenting claims, or in 90 days after the claim was presented and disallowed upon notice to plaintiffs. It was held that plaintiffs were not "creditors" or "claimants" within the meaning of this section and therefore it is not applicable to the action, and further, even conceding the statute is applicable, it would be inequitable and unconscionable for defendant to be allowed to set same up as a defense. Bright v. Hood, 214 N.C. 410, 199 S.E. 630 (1938).

IV. DISTRIBUTION OF ASSETS AND PREFERENCES.

Collection Made and Unremitted Given Preference. — It will be noted that under subsection (m) of this section claims against the estate of an insolvent bank for amounts due on collections made and unremitted, or for which final actual payment has not been made by the bank, are given preference, in the final distribution of the assets of said bank. Braswell v. Citizens Nat'l Bank, 197 N.C. 229, 148 S.E. 236 (1929).

Same — Not Applicable to National Banks. — The proviso in subsection (m) of this section relating to the distribution of the assets of insolvent banks has no application to the assets of national banks. The National Banking Act provides how the assets of insolvent national banks shall be distributed, and it is well settled that state statutes cannot affect this distribution. Spradlin v. Royal Mfg. Co., 73 F.2d 776 (4th Cir.), rev'g 6 F. Supp. 98 (M.D.N.C. 1934).

So where a national bank received a draft for collection and remitted therefor a draft drawn on one of its correspondents, but failed before this draft could be paid, it was held that the owner of the draft collected had no lien on the assets of the insolvent bank in the hands of the receiver. There was no augmentation of the assets of the bank as a result of the collection, but merely a shifting of credits, and consequently no basis for the declaration of a tract. Spradlin v. Royal Mfg. Co., 73 F.2d 776 (4th Cir.), rev'g 6 F. Supp. 98 (M.D.N.C. 1934).

A certificate of deposit sent by an insurance company to a national bank for collection was used in clearance, a draft for the balance on the clearance transaction being received by the bank and its draft being sent to the company for the amount collected on the certificate. The clearance draft not being paid, the collecting bank stopped payment on its draft and subsequently became insolvent, as did the other bank to the clearance transaction. The collecting bank's receiver filed claim with the receiver of the other bank for the amount of the clearance draft, which was paid in full as a preferred claim under subsection (m) of this section. It was held that a debtor and creditor relationship in regard to the certificate arose between the insurance company and the collecting bank, and the company's successor was not entitled to a preference in the distribution of the collecting bank's assets. Citi-

zens Nat'l Bank v. Fidelity & Cas. Co., 86 F.2d 4 (4th Cir. 1936).

Solvent Banks Not Included. — The proviso of subsection (m) of this section, relating to lien for amount of check, etc., collected and not remitted for, was not intended to apply to solvent banks. Spradlin v. Royal Mfg. Co., 73 F.2d 776 (4th Cir.), rev'g 6 F. Supp. 98 (M.D.N.C. 1934).

The words "or otherwise" in the proviso in subsection (m) of this section, are to be construed in connection with the other parts of the statute, meaning any mode of transportation analogous to those specified in the statute, requiring "remitting" or "sending" the money to the payee of the check. Morecock v. Hood, 202 N.C. 321, 162 S.E. 730 (1932).

Purchaser of Bank Draft or Check Not Entitled to Preference. — The purchase of a bank draft, a cashier's check or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased. Great Atl. & Pac. Tea Co. v. Hood, 205 N.C. 313, 171 S.E. 344 (1933).

Same — Cashier's Check. — Where a bank debits an account with the amount of a check drawn by the depositor and issues its cashier's check for the amount but is placed in a receiver's hands before remitting the proceeds to a third person as instructed to do by the depositor, the cashier's check does not constitute a preference as defined by this section. Board of Educ. v. Hood, 204 N.C. 353, 168 S.E. 522 (1933).

If a depositor in a bank takes a cashier's check for his deposit, and thereafter surrenders the cashier's check, purchasing with the proceeds a draft for the purchase price of Liberty Bonds, and the bank is closed before the draft is paid, such transaction does not constitute a preference as defined by this section. In re Bank of Pender, 204 N.C. 143, 167 S.E. 561 (1933).

Same — Check or Draft on Another Bank. — Where a check was purchased from a bank, which a few days later became insolvent and the bank on which the check was drawn refused to honor it, the purchaser could not claim a preference under this section. Great Atl. & Pac. Tea Co. v. Hood, 205 N.C. 313, 171 S.E. 344 (1933).

A depositor presented his check for payment over the counter of a bank, which charged his account with the amount thereof and gave him a draft drawn on another bank. He deposited the draft in a third bank and it was returned unpaid. It was held that he was not entitled to a preference in the assets of the bank drawing the draft, the transaction not coming within the proviso in subsection (m). Morecock v. Hood, 202 N.C. 321, 162 S.E. 730 (1932).

Same — Draft Sent to Drawee Bank for Collection Not Charged to Drawer's Account. — Where a depositor drew a draft on his local bank against a general deposit and the payee forwarded the draft to the drawee bank for collection and it was returned with notice of the bank's insolvency, it was held that the drawer's claim was not entitled to a statutory preference under this section for the reason that the bank did not charge the draft to the account of the drawer; and if the bank's failure to return the draft within 24 hours after its receipt by mail implied an acceptance under the provisions of former §§ 25-143 and 25-144, such acceptance did not ipso facto create a preference. Lamb v. Hood, 205 N.C. 409, 171 S.E. 359 (1933).

Taxes Constitute Preferred Claim. — A bank, owning the land upon which the bank building was situate, closed its doors and the Commissioner of Banks took possession for purposes of liquidation by virtue of the statute. At the time of closing there was an outstanding mortgage securing an indebtedness of $25,000, all of which was unpaid and in default. The mortgagee took possession of the real estate and collected the rents and thereafter the liquidating agent of the bank listed the real property for taxation. County and town taxes were duly assessed and subsequently the mortgagee duly exercised the power of sale and became the purchaser of the property. It was held that as the bank, the mortgagor, was the real owner it was liable for taxes unpaid at the time of the sale and such taxes constitute a preferred claim against the assets of the insolvent bank. Hood v. McGill, 206 N.C. 83, 173 S.E. 20 (1934).

Applied in Dixie Mercerizing Co. v. Hood, 207 N.C. 135, 176 S.E. 285 (1934); Williams v. Hood, 207 N.C. 737, 178 S.E. 669 (1935); In re Champion Bank & Trust Co., 207 N.C. 802, 178 S.E. 555 (1935).

V. ACTIONS.

Action to Recover for Wrongful Act of Officers and Directors.—Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank. Upon its insolvency and upon the appointment of a receiver for the liquidation of the bank, such receiver, in the first instance, may alone maintain the action to recover the damages, as assets of the bank, to be administered by him for the benefit of all its depositors, creditors or stockholders. Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926), citing Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

A bank creditor may not maintain an action to interfere with the disposition of its assets by the Commissioner in the absence of any allegation of fraud, bad faith, or neglect on the part of the Commissioner, and a showing that a greater return would result from the disposition of the assets as contended for by the creditor. In re Hood, 208 N.C. 509, 181 S.E. 621 (1935).

When the Commissioner is made a party, he succeeds to the rights of the bank in the litiga-

tion pending and comes into the pending case for the purpose of protecting the rights of creditors in the recovery, not for the purpose of asserting a new and independent cause of action. Fidelity & Deposit Co. v. People's Bank, 72 F.2d 932 (4th Cir. 1934).

No new cause of action is created where Commissioner is made a party to a previous action by the bank on its cashier's fidelity bond. See People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933).

Venue. — In determining residence for purposes of venue, the personal residence of the Commissioner of Banks controls, in the absence of statute. Hartford Accident & Indem. Co. v. Hood, 225 N.C. 361, 34 S.E.2d 204 (1945).

An action on a note by the Commissioner of Banks and the liquidating agent, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendant's motion for change of venue to the county of their residence is properly refused. Hood v. Progressive Stores, 209 N.C. 36, 182 S.E. 694 (1935).

§ 53-21. Sale of stocks of defunct banks validated. — All private sales of stocks in resident corporations, joint stock companies and limited partnerships, made prior to March 20, 1935, by the Commissioner of Banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 53-22. Statute relating to receivers applicable to insolvent banks. — The provisions of G.S. 1-507.1 through 1-507.11, both inclusive, relating to receivers, when not inconsistent with the provisions of G.S. 53-20, shall apply to liquidation of insolvent banks. (1921, c. 4, s. 19; 1923, c. 148, s. 4; C. S., s. 218(e); 1931, c. 215; 1955, c. 1371, s. 4.)

Cited in Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925); Blades v. Hood, 203 N.C. 56, 164 S.E. 828 (1932); Hoft v. Mohr, 215 N.C. 397, 2 S.E.2d 23 (1939).

§ 53-23. Disposition of books, records, etc. — All books, papers, and records of a bank which has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court for the county in which the office of such bank is located, or in such other place as in his judgment will provide for the proper safekeeping and protection of such books, papers, and records. The books, papers, and records herein referred to shall be held subject to the orders of the Commissioner of Banks and the clerk of the superior court for the county in which such bank was located. (1921, c. 4, s. 20; C. S., s. 218(f); 1931, c. 243, s. 5.)

§ 53-24. Destruction of records of liquidated insolvent banks. — After the expiration of 10 years from the date of filing in the office of the clerk of the superior court of a final order approving the liquidation by the banking department of any insolvent bank and the delivery to the clerk or into his custody of the records of such bank, the said records may be destroyed by the clerk of the superior court holding said records by burning the same in the presence of the register of deeds and the sheriff of said county, who shall join with the clerk in the execution of a certificate as to the destruction of said records. The certificate shall be filed by the clerk in the court records of the liquidation of the bank whose records are thus destroyed.

After 10 years from the filing by the Commissioner of Banks of a final report of liquidation of any insolvent bank, the said Commissioner, by and with the consent of the State Banking Commission or its successor, may destroy by burning the records of any insolvent bank held in the Department of the Commissioner of Banks in connection with the liquidation of such bank:

Provided, that in connection with any unpaid dividends the Commissioner of Banks shall preserve the deposit ledger or other evidence of indebtedness of the bank with reference to the unpaid dividend until the dividend shall have been paid.

Nothing in this section shall be construed to authorize the destruction by the clerk of the superior court of any county or by the Commissioner of Banks of any of the formal records of liquidation, nor shall the Commissioner of Banks have authority under this section to destroy any of the records made in his office with reference to the liquidation of any insolvent bank. (1939, c. 91, s. 1; c. 135.)

§ 53-25. Trust terminated on insolvency of trustee bank. — Whenever any bank or trust company created under the laws of this State, which has heretofore been, or shall hereafter be, appointed trustee in any indenture, deed of trust or other instrument of like character, executed to secure the payment of any bonds, notes or other evidences of indebtedness, has been or shall be by reason of insolvency, or for any other cause provided by law, taken over for liquidation by the Commissioner of Banks of this State or by any other legally constituted authority, the powers and duties of such bank or trust company as trustee in any such instrument shall, upon the entry of an order of the clerk of the superior court appointing a successor trustee, upon a petition as hereinafter provided, immediately cease and determine. (1931, c. 250, s. 1.)

§ 53-26. Petition for new trustee; service upon parties interested. — In all cases of such insolvency and liquidation mentioned in G.S. 53-25, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in some newspaper published in the county, or in some adjoining county if no newspaper is published in the county where such application is made, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than 30 days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2.)

§ 53-27. Publication and contents of notice. — Such notice shall be published in the manner required by law for service of summons by publication, and shall set forth the names of the parties to the indenture, deed of trust or other such instrument, the date thereof, and the place or places where the same is recorded. (1931, c. 250, s. 3.)

§ 53-28. Appointment where no objection made. — If, upon the day fixed in said notice, no person shall appear and object to the appointment of a substitute trustee, the clerk shall, upon such terms as he deems advisable to the best interest of all parties, appoint some competent person, or corporation authorized to act as such, substitute trustee, who shall be vested with and shall exercise all the powers conferred upon the trustee named in said instrument. (1931, c. 250, s. 4.)

§ 53-29. Hearing where objection made; appeal from order. — If objection shall be made to the appointment of a new trustee, the clerk shall hear and determine the matter, and from his decision an appeal may be prosecuted as in case of special proceedings generally. (1931, c. 250, s. 5.)

§ 53-30. Registration of final order. — The final order of appointment of such new trustees shall be certified by the clerk of the superior court in which such order is entered and shall be recorded in the office of the register of deeds in the county or counties in which the instrument under which such appointment

has been made is recorded, and a minute of the same shall be entered by the register of deeds on the margin of the record where said original instrument is recorded. (1931, c. 250, s. 6.)

§ 53-31. Petition and order applicable to all instruments involved. — The petition and the order appointing such new trustee may include and relate and apply to any number of indentures, deeds of trust or other instruments, wherein the same trustee is named. (1931, c. 250, s. 7.)

§ 53-32. Additional remedy. — Sections 53-25 to 53-31 shall be in addition to and not in substitution for any other remedy provided by law. (1931, c. 250, s. 8.)

Editor's Note. — As the remedy provided is cumulative, the statute should be read in connection with §§ 45-10 to 45-16. 9 N.C.L. Rev. 403.

§ 53-33. Validation of acts of officers of insolvent banks as trustees in deeds of trust. — Whenever any State bank, prior to January 1, 1931, shall have become insolvent and its assets and business been placed in the hands of the Commissioner of Banks or taken control of by the Commissioner of Banks for liquidation, and the board of directors of said bank shall have thereafter by resolution authorized or directed the officers of said bank or some of them to perform or exercise in the name of the bank as trustee any power or duty of such bank as trustee under any deed in trust to it recorded in any county in this State, provided said resolution was passed prior to the eleventh day of May, 1931, the performance or exercise of any such power or duty heretofore or hereafter by any officer or officers so authorized shall be effective and binding on all parties concerned as the act of such bank as trustee as aforesaid, to the same extent and in the same manner as if such bank had not become insolvent and its assets and business had not been placed in the hands of the Commissioner of Banks or taken control of by the Commissioner of Banks for liquidation. (1931, c. 403.)

Editor's Note. — Pursuant to Session Laws 1931, c. 243, s. 5, "Commissioner of Banks" has been substituted for "Corporation Commission" in four places. Refer to § 53-92.

§ 53-34. Validation of sales by Commissioner of Banks under mortgages, etc., giving banks power of sale. — Whenever it appears that either the Commissioner of Banks or any liquidating agent appointed pursuant to the provisions of G.S. 53-20, has undertaken to exercise the power of sale set up in any mortgage, deed of trust, or other written instrument for the security of the payment of money in which any bank then in liquidation was named trustee, the said acts including the acts of resigning the trust, of the Commissioner of Banks and/or liquidating agent appointed as aforesaid, are hereby validated and declared to be of the same force and effect as if done by the bank named as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)

Editor's Note. — This section appears to have been intended to overcome the effect of Mitchell v. Shuford, 200 N.C. 321, 156 S.E. 513 (1931). In view, however, of this case, and of Booth v. Hairston, 193 N.C. 278, 136 S.E. 879 (1927); Booth v. Hairston, 195 N.C. 8, 141 S.E. 480 (1928), doubt has been cast upon the constitutionality of the validating act. It is believed, however, that the facts of the situation aimed at by the validating act can be distinguished. The future policy is stated in § 53-25 et seq., and in the 1931 amendment to § 53-20, subsection (g). 9 N.C.L. Rev. 401.

Pursuant to Session Laws 1931, c. 243, s. 5, "Commissioner of Banks" has been substituted for "North Carolina Corporation Commission, the chief State bank examiner" and for "North Carolina Corporation Commission and/or chief State bank examiner." Refer to § 53-92.

§ 53-35. Foreclosures and execution of deeds by Commissioner of Banks validated. — Whereas, the Commissioner of Banks, created by Chapter 243 of the Public Laws of 1931, was given general supervision over the banks of this State; and

Whereas, the Commissioner of Banks, under authority of Chapter 385 of the Public Laws of 1931, succeeded to all the property of banks in liquidation, including fiduciary powers under the mortgages and deeds of trust; and

Whereas, the Commissioner of Banks, in his own name and in the name of a number of conservators or liquidating agents of banks in the process of liquidation under his supervision, has foreclosed a large number of deeds of trust in which such banks were the named trustee, and has executed under the powers contained therein a large number of trustee's deeds under authority thereof: Now, therefore, all the deeds and acts of the Commissioner of Banks and/or conservators or liquidating agents of such banks in the process of liquidation, as in the preamble to this section described, are hereby in all respects ratified, validated and confirmed.

This section shall not affect litigation pending April 3, 1939. (1939, c. 368.)

§ 53-36. Commissioner to report to Secretary of State certain matters relative to liquidation of closed banks; publication. — The Commissioner of Banks of the State of North Carolina shall on or before the first day of June, 1933, and on the first day of January and July of each year thereafter file with the Secretary of the State of North Carolina a report showing all banks under liquidation in the State of North Carolina, and the names of any and all auditors together with the amounts paid to them for auditing each of said banks, and the names of any and all attorneys employed in connection with the liquidation of said banks together with the amount paid or contracted to be paid to each of said attorneys. If any attorney has been employed on a fee contingent upon recovery said report must state in substance the contract.

Within five days from the receipt of said report the Secretary of the State of North Carolina shall cause same to be published one time in some newspaper published in each county in which a bank or banks are under liquidation, if there be a newspaper published in said county. If not, the Secretary of the State of North Carolina shall cause a copy of said report to be posted at the courthouse door in said county. (1933, c. 483.)

ARTICLE 4.

Reopening of Closed Banks.

§ 53-37. Conditions under which banks may reopen. — Whenever the Commissioner of Banks has taken in possession any bank, such bank may, with the consent of the Commissioner of Banks, resume business upon such terms and conditions as may be approved by the State Banking Commission. When such banks have been taken in possession under the provisions of G.S. 53-20, subsections (a) or (b), such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the superior court in the action required to be commenced in such cases against said bank under the provisions of G.S. 53-20, subsection (c): Provided, however, no bank or banking institution which has been taken in possession by the Commissioner of Banks under the provisions of the State banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

(1) The bank has been completely restored to solvency;
(2) The capital stock, if impaired, has been entirely restored in cash;
(3) It shall clearly appear to the Commissioner of Banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community. (1921, c. 4, s. 16; C.

S., s. 218(q); 1927, c. 113, s. 1; 1931, c. 243, s. 5; c. 388, s. 1; 1939, c. 91, s. 2.)

§ 53-38. Certain contracts not affected. — Nothing in G.S. 53-37 shall impair or affect any contracts made by banks and depositors of banks reopened prior to May 12, 1931, under the permission of the State Banking Department. (1931, c. 388, s. 4.)

Cross References. — As to liquidation, see § 53-20. As to when Commissioner takes charge, see § 53-19.

Applied in Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924).

ARTICLE 5.

Stockholders.

§ 53-39. New State banks to set up surplus fund. — The common stockholders of any bank organized after March 17, 1933, under the laws of the State of North Carolina shall pay in, in cash, a surplus fund equal to fifty per centum (50%) of its common capital stock before the bank shall be authorized to commence business. (1933, c. 159, s. 2; 1935, c. 79, s. 1.)

Editor's Note. — For a discussion of this section, see 11 N.C.L. Rev. 200. And see 13 N.C.L. Rev. 91.

§ 53-40. Executors, trustees, etc., not personally liable. — Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1921, c. 4, s. 23; C. S., s. 219(c).)

This section extends to every trust relation, however created, and attaches liability to the estate and funds in the hands of the trustee. Hood v. North Carolina Bank & Trust Co., 209 N.C. 367, 184 S.E. 51 (1936).

This provision is held to refer not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relation, however created. But the exemption is limited to cases of express and active trusts, where there is a probability of some estate to respond to the liability. American Trust Co. v. Jenkins, 193 N.C. 761, 138 S.E. 139 (1927).

Former Statutory Liability of Stockholders Abolished. — Public Laws 1935, c. 99, amending C. S. § 219(a), abolished the former statutory liability of stockholders in the banks of this State. Fidelity Security Co. v. Hight, 211 N.C. 117, 189 S.E. 174 (1937); Hood v. Richardson Realty, 211 N.C. 582, 191 S.E. 410 (1937).

A trust estate was held liable for assessment on bank stock owned regardless of the method by which the trust was established, and where shares of bank stock appeared on the books of the bank in the name of "executors," the statutory liability thereon of the estate could not be defeated by showing that the stock was held by the executors as executors and trustees under the will for the benefit of minor ulterior beneficiaries, the beneficiaries of the income from the trust estate being of age, and there being nothing on the books of the bank to disclose the trusteeship. Hood v. North Carolina Bank & Trust Co., 209 N.C. 367, 184 S.E. 51 (1936).

Assignee of Judgment against Executor as Such Not Entitled to Set Up Personal Liability of Executor. — Plaintiff assignee of a judgment against an executor in his representative capacity for a stock assessment made on shares of stock of a bank in liquidation, sought by subsequent proceedings to charge the executor personally with liability upon allegations that the executor personally owned the bank stock, legally or equitably. The mere assignment of the judgment, without more, was held to transfer only the rights of the assignor of the judgment in his status of judgment creditor and not his personal rights not incident to such status, and plaintiff was not entitled to set up the personal liability of the executor. Jones v. Franklin's Estate, 209 N.C. 585, 183 S.E. 792 (1936).

Liability of Trustee to Trust Estate Cannot Be Set Off against Liability of Estate. — The liability of a bank trustee to the trust estate for its negligent failure to sell for reinvestment shares of stock of the bank belonging to the trust estate could not be set up as a counterclaim or setoff against the former statutory liability of the estate upon the insolvency of the bank. In re United Bank & Trust Co., 209 N.C. 389, 184 S.E. 64 (1936).

§ 53-41. Stock sold if subscription unpaid. — Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder 20 days' notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within 30 days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1921, c. 4, s. 25; C. S., s. 219(e).)

§ 53-42. Impairment of capital; assessments, etc. — The Commissioner of Banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within 60 days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in G.S. 53-11. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon 30 days' notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the Commissioner of Banks, the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock. (Ex. Sess. 1921, c. 56, s. 3; C. S., s. 219(f); 1925, c. 117; 1931, c. 243, s. 5; 1959, c. 157.)

Cross Reference. — As to the amount of reserve required, see §§ 53-50 and 53-51.

Editor's Note. — This section first appeared in Public Laws 1921, Ex. Sess., c. 56, amending the Public Laws 1921, c. 4. Its provisions are substantially similar to the National Banking Act which was designed principally for the purpose of strengthening banks whose capital has become impaired. See Elon Banking & Trust Co. v. Burke, 189 N.C. 69, 126 S.E. 163 (1925).

Amendatory Act Cannot Be Given Retroactive Effect. — The act of 1925, amending this section by providing for personal liability of stockholders for the amount by which the sale of their stock failed to realize a sum sufficient to pay the assessment, provided a new remedy, and to permit the bank to maintain the action against a stockholder who purchased his stock prior to the enactment of the amendment of 1925 would violate due process of law, and would impair the obligations of the contract, and hence the act of 1925 cannot be given retroactive ef-

fect. Bank of Pinehurst v. Derby, 218 N.C. 653, 12 S.E.2d 260 (1940).

"Payable in Cash" Construed. — The expression "payable in cash" merely means that the account is presently due, and its payment may be presently enforced, but only by the methods the statute specifies. Elon Banking & Trust Co. v. Burke, 189 N.C. 69, 126 S.E. 163 (1925).

§ 53-42.1. Report of changes in ownership or management. — (a) Whenever a change occurs in the outstanding voting stock of any bank which will result in a change in the control of the bank, the president or other chief executive officer of such bank shall report such facts to the Commissioner of Banks within 24 hours after obtaining knowledge of such change in the control of the bank. As used in this section the term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policy of the bank, or a change in the ownership of as much as ten percent (10%) of the outstanding voting stock in any bank.

(b) Whenever a loan or loans are made by a bank, which loan or loans are, or are to be, secured by ten percent (10%) or more of the voting stock of a bank, the president of other chief executive officer of the bank which makes the loan or loans shall report such fact to the Commissioner of Banks within 24 hours after obtaining knowledge of such loan or loans, except when the borrower has been the owner of record of the stock for a period of one year or more, or the stock is of a newly organized bank prior to its opening.

(c) The reports required in subsections (a) and (b) of this section shall contain whatever information is available to inform the Commissioner of Banks of the effect of the transaction upon control of the bank whose stock is involved and shall contain, when known by the person making the report, the number of shares involved, the identity of the sellers (or transferors) and purchasers (or transferees) of record, the identity of the beneficial owners of the shares involved, the purchase price, the total number of shares owned by the sellers (or transferors) and purchasers (or transferees) of record, both immediately prior to and after the transaction being reported, and the total number of shares owned by the beneficial owners of the shares involved, both immediately prior to and after the transaction being reported, and the identity of borrowers, the name of the bank issuing the stock securing the loan, the number of shares securing the loan and the amount of the loan or loans, and such reports shall be in addition to any reports that may be required pursuant to other provisions of law.

(d) Each bank shall report to the Commissioner of Banks within 24 hours any changes in chief executive officers or directors, including in its report a statement of the past and current business and professional affiliations of new chief executive officers or directors. (1967, c. 789, s. 5.)

ARTICLE 6.

Powers and Duties.

§ 53-43. General powers. — In addition to the powers conferred by law upon private corporations, banks shall have the power:

(1) To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporation at the time of making loans may not take and receive interest or discounts in advance where the effective rates of interest or discounts collected shall exceed the maximum rates of

interest provided under this section, G.S. 24-1.1 and G.S. 24-1.2 if such interest or discount had not been collected in advance.

(2) To adopt regulations for the government of the corporation not inconsistent with the Constitution and laws of this State.

(3) To purchase, hold, and convey real estate for the following purposes:

a. Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other apartments to rent as a source of income, which investment shall not exceed fifty percent (50%) of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, 1921. Provided further, that the Commissioner of Banks may in his discretion authorize the continuance of investments made prior to the first day of February, 1925, of the character described in this paragraph. Provided, further, that the Commissioner of Banks may, in his discretion, authorize any bank located in a city having a population of more than 5,000, according to the last United States census, to invest more than fifty percent (50%) of its capital and permanent surplus in its banking houses, furniture, and fixtures.

b. Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

c. Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subdivision shall be sold by such bank within one year after it is acquired, unless, upon application by the board of directors, the Commissioner of Banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this chapter, are hereby repealed.

(4) Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities, either directly or through subsidiary corporations: Provided, however, that the term "dealing in investment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, shall not be deemed to include obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the federal home loan banks or the Home Owner's Loan Corporation.

Any provision in conflict with this subdivision contained in the articles of incorporation heretofore issued to any banking corporation is hereby revoked.

(5) Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may

at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of 1933 (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporation.

(6) Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash and secure, under rules and regulations of the State Banking Commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the State of North Carolina, equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per centum (125%) of such deposits. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department or to the individual fiduciary accounts, no creditor of the bank shall have any claim or right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The Banking Commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and is hereby conferred under the general authority heretofore conferred upon said Commission as well as by this paragraph.

(7) To issue, advise and confirm letters of credit authorizing the beneficiaries thereof to draw upon the institution or its correspondents.

(8) To receive money for transmission.

(9) To become a member of a clearinghouse association and to pledge assets required for its qualification.

(10) To provide for the performance of bank service corporation services, such as data processing services and bookkeeping, subject to such rules and regulations as may be adopted by the State Banking Commission. (1921, c. 4, s. 26; 1923, c. 148, s. 5; C. S., s. 220(a); Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1; c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; 1955, c. 590; 1961, c. 954; 1967, c. 789, s. 6; 1969, c. 541, s. 8; c. 1303, ss. 8, 9.)

Cross References. — As to powers conferred upon private corporations, see § 55-17 et seq. As to form for corporate conveyances, see § 47-41.

Editor's Note. — For comment on subdivision (6), see 19 N.C.L. Rev. 544.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Similarity of Section to Federal Act. — The words used in the statute relative to the powers of corporations engaged in the banking business under the laws of this State are almost identical with those used in the federal statute, relative to the powers of national banks. Indiana Quarries Co. v. Angier Bank & Trust Co., 190 N.C. 277, 129 S.E. 619 (1925).

State banks have no powers beyond those expressly granted, or those fairly incidental thereto, in this Article. Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962).

Power to Become Surety or Lend Credit. — In the absence of an express grant of authority, a banking corporation, as a rule, has not the power to become the guarantor or surety of the obligation of another person, or to lend its credit to any person. Indiana Quarries Co. v. Angier Bank & Trust Co., 190 N.C. 277, 129 S.E. 619 (1925).

A bank is not authorized to become a guarantor, except where it is necessary to protect its rights where the guaranty relates to commercial paper and is an incident to the purchase and sale thereof, or when the guaranty is especially authorized by law. Indiana Quarries Co. v. Angier Bank & Trust Co., 190 N.C. 277, 129 S.E. 619 (1925).

Negotiations of Evidences of Debt. — In the course of its dealings and for a lawful purpose, a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by this section; and where there is more than one transfer of the same security, and the equities are equal, the first in time will prevail. Richmond County v. Page Trust Co., 195 N.C. 545, 132 S.E. 786 (1928).

It is general banking practice to require that interest be paid in advance. The plaintiff wanted $33,000. Had it been required to pay the interest from that sum, it would have received $7,920 less than it sought to borrow. By adding the interest to the principal of the note, it paid only six percent of the amount borrowed, and this would appear to be the most convenient method of payment. Such a transaction is not tainted with usury. Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (1967).

Cited in Lambeth v. Lambeth, 249 N.C. 315, 106 S.E.2d 491 (1959); Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-43.1. Obligations of agencies supervised by Farm Credit Administration as securities for deposits of public funds. — Notwithstanding any restrictions or limitations on securities for deposits of public funds contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be without limitation, authorized securities for all deposits of public funds for the State of North Carolina, of agencies of the State of North Carolina, of counties of North Carolina, and of municipalities and other political subdivisions of the State of North Carolina. This section shall be cumulative to all other laws relating to securities for deposits of such funds. (1957, c. 507; 1973, c. 239, s. 2.)

Editor's Note. — The 1973 amendment inserted the provisions as to obligations issued by a farm credit institution pursuant to the Farm Credit Act of 1971.

§ 53-43.2. Obligations of agencies supervised by Federal Home Loan Bank Board as securities for deposits of public funds. — Notwithstanding any restrictions or limitations on securities for deposits of public funds contained in any law of this State, federal home loan banks securities issued by federal home loan banks pursuant to the Federal Home Loan Bank Act of 1932 as amended shall be without limitation, authorized securities for all deposits of

public funds for the State of North Carolina, of agencies of the State of North Carolina, of counties of North Carolina, and of municipalities and other political subdivisions of the State of North Carolina. This section shall be cumulative to all other laws relating to securities for deposits of such funds. (1959, c. 1069, s. 1.)

§ 53-43.3. Officers and employees; share purchase and option plans. — Subject to any applicable rules or regulations of the State Banking Commission, a bank may grant options to purchase, sell or enter into agreements to sell shares of its capital stock to its officers or employees, or both, for a consideration of not less than one hundred percent (100%) of the fair market value of the shares on the date the option is granted, or, if pursuant to a stock purchase plan, eighty-five percent (85%) of the fair market value of the shares on the date the purchase price is fixed, pursuant to the terms of an officer-employee qualified stock option plan or an officer-employee stock purchase plan which has been adopted by the board of directors of the bank and approved by the holders of at least two thirds of the particular class or classes of stock entitled to vote on such proposal and by the Commissioner of Banks. In no event shall the option to purchase such shares be for a consideration less than the par value thereof. Stock options issued hereunder shall qualify as qualified stock options under the Internal Revenue Code of 1954, and corresponding provisions of subsequent United States law. (1967, c. 789, s. 7; 1973, c. 1127.)

Editor's Note. — The 1973 amendment substituted "qualified" for "restricted" near the middle of the first sentence and in the last sentence.

§ 53-43.4. Issuance of capital notes and debentures. — A bank shall have authority to issue capital notes or debentures, convertible or otherwise, subject to such regulations as the Banking Commission may adopt with respect thereto. (1967, c. 789, s. 7.)

§ 53-43.5. Minors' deposits and safe-deposit agreements. — (a) Deposits. — A bank may operate a deposit account in the name of a minor or in the name of two or more persons, one or more of whom are minors, with the same effect upon its liability as if such minors were of full age. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(b) Dealings with Minor. — A bank may lease a safe-deposit box to and in connection therewith deal with a minor with the same effect as if leasing to and dealing with a person of full legal capacity. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(c) Safe-Deposit Agreements. — An institution may rent a safe-deposit box or other receptacle for safe deposit of property to, and receive property for safe deposit from, a married minor and spouse, whether adult or minor, jointly. This section shall not affect the law governing transactions with minors in cases outside the scope of this section. (1967, c. 789, s. 7.)

Stated in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 53-43.6. School thrift or savings plan. — (a) A bank may arrange for the collection of savings from school children by the principal of the school, by the teachers, or by collectors, pursuant to regulations issued by the State Banking Commission and approved, in the case of public schools, by the board of education or board of trustees of the city or district in which the school is

situated. The principal, teacher, or person authorized by the bank to make collections from the school children shall be the agent of the bank and the bank is liable to the pupil for all deposits made with such principal, teacher, or other authorized person to the same extent as if the deposits were made directly with the bank.

(b) The acceptance of deposits in furtherance of a school thrift or savings plan by an officer, employee or agent of a bank at any school shall not be construed as the establishment or operation of a branch or branch facility. (1967, c. 789, s. 7.)

§ 53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats. — (a) If the rental due on a safe-deposit box has not been paid for one year, the lessor may send a notice by registered mail to the last known address of the lessee stating that the safe-deposit box will be opened and its contents stored at the expense of the lessee unless payment of the rental is made within 30 days. If the rental is not paid within 30 days from the mailing of the notice, the box may be opened in the presence of an officer of the lessor and of a notary public who is not a director, officer, employee or stockholder of the lessor. The contents shall be sealed in a package by the notary public who shall write on the outside the name of the lessee and the date of the opening. The notary public shall execute a certificate reciting the name of the lessee, the date of the opening of the box and a list of its contents. The certificate shall be included in the package and a copy of the certificate shall be sent by registered mail to the last known address of the lessee. The package shall then be placed in the general vaults of the lessor at a rental not exceeding the rental previously charged for the box.

(b) Any documents or writings of a private nature, and having little or no apparent value need not be offered for sale, but shall be retained, unless claimed by the owner, for the period specified for unclaimed deposits, after which they may be destroyed.

(c) If the contents of the safe-deposit box have not been claimed within two years of the mailing of the certificate, the lessor may send a further notice to the last known address of the lessee stating that, unless the accumulated charges are paid within 30 days, the contents of the box will be sold at public auction at a specified time and place, or, in the case of securities listed on a stock exchange, will be sold upon the exchange on or after a specified date and that unsalable items will be destroyed. The time, place and manner of sale shall also be posted conspicuously on the premises of the lessor and advertised once in a newspaper of general circulation in the community. If the articles are not claimed, they may then be sold in accordance with the notice.

(d) The balance of the proceeds, after deducting accumulated charges, including the expense of advertising and conducting the sale, together with any money discovered in the box shall be deposited to the credit of the lessee in any account maintained by him, or if none, shall be deemed a deposit account with the bank or trust company operating the safe-deposit facility, or in the case of a subsidiary safe-deposit company, a bank or trust company owning stock therein, and shall be identified on the books of the bank as arising from the sale of contents of a safe-deposit box. When any such deposit is surrendered as unclaimed deposits, the lessor shall also send to the Commissioner a copy of the certificate and an itemized statement of the amount received and the deductions. Any items remaining unsold may be destroyed.

(e) The deposits or proceeds from sales referred to in the preceding paragraph shall be subject to all the provisions of G.S. 116A-6, relating to the escheat of bank deposits.

(f) A copy of this section shall be printed on every contract for rental of a safe-deposit box. (1967, c. 789, s. 7.)

§ 53-44. Investment in bonds guaranteed by United States. — (a) Any bank, building and loan association, land and loan association, savings and loan association, insurance company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation incorporated under the laws of this State, and operating under the supervision of the Commissioner of Banks, Insurance Commissioner, or Superintendent of Savings and Loan Associations; the State Treasurer, as custodian of the assurance fund provided under the Torrens Act, or any officer charged with the investment of sinking funds of the State, any county, city, town, incorporated village, township, school district, school taxing district, or other district or political subdivision of government of the State; the North Carolina State Thrift Society, any clerk of the court holding money by color of his office or as receiver; and any person, firm or corporation acting as executor, administrator, guardian, trustee, or other person acting in a fiduciary capacity may invest in bonds issued, or in bonds which are fully and unconditionally guaranteed as to principal and interest by the United States, to the same extent as the same are now or may be hereafter authorized to invest in any obligation of the United States: Provided that all investments authorized hereunder shall be guaranteed, both as to the payment of principal and interest thereon, by the United States treasury.

(b) Security for Loans and Deposits. — No bank shall be required to maintain a reserve against deposits secured by any of the above-mentioned bonds equal in market value to the amount of such deposits, and such bonds shall be valid security for all loans and deposits to the same extent as are any obligations of the United States.

(c) Bonds Deemed Cash in Settlements by Fiduciaries. — In settlements by guardians, executors, administrators, trustees and others acting in a fiduciary capacity, the bonds and securities herein mentioned shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds, and may be paid as such by the transfer thereof to the persons entitled and without any liability for a greater rate of interest than the amount actually accruing from such bonds. (1935, c. 164; 1937, c. 433.)

Cross References. — As to investment of funds held by bank for investment or distribution, see § 36-27. As to trustees, including banks, holding stock as fiduciary, see § 36-32. For other provisions as to investment of funds in hands of clerks of court by color of their office, see § 7A-112.

Editor's Note. — As to section generally, see 13 N.C.L. Rev. 362.

§ 53-44.1. Investments in obligations of agencies supervised by Farm Credit Administration. — Notwithstanding any restrictions or limitations on investments contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be, without limitation, authorized investments of funds of banks, savings banks, trust companies, insurance companies, building and loan associations, savings and loan associations, credit unions, fraternal organizations, pension and retirement funds, and of fiduciary funds of executors, administrators, guardians and trustees, unless such trust and fiduciary funds are required to be otherwise invested by will, deed, order or decree of court, gift, grant or other instrument creating or fixing the trust. This

section shall be cumulative to all other laws relating to investments of such funds. (1957, c. 508; 1973, c. 239, s. 3.)

Editor's Note. — The 1973 amendment inserted the provisions as to obligations issued by a farm credit institution pursuant to the Farm Credit Act of 1971.

§ 53-44.2. Investments in obligations of agencies supervised by Federal Home Loan Bank Board. — Notwithstanding any restrictions or limitations on investments contained in any law of this State, federal home loan banks securities issued by federal home loan banks pursuant to the Federal Home Loan Bank Act of 1932 as amended shall be without limitation, authorized investments of funds of banks, savings banks, trust companies, insurance companies, building and loan associations, savings and loan associations, credit unions, fraternal organizations, pension and retirement funds, and of fiduciary funds of executors, administrators, guardians and trustees, unless such trust and fiduciary funds are required to be otherwise invested by will, deed, order or decree of court, gift, grant or other instrument creating or fixing the trust. This section shall be cumulative to all other laws relating to investments of such funds. (1959, c. 1069, s. 2.)

§ 53-45. Banks, fiduciaries, etc., authorized to invest in securities approved by the Secretary of Housing and Urban Development, Federal Housing Administration, Veterans Administration, etc. — (a) Insured Mortgages and Obligation of National Mortgage Associations and Federal Home Loan Banks. — It shall be lawful for all commercial and industrial banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development or Federal Housing Administration, and other financial institutions engaged in business in this State, and for guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State to invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust insured or guaranteed by the Federal Housing Administration, Secretary of Housing and Urban Development or the Veterans Administration, or in mortgages or deeds of trust on real estate which have been accepted for insurance or guarantee by the Federal Housing Administration, Secretary of Housing and Urban Development or Veterans Administration, and in obligations of a national mortgage association which obligations are insured or guaranteed by the United States Government, or bonds, debentures, consolidated bonds, or other obligations of any federal home loan bank or banks.

(b) Insured or Guaranteed Loans; Loans Purchased by National Mortgage Associations and Federal Home Loan Banks. — All such banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration, and other financial institutions, and also all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State, may make such loans, secured by real estate, as the Secretary of Housing and Urban Development, the Federal Housing Administration, a national mortgage association, or the Veterans Administration has insured or guaranteed, or has made a commitment to insure or guarantee, and may obtain such insurance or guarantee; provided, further, that the above designated financial institutions, may make loans, secured by real estate, that are eligible and committed for sale

to a national mortgage association, federal home loan bank, federal home loan mortgage corporation or other agency or instrumentality of the United States.

(c) Eligibility for Credit Insurance. — All banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration and other financial institutions, on being approved as eligible for credit insurance by the Secretary of Housing and Urban Development, the Federal Housing Administration, or the Veterans Administration, may make such loans as are insured by the Secretary of Housing and Urban Development or Federal Housing Administration or insured or guaranteed by the Veterans Administration.

(d) Certain Securities Made Eligible for Collaterals, etc. — Whenever by statute of this State, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund is required to be maintained, consisting of designated securities, bonds, and notes secured by a mortgage or deed of trust insured or guaranteed by the Secretary of Housing and Urban Development, Federal Housing Administration, or Veterans Administration, debentures issued by the Secretary of Housing and Urban Development or the Federal Housing Administration and obligations of a national mortgage association shall be eligible for such purposes.

(e) General Laws not Applicable. — No law of this State prescribing the nature, amount or form of security or requiring security upon which loans or investments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraphs. (1935, cc. 71, 378; 1937, c. 333; 1959, c. 364, s. 1; 1961, c. 291; 1971, c. 888.)

Editor's Note. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-46. Limitations on investments in securities. — The investment in any bonds or other debt obligations of any one firm, individual, or corporation, unless it be the obligations of the United States, or agency thereof, or other obligations guaranteed by the United States Government, State of North Carolina, or other state of the United States, or of some city, town, township, county, school district, or other political subdivision of the State of North Carolina, shall at no time be more than twenty percent (20%) of the unimpaired capital and permanent surplus of any bank to an amount not in excess of two hundred and fifty thousand dollars ($250,000); and not more than ten percent (10%) of the unimpaired capital and permanent surplus in excess of two hundred and fifty thousand dollars ($250,000). (1921, c. 4, s. 27; C. S., s. 220(b); 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199; 1937, c. 186; 1967, c. 789, s. 8.)

Cross References. — As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-47. Limitations on investment in stocks. — No bank shall make any investment in the capital stock of any other state or national bank: Provided, that nothing herein shall be construed to prevent banks doing business under this Chapter from subscribing to or purchasing, upon such terms as may be agreed upon, the capital stock of clearing corporations as defined in G.S.

25-8-102(3), the capital stock of banks organized under that act of Congress known as the "Edge Act" or the capital stock of central reserve banks whose capital stock exceeds one million dollars ($1,000,000). To constitute a central reserve bank as contemplated by this Chapter, at least fifty percent (50%) of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the act of Congress commonly known as the "Edge Act," shall at no time exceed ten percent (10%) of the paid-in capital and permanent surplus of the bank making same. No bank shall invest more than fifty percent (50%) of its permanent surplus in the stocks of other corporations, firms, partnerships, or companies, unless such stock is purchased to protect the bank from loss. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the same, and if not so disposed of they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the Commissioner of Banks if in his judgment it is for the best interest of the bank that such extension be granted; provided that the limitations imposed in this section on the ownership of stock in or securities of corporations is suspended to the extent (and to that extent only) that any bank operating under the supervision of the Commissioner of Banks may subscribe for and purchase shares of stock in or debentures, bonds or other types of securities of any corporation organized under the laws of the United States of America for the purpose of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; C. S., s. 220(c); 1931, c. 243, s. 5; 1935, c. 81, s. 3; 1973, c. 497, s. 7.)

Editor's Note. — The 1973 amendment inserted in the first sentence, "the capital stock of clearing corporations as defined in G.S. 25-8-102(3)."

§ 53-48. Limitations of loans. — The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty percent (20%) of two hundred and fifty thousand dollars ($250,000), or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten percent (10%) of the excess of two hundred and fifty thousand dollars ($250,000) of the unimpaired capital and permanent surplus of the bank: Provided, however, that the discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other solvent commercial or business paper actually owned by the person, firm or corporation negotiating the same and the purchase of any notes, the making of any loans, secured by not less than a like face amount of bonds of the United States, or an agency of the United States, or other obligations guaranteed by the United States Government, or State of North Carolina or certificates of indebtedness of the United States, or agency thereof, or other obligations guaranteed by the United States Government, shall not be considered as money borrowed within the meaning of this section: Provided, further, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States. (1921, c. 4, s. 29; 1923, c. 148, s. 6; C. S., s. 220(d); 1925, c. 119,

s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; 1945, c. 127, s. 1; 1967, c. 789, s. 9.)

Cross References. — As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Purpose of Section. — The wisdom of this provision and § 53-111 is manifest; banks whose business is conducted in strict compliance therewith seldom become insolvent. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Section Not Retroactive. — The statutory limitation upon a bank making loans to any one person or class of common interest, does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of the statute. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Loss of Assets Must Result. — In an action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the limit set forth in this section, the evidence is insufficient to be submitted to a jury, if it appears that no loss to the assets of the bank has been caused by the acts of the officials. Gordon v. Pendleton, 202 N.C. 241, 162 S.E. 546 (1932).

Criminal Liability. — The violation of this section is a misdemeanor. See § 53-134.

A bank must act through its officers and directors, and where they have violated the provisions of this section as to lending the bank's money, the offense is committed by them under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925); State v. Davidson, 205 N.C. 735, 172 S.E. 489 (1934).

Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by § 53-134. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Intent to Defraud Not Element of Offense. — An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the unlawful act constitutes the crime declared by § 53-134 to be a misdemeanor, punishable as such in the discretion of the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Consolidation of Indictments. — An indictment charging the officer of the bank of violating § 53-111, and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permanent surplus, in violation of this section, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-49. Suspension of investment and loan limitation. — The board of directors of any bank, may by resolution duly passed at a meeting of the board, request the Commissioner of Banks to suspend temporarily the limitations on loans and investments as the same may apply to any particular loan or investment in excess of the limitations of G.S. 53-46, 53-47, and 53-48 which the bank desires to make. Upon receipt of a duly certified copy of such resolution, the Commissioner of Banks may, in his discretion, suspend the limitations on loans and investments insofar as they would apply to the loan or investment which the bank desires to make: Provided, however, such loan shall be amply secured and shall be for a period not longer than 120 days. (1921, c. 4, s. 30; C. S., s. 220(e); 1931, c. 243, s. 5; 1933, c. 239, s. 1.)

§ 53-50. Requirement of reserve fund. — (a) A bank which is not a member of the Federal Reserve System shall maintain at all times a reserve fund in such percentages as shall be fixed by regulation of the Banking Commission, which percentages shall be equal to or less than by not more than two percentage points, but never greater than, those required under the laws of the United States for banks which are members of the Federal Reserve System. The amount of the required reserve for each day shall be computed on the basis of average

daily deposits covering such biweekly or shorter periods as shall be fixed by regulation of the Banking Commission.

(b) A bank which is a member of the Federal Reserve System shall maintain at all times a reserve fund in accordance with the requirements applicable to a member bank under the laws of the United States.

(c) A bank shall give written notice to the Commissioner of Banks, in the manner prescribed by the Commissioner for such notice, of any deficiency in the reserve fund required under subsection (a) or (b) of this section within three business days after the close of any scheduled averaging period during which such deficiency occurs. (1921, c. 4, s. 31; C. S., s. 220(f); 1967, c. 789, s. 10; 1973, c. 554.)

Cross References. — As to effect of impaired capital upon reserve, see § 53-42. As to authority to join federal reserve bank, see § 53-61. As to failure to maintain required reserve, see § 53-111.

Editor's Note. — The 1973 amendment rewrote subsection (a).

Applied in State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-51. Reserve and cash defined. — Reserve shall consist of cash on hand and balances payable on demand, due from other approved solvent banks, which have been designated depositories as hereinafter provided in this Chapter. Cash includes lawful money of the United States, and exchange of any clearinghouse association. (1903, c. 275, s. 29; Rev., s. 232; 1919, c. 58; 1921, c. 4, s. 32; C. S., s. 220(g).)

§ 53-52. Payment of forged check. — No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money unless within 60 days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged. (1921, c. 4, s. 33; C. S., s. 220(h).)

Cross Reference. — As to bank customer's duty to discover and report unauthorized signature or alteration under Uniform Commercial Code, see § 25-4-406.

Editor's Note. — "This section is a substantial reenactment of C. S. § 231, except that formerly the depositor had six months within which to give notice of the forgery. Greensboro Ice & Fuel Co. v. Security Nat'l Bank, 210 N.C. 244, 186 S.E. 362 (1936)." Arnold v. State Bank & Trust Co., 218 N.C. 433, 437, 11 S.E.2d 307 (1940).

Receipt of Statement by Agent Who Is Forger Is Receipt by Depositor.—The mailing of a bank statement, with cancelled checks, and the acceptance thereof from the post office by the depositor in person or through his authorized agent, constitutes a receipt by the depositor of such documents within the meaning of this section, and the depositor's failure to give the required notice to the bank, within the specified time thereafter, bars his right of recovery even though the "authorized agent" so receiving the bank statement, is the forger and, again, is unfaithful to his trust by concealing the voucher from the depositor. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Receipt of Statement by Bookkeeper Who Forged Checks Is Receipt by Corporation. — The receipt of a corporation's bank statement by its bookkeeper is receipt of the statement by the corporation, and it may not recover against the bank for the payment of forged checks when notice is not given within 60 days after such receipt of the bank statement, even though the checks were forged by the bookkeeper, who destroyed them after he received the canceled checks from the bank. Greensboro Ice & Fuel Co. v. Security Nat'l Bank, 210 N.C. 244, 186 S.E. 362 (1936).

But Rule Does Not Apply Where Account Is Unauthorized and Unknown. — See Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Section Runs from Delivery of Each Individual Instrument. — Where several vouchers, paid and delivered at different times, are made the basis of a claim, this section applies and bars not from the delivery of the first nor the last such voucher, but runs against each individual voucher from the date of its delivery. Schwabenton v. Security Nat'l Bank, 251 N.C. 655, 111 S.E.2d 856 (1960).

There is no duty upon the depositor to examine endorsements upon his genuine checks. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Section Is Inapplicable If Checks Are Not Forgeries or Notice Is Given. — If checks drawn by an agent of the depositor are not forgeries, this section has no application; if the checks are forgeries, the defense of the statute is not available to the bank when the depositor gives notice to the bank within the time provided by the statute. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966) (not deciding whether check signed in name of depositor by one claiming to be agent, but without authority to sign, is a forgery).

Only those checks returned more than sixty days prior to the protest are proper credits under this section. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 262 N.C. 79, 136 S.E.2d 202 (1964).

This section does not require notice in any specified form. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Sufficiency of Notice. — It is sufficient that within the time allowed by this section the depositor gives to the bank notice sufficient in content to advise the bank that the debits charged to the depositor's account are based upon checks which are "forged." Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Notice to the bank that the entire account is unauthorized and unknown to the person in whose name it is opened necessarily advises the bank that any check charged thereto, which check purports to be drawn in the name of such account holder, was drawn without authority and with fraudulent intent — a forgery within the contemplation of a stipulation that checks drawn on the account were forgeries and not checks or drafts of the plaintiff. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

The burden is on the bank seeking the protection afforded by this section to show delivery of the voucher to the depositor more than 60 days before the claim is made. When that fact is established, it constitutes a complete defense to a claim based on such voucher. Schwabenton v. Security Nat'l Bank, 251 N.C. 655, 111 S.E.2d 856 (1960).

The burden is on the bank seeking the protection afforded by this section to show delivery of the voucher to the depositor more than sixty days before the claim is made. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

The burden is on a bank, in order to avail itself of the provisions of this section, to show when the checks were returned to the depositor. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 262 N.C. 79, 136 S.E.2d 202 (1964).

§ 53-53. Payment of deposit in the name of minor. — When money is held on deposit by any state, industrial or national bank in this State in the name of a minor under 15 years of age, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by such minor and one of the minor's parents. When money is held on deposit by any state, industrial or national bank in this State in the name of a minor 15 years of age or upward, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by the minor. A written statement from the minor, if 15 years of age or upward, or from one of the said minor's parents, if the minor is under 15 years of age, shall be conclusive evidence of the age of the minor. (1921, c. 4, s. 34; C. S., s. 220(i); 1939, c. 84.)

Cross Reference. — As to payment of deposit in trust for minor to minor upon death of trustee, see § 53-59.

Editor's Note. — See 17 N.C.L. Rev. 345.

This section is an exception to the general rule that contracts of an infant are voidable at the option of the infant. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N.C. 41, 178 S.E. 863 (1935).

Cited in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 53-54. Transactions not performed during banking hours. — Nothing in any law of this State shall in any manner whatsoever affect the validity of, or

render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this State, because done or performed during any time other than regular banking hours: Provided, that nothing herein shall be construed to compel any bank in this State, which by law or custom is entitled to close at 12 noon on any Saturday, or for the whole or part day of any legal holiday, to keep open for the transaction of business, or to perform any of the acts or transactions aforesaid on any Saturday after such hour or on any legal holiday, except at its option. (1921, c. 4, s. 35; C. S., s. 220(j).)

§ 53-55. Commercial and business paper defined. — The term "commercial or business paper," as used in this Chapter, is hereby defined to mean a promissory note, and the term "trade acceptance" to mean a draft or bill of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used or are to be used for such purposes, but such definition shall not include notes, drafts, or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other investment securities, except bonds and notes of the government of the United States and State of North Carolina. (1921, c. 4, s. 36; 1923, c. 148, s. 7; C. S., s. 220(k); 1941, c. 268.)

§ 53-56. Bank acceptances defined. — Any bank doing business under this Chapter may accept for payment at a future date, drafts or bills of exchange having not more than six months' sight to run, drawn upon it by its customers under acceptance agreements, and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment of goods within a specified reasonable time, and the existence of such contract is certified in the acceptance agreement; or which grow out of transactions involving the domestic shipment of goods, provided that shipping documents, conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for his account, at the time of acceptance, or which are secured at the time of acceptance by warehouse receipts or other documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other documents to be those of a responsible warehouse, independent of the drawer, the acceptance to remain secured during the life of the acceptance unless suitable security of same character, or cash, be substituted: Provided, no bank shall accept drafts or bills of exchange under this section to an aggregate amount at any time more than equal to the sum of its capital and permanent surplus: Provided further, that no bank shall accept, whether in a foreign or domestic transaction, for any one person, firm, or corporation, to any amount at any time equal to more than twenty-five percent (25%) of its capital and permanent surplus, unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided in this Chapter. The State Banking Commission may issue such further regulations as to such acceptances as it may deem necessary in conformity with this Chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; C. S., s. 220(l); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

Acceptance Prior to Statute. — Notwithstanding that prior to the statute, an acceptance was beyond the power of a bank when not expressly permitted by the charter, an acceptance by a bank not so authorized was not invalid, though actually beyond power, and a payment might be enforced. Sherrell v. American Trust Co., 176 N.C. 591, 97 S.E. 471 (1918).

§§ 53-57, 53-58: Repealed by Session Laws 1965, c. 700, s. 2.

Cross Reference. — For provisions of the Uniform Commercial Code as to bank deposits and collections, see §§ 25-4-101 to 25-4-504.

§ 53-59. Payment of deposits in trust. — Whenever any deposits shall be made in any bank or banking institution in this State by any person in trust for any other person who is a minor of the age of 15 years and upward, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the bank, in event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made: Provided, that the amount of said deposit is not in excess of one hundred dollars ($100.00). (1921, c. 4, s. 40; C. S., s. 220(o).)

Cross References. — As to whom a deposit in trust for a minor may be paid generally, see § 53-53. As to deposits by fiduciaries generally, see § 32-8 et seq.

Editor's Note. — This section is discussed in 9 N.C.L. Rev. 13.

§ 53-60. Authorized investment in farm loan bonds. — Any bank or insurance company organized under the laws of this State, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or joint-stock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, 1916, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended. (1921, c. 4, s. 41; C. S., s. 220(p); 1973, c. 239, s. 4.)

Editor's Note. — The 1973 amendment inserted the provisions as to obligations issued by a farm credit institution pursuant to the Farm Credit Act of 1971.

§ 53-61. Authority to join federal reserve bank. — (a) Terms Defined. — The words "Federal Reserve Act," as herein used, shall be held to mean and to include the act of Congress of the United States, approved December 23, 1913, as heretofore and hereafter amended. The words "Federal Reserve Board" shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words "federal reserve banks" shall be held to mean federal reserve banks created and organized under the authority of the Federal Reserve Act. The words "member bank" shall be held to mean any national or state bank or bank and trust company which has become or which becomes a member of one of the federal reserve banks created by the Federal Reserve Act.

(b) Membership in Bank. — Any bank incorporated under the laws of this State shall have the power to subscribe to the capital stock and become a member of a federal reserve bank.

(c) Powers Vested by Federal Reserve Act. — Any bank incorporated under the laws of this State which is, or which may become, a member of the federal reserve bank is by this Chapter vested with all powers conferred upon member banks of the federal reserve banks by terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described therein, and such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act, or by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

(d) Compliance with Reserve Requirements. — A compliance on the part of any such bank with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with the provisions of the laws of this State, which require banks to maintain cash balances in their vaults or with other banks, and no such bank shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

(e) Supervision and Examination of Bank. — Any such bank shall continue to be subject to the supervision and examination required by the laws of this State, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the authorities of this State having supervision over such banks may disclose to the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become, a member of a federal reserve bank. (1921, c. 4, s. 42; C. S., s. 220(q).)

Cross Reference. — As to the amount of reserve required, see § 53-50.

Editor's Note. — This section is a substantial reenactment of C. S. § 221.

Unemployment Compensation. — A bank organized under the laws of this State is not an instrumentality of the federal government so as to exempt it from the tax imposed by the Unemployment Compensation Act, notwithstanding that the bank may be a member of the Federal Reserve System. Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

§ 53-62. Establishment of branches or tellers' windows. — (a) The word "capital" as used in this section means capital stock and unimpaired surplus.

(b) Any bank doing business under this Chapter may establish branches or teller's windows in the cities or towns in which they are located, or elsewhere, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.

(c) Such branch banks shall be operated as branches of and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier or such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee

shall be responsible for the conduct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: Provided, that the Commissioner of Banks shall not authorize the establishment of any branch or teller's window, the capital of whose parent bank is not sufficient in an amount to provide for the capital of at least one hundred thousand dollars ($100,000) for the parent bank, and a capital of at least one hundred thousand dollars ($100,000) for each branch or teller's window which it proposed to establish in cities or towns of 3,000 population or less; at least one hundred fifty thousand dollars ($150,000) in cities or towns whose population exceeds 3,000, but does not exceed 10,000; at least two hundred thousand dollars ($200,000) in cities or towns whose population exceeds 10,000, but does not exceed 25,000; at least two hundred fifty thousand dollars ($250,000) in cities or towns whose population exceeds 25,000, but does not exceed 50,000; at least three hundred thousand dollars ($300,000) in cities or towns whose population exceeds 50,000. The provisions of this subsection shall not be retroactive with respect to branches or teller's windows established or approved by the State Banking Commission prior to June 11, 1963. If a bank which hereafter proposes to establish a branch or teller's window is deficient in capital stock as measured by the above set-forth formula, it shall not be necessary for such bank to provide or allocate additional capital for branches or teller's windows established or approved by the State Banking Commission prior to June 11, 1963, until such a time as such bank makes application for an additional branch or teller's window. At that time sufficient capital and surplus must be allocated to bring the parent bank and all branches and teller's windows into compliance with the above requirements. The bank may, at its option, allocate capital stock and unimpaired surplus, or either, to its branches and teller's windows and may determine the proportion of each, or may allocate all capital stock or all unimpaired surplus. In applying this section, population shall be ascertained by the last preceding national census; provided, however, with respect to any branch or teller's windows established or approved by the State Banking Commission before June 11, 1963, population shall be ascertained by the last national census preceding the establishment of such branch.

(d) A teller's window within the meaning of this section shall be considered to be a place in which no loans or investments for the bank are made and at which only the functions and duties of a bank teller are performed. Upon securing the approval provided for in subsection (b) of this section and upon compliance with the capital requirements set forth in subsection (c) of this section, a teller's window may be established in a small community having no other banking facilities. Notwithstanding any other provisions in this section, a teller's window may also be established in a city or town in which the applicant bank's home office or a branch thereof is located or within two miles of the limits of such city or town without complying with the capital allocation requirements of subsection (c) of this section with respect to said teller's window if the Commissioner shall find that the capital of said bank will not be unduly impaired by the establishment of such teller's window, and any such teller's window which has been heretofore or may hereafter be so established or approved by the Banking Commission shall not be taken into account in computing the capital allocation requirements for the parent bank and other branches and teller's windows of such bank.

(e) A bank may discontinue a branch office or teller's window upon resolution of its board of directors or board of managers. Upon the adoption of such a resolution, the bank shall file a certification with the Commissioner of Banks specifying the location of the branch office or teller's window to be discontinued and the date upon which it is proposed that the discontinuance shall be effective. This certificate must state the reasons for the closing of such branch or teller's window and indicate that the needs and conveniences of the community would

still be adequately met. Notice stating the intention to discontinue said branch or teller's window shall be published in a newspaper serving such community once a week for four consecutive weeks before any certificate requesting discontinuance is filed with the Commissioner of Banks. No such branch or teller's window may be discontinued until approved by the Commissioner of Banks, who shall first hold a public hearing thereon, if so requested by any interested party.

(f) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; C. S., s. 220(r); 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990; 1953, c. 1209, ss. 2, 5; 1963, c. 793, s. 3; 1967, c. 789, s. 11.)

Editor's Note. — For law review comments on previous amendments, see 11 N.C.L. Rev. 199; 13 N.C.L. Rev. 360.

Section construed and applied in First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969).

Purpose of Section. — The motivation for this section was to minimize the danger of a run on a bank due to a rumor of insolvency. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose of subsection (b) of this section was to require that each separate branch contribute to the solvency of the system. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose to be accomplished by subsection (b)'s rules was to protect the solvency of banks. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

There is no conflict between the policies of the federal antitrust statutes and the "need and convenience" test for the establishment of a branch bank. First Nat'l Bank v. Wachovia Bank & Trust Co., 448 F.2d 637 (4th Cir. 1971).

"Need and Convenience". — Neither the North Carolina statute nor any decided cases provides any degree of specificity as to the factors, proof of which would show the presence or absence of "need and convenience" for a new branch bank. First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969).

This section does not provide any degree of specificity as to the factors, proof of which would show the presence or absence of "need and convenience" for a new branch bank. State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

Determination of whether a proposed branch bank will meet the needs and promote the convenience of the community to be served should involve a consideration of at least the following factors: (1) whether existing banks provide a full complement of banking services at competitive rates and fees; (2) the need for specialized services offered by the applicant bank not presently available through existing banks, examples of such services being: a. larger lending limits, b. trust department services, c. consumer and commercial loan expertise, d. international banking, e. farm development services, f. industrial development services, g. automated accounting and check clearance services; (3) the extent to which management of existing banks has been active and vigorous as evidenced by the assumption of leadership and participation in the economic growth of the community; (4) the composition of the population and its prospects for growth; (5) the nature and strength of the economy and its prospects for growth; (6) the extent to which competition from the entry of a new bank in the area will stimulate the economy and make for a more healthy banking business; and (7) the extent to which the entry of the new bank has public support in the community. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

Quantum of proof to show need and convenience for the establishment of a branch office in a suburban area would be much less than that required to show need and convenience for the establishment of an entirely new banking facility in the city. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

The fact that applicant is the largest bank in North Carolina is irrelevant, alone, in determining needs and convenience. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

Is an Administrative Question. — With respect to banking, what will serve the needs of the community is, to a substantial degree, an administrative question involving a multiplicity of factors which cannot be given inflexible consideration. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9 (1972); State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

But Banking Commission Does Not Have Untrammeled Discretion. — The Banking Commission does not have untrammeled discretion in

determining what "will meet the needs and promote the convenience" of the community. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9 (1972).

What Commission Must Find. — As a condition precedent to the establishment of a branch, the Commissioner of Banks must find that such branch will meet the needs of the community and the probable volume of business will be sufficient to assure and maintain the solvency of such branch. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

The solvency tests under subsection (b) of this section are twofold: Each new branch must not endanger the solvency of the parent bank and it must not endanger the solvency of another bank already in the field. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

A branch may not be established which would be a financial failure or would endanger the solvency of another bank already in the field. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

Applicant Need Not Establish Existence of Specific Unmet Banking Need. — Subsection (b) of this section does not require that an applicant bank establish the existence of specific, unmet banking needs as a prerequisite to the establishment of a branch bank. State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

Subsection (b) of this section does not require an applicant for a branch bank to establish the existence of a specific unmet banking need which existing banks are unable or unwilling to provide as a prerequisite to the establishment of a new facility. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9 (1972).

But Merely Offering to Provide Alternative Banking Services Is Not Sufficient. — Absent some indication that additional competition is desirable, merely offering to provide alternative banking services is not sufficient under the statute. State ex rel. Banking Comm'n v. Avery County Bank, 14 N.C. App. 283, 188 S.E.2d 9 (1972).

Test of Substantial Evidence Not Met. — Where the evidence is uncontradicted that the existing banks offer a full complement of banking services at competitive rates, that the only specialized services offered by the applicant which are not offered by the existing banks are larger lending limits and international banking for which the likelihood of any need now or in the future has not been shown, and that there is no indication the proposed branch has public support in the community, the decision that a new bank is necessary does not meet the test of substantial evidence. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

No provision is made for the approval of any branch that fails to meet the requirements of subsection (b)(i) and (ii). State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

Consolidation of Applications for Hearing. — Applications for branches may be consolidated and heard together, but the evidence and finding must be sufficient to support each application independent of the other. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972).

The fact that the Commission consolidated two applications for hearing, and made findings and conclusions applicable to both, does not of itself invalidate an order approving the applications. State ex rel. Banking Comm'n v. Lexington State Bank, 12 N.C. App. 232, 182 S.E.2d 854 (1971).

While two applications by a bank to establish branches in the same city may be consolidated for hearing, each application must be treated as a separate application and be approved or denied on the basis of the evidence relating thereto, and separate findings and conclusions must be made as to each application. State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108. 187 S.E.2d 747 (1972).

National branch banking is limited to states the laws of which permit it, and even there only to the extent that the state laws permit branch banking. First Nat'l Bank v. Wachovia Bank & Trust Co., 325 F. Supp. 523 (M.D.N.C. 1971), aff'd, 448 F.2d 637 (4th Cir. 1971).

Approval of Branch National Bank. — All statutory law requirements of the State dealing with the establishment of branch State banks must be complied with before a branch national bank can be lawfully approved by the Comptroller of the Currency of the United States. First Citizens Bank & Trust Co. v. Camp, 281 F. Supp. 786 (E.D.N.C. 1968).

The Comptroller of the Currency of the United States is bound by State law in considering the applications of national banks to establish branch banks. Citizens Nat'l Bank v. Wachovia Bank & Trust Co., 329 F. Supp. 585 (M.D.N.C. 1971).

The Comptroller of the Currency of the United States is bound by North Carolina's "need and convenience" and "solvency of the branch" criteria as set forth in subsection (b) of this section. First Nat'l Bank v. Wachovia Bank & Trust Co., 448 F.2d 637 (4th Cir. 1971).

The Comptroller of the Currency in authorizing branch offices of national banks in North Carolina is bound by the "need and convenience" and "solvency of the branch" criteria of subsection (b) of this section. State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

The Comptroller of the Currency of the United States is bound to consider the North Carolina "need and convenience" test for the estab-

lishment of a branch bank. First Nat'l Bank v. Wachovia Bank & Trust Co., 448 F.2d 637 (4th Cir. 1971).

Where the Comptroller of the Currency of the United States has made, even though belated and grudgingly, legally sufficient findings and conclusions on the criteria prescribed by this section, and such findings are supported by substantial evidence, his action would be neither arbitrary nor capricious and must be approved. Citizens Nat'l Bank v. Wachovia Bank & Trust Co., 329 F. Supp. 585 (M.D.N.C. 1971).

Where a careful reading of the entire opinion of the Comptroller of the Currency of the United States left the court with the impression that he had in fact taken into acount the factors required to be considered by this section, the court held that his findings sufficed to satisfy the requirements of this section, notwithstanding his avowed intention not to do so. First Citizens Bank & Trust Co. v. Southern Nat'l Bank, 329 F. Supp. 186 (E.D.N.C. 1971).

To show that the needs of a community will be met by a proposed branch bank does not require evidence from potential bank customers of their individual needs which existing banks are unwilling or unable to provide; rather, the Comptroller of the Currency of the United States is free to apply the expertise of his office to determine if the proposed branch will meet the needs and promote the convenience of the community to be served, and if his decision is supported by substantial evidence it will be sustained. Bank of New Bern v. Wachovia Bank & Trust Co., 353 F. Supp. 643 (E.D.N.C. 1972).

Applied in First-Citizens Bank & Trust Co. v. Camp, 432 F.2d 481 (4th Cir. 1970); State ex rel. Banking Comm'n v. Bank of Rocky Mount, 12 N.C. App. 112, 182 S.E.2d 625 (1971); State ex rel. Banking Comm'n v. Lucama-Kenly Bank, 17 N.C. App. 557, 195 S.E.2d 69 (1973).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-63. Unlawful issuing of certificate of deposit. — It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money; nor shall such moneys, checks, drafts, or bills of exchange be the proceeds of any note given in payment of the purchase price of any stock. Any officer or employee of any bank violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 44; C. S., s. 220(s).)

Cited in City of Southport v. Williams, 290 F. 488 (E.D.N.C. 1923).

§ 53-64. Unlawful to loan on bank's own stock. — It shall be unlawful for any bank to make any loan secured by the pledge of its own shares of stock, nor shall any bank be the holder as pledgee, or as purchaser, of any portion of its capital stock unless such stock is purchased or pledged to it to prevent loss upon a debt previously contracted in good faith. Provided, that whenever any bank shall have shares of its own stock sold to, or pledged to it, for the purpose of preventing a loss upon a debt previously contracted, it shall dispose of all such shares of stock within a period of six months from the date such stock was sold or pledged to it and if not so disposed of, the same shall be charged to profit and loss and no longer carried as an asset of the bank. (1921, c. 4, s. 45; C. S., s. 220(t); 1927, c. 47, s. 9.)

Editor's Note. — As to lien on stock under former law, see Boyd v. Redd, 120 N.C. 335, 27 S.E. 35 (1897); First Nat'l Bank v. Riggins, 124 N.C. 534, 32 S.E. 801 (1899); In re W.W. Mills Co., 162 F. 42 (E.D.N.C. 1908).

Taking Stock in Payment of Note. — A payee bank may not cancel a note in consideration of shares of its stock delivered to it by the maker of the note, it not appearing that he was insolvent, or that the transaction was necessary to prevent loss to the bank, and payment so made is not a valid defense in the hands of another bank to which the note had been indorsed before maturity by the payee bank as collateral security. White v. Whitehurst, 194 N.C. 305, 139 S.E. 598 (1927).

§ 53-65. Deposits payable on demand. — Any bank may receive deposits of funds subject to withdrawals or to be paid upon the checks of the depositor. All deposits in such banks shall be payable on demand, without notice, except when the contract of deposit shall otherwise provide. (1921, c. 4, s. 46; C. S., s. 220(u).)

Cross Reference. — As to definition of "demand deposits," see § 53-1.

§ 53-66. Savings deposits. — Any bank conducting a savings department may receive deposits on such terms as are authorized by its board of directors and agreed to by its depositors. The board of directors shall prescribe the terms upon which such deposits shall be received and paid out, and a passbook or other evidence of deposit shall be issued to each depositor containing the rules and regulations adopted by the board of directors governing such deposits. By accepting such book or such other evidence of deposit the depositor assents and agrees to the rules and regulations therein contained. (1921, c. 4, s. 47; C. S., s. 220(v); 1959, c. 270.)

Editor's Note. — See 9 N.C.L. Rev. 13.

§ 53-67. Banks controlled by boards of directors. — The corporate powers, business, and property of banks doing business under this Chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held at such time as may be designated by the charter or the bylaws of the bank but shall be held not later than the thirty-first day of March in each year. In addition to the foregoing powers relating to the fixing of the number and the election of directors, the stockholders of a bank, at any stockholders' meeting, special or annual, may authorize not more than two additional directorships which may be left unfilled and to be filled in the discretion of the directors of the institution during the interval between such stockholders' meetings. (1921, c. 4, s. 48; C. S., s. 220(w); 1925, c. 170; 1965, c. 188; 1967, c. 789, s. 12.)

§ 53-68. Statements showing deposits of State and State officials. — All banks in which any money is on deposit by the State of North Carolina or any of the officials thereof shall, in their published statements as by law required, show the amount of money on deposit in such bank to the credit of the State or of any official thereof; and no officials of the State shall deposit money in any bank which shall refuse to comply with the provisions of this section. (1923, c. 211, s. 1; C. S., s. 220(x).)

Cross Reference. — As to deposit of State funds, see § 147-77 et seq.

§ 53-69: Repealed by Session Laws 1945, c. 635.

§ 53-70. No fees on remittances covering checks. — No bank or trust company in this State shall charge a fee on remittances covering checks. (1921, c. 20, s. 1; C. S., s. 220(z); 1971, c. 244, s. 1.)

§ 53-71. Checks payable in exchange. — In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust

companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said drawee bank when any such check is presented by or through any federal reserve bank, post office, or express company, or any respective agents thereof. (1921, c. 20, s. 2; C. S., s. 220(aa).)

Cross Reference. — As to checks exempt from section, see § 53-73.

Editor's Note. — For discussion of section, see 1 N.C.L. Rev. 133; 2 N.C.L. Rev. 36; 8 N.C.L. Rev. 55.

Purpose and Effect. — This section was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the federal reserve bank with respect to the collection of checks drawn on said banks and trust companies. It does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. The purpose of the section and its only effect is to confer upon such banks and trust companies the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

The effect of this section is as though the provision of the law is written into the face of the check; and consequently where the maker or drawer does not specify cash payment, he agrees, as does the payee in accepting it, that if presented by or through a federal reserve bank, express company, etc., the check shall be payable by an exchange draft drawn by the payee bank on its reserved deposits. Farmers' & Merchants' Bank v. Federal Reserve Bank, 262 U.S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923); Cleve v. Craven Chem. Co., 18 F.2d 711 (4th Cir. 1927).

Constitutionality. — This section does not violate the Constitution of the United States. Farmers' & Merchants' Bank v. Federal Reserve Bank, 262 U.S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923), overruling 183 N.C. 546, 112 S.E. 252 (1922); Federal Land Bank v. Barrow, 189 N.C. 303, 127 S.E. 3 (1925).

Construed Strictly. — This section should be construed strictly. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Federal reserve banks cannot require payment in any other medium than the exchange. Federal Land Bank v. Barrow, 189 N.C. 303, 127 S.E. 3 (1925).

This section does not change the general rule that when a depositor draws his check on a bank or trust company chartered by this State, such check is payable in money, or at the option of the holder, in a medium other than money — such payment being at the risk of the holder. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Certificates of Deposit. — This section has no application to certificates of deposit. Citizens Nat'l Bank v. Fidelity & Cas. Co., 86 F.2d 4 (4th Cir. 1936).

Requiring Payment in Money. — Under this section the drawer has the right to specify on the face of the check that payment shall be made in money, and in such case the drawee bank or trust company must pay in money, in any event. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Payment in money may be required if the check is presented for payment, in person, or by an agent for collection other than as prescribed by this section. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Liability Where Exchange Unpaid. — It will not be held under this section, that a drawee bank can charge checks drawn on it by its customers to the accounts of such customers, remit in drafts or exchange to the forwarding bank, and thereby be released, notwithstanding that said drafts or exchange are, for valid and lawful reasons, not paid. Where a check drawn on a bank or trust company chartered by this State is presented to the drawee bank, "by or through any federal reserve bank, post office or express company or any respective agent thereof," and such bank or trust company, in the exercise of the option conferred by said statute, sends to the forwarding bank its draft on its reserve deposits in payment of such check, it will not be discharged of liability for the collection of its depositor's check until such draft on its reserve deposit has been paid. Graham v. Proctorville Whse., 189 N.C. 533, 127 S.E. 540 (1925).

Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of this section and former § 53-57 as being a check presented by or through a "post office," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. Braswell v. Citizens Nat'l Bank, 197 N.C. 229, 148 S.E. 236 (1929).

Where a bank receives a check in payment of a note and elects to put it in the hands of a federal reserve bank for collection, which bank accepts the check of the drawee bank on another

bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency; and this result is not affected by this section since the payee bank has the option of presenting the check for payment through the federal reserve bank or not. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929), criticizing Cleve v. Craven Chem. Co., 18 F.2d 711 (4th Cir. 1927).

Charging Check to Drawer's Account as Payment. — When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged from liability, not only on the check, but also for the debt in payment of which the check was drawn. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929), citing Dewey Bros. v. Margolis, 195 N.C. 307, 142 S.E. 22 (1928); Quarles v. Taylor & Co., 195 N.C. 313, 142 S.E. 25 (1928).

§ 53-72: Repealed by Session Laws 1971, c. 244, s. 3.

§ 53-73. **Checks exempted.** — All checks drawn on the banks and trust companies in this State in payment of obligations due the State of North Carolina or the federal government shall be exempt from the provisions of G.S. 53-71. (1921, c. 20, s. 4; C. S., s. 220(cc); 1971, c. 244, s. 2.)

§ 53-74: Repealed by Session Laws 1971, c. 244, s. 3.

§ 53-75. **Statement of account from bank to depositor deemed final adjustment if not objected to within five years.** — When a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in such account, or the depositor's passbook has been written up by the bank showing the condition of the depositor's account and delivered to such depositor with like accompaniment of vouchers, if any, such account shall, after the period of five years from the date of its rendition in the event no objection thereto has been theretofore made by the depositor, be deemed finally adjusted and settled and its correctness conclusively presumed and such depositor shall thereafter be barred from questioning the incorrectness of such account for any cause. (1929, c. 188, s. 1.)

§ 53-76. **Depositor not relieved from exercising diligence as to errors.** — Nothing in the preceding section [G.S. 53-75] shall be construed to relieve the depositor from the duty now imposed by law of exercising due diligence in the examination of such account and vouchers, if any, when rendered by the bank and of immediate notification to the bank upon discovery of any error therein, nor from the legal consequences of neglect of such duty; nor to prevent the application of G.S. 53-52 to cases governed thereby. (1929, c. 188, s. 2.)

§ 53-77. **Governor empowered to proclaim banking holidays.** — The Governor is hereby authorized and empowered, by and with the advice and consent of the Council of State, to name and set apart such day or days, as he may from time to time designate, as banking holidays. During such period of holidays, all the ordinary and usual operations and business of all banking corporations, State or national, in this State shall be suspended, and during such period no banking corporation shall pay out or receive deposits, make loans or discounts, transfer credits, or transact any other banking business whatsoever: Provided, however, that during any such holiday, including the holiday validated in this section, the Commissioner of Banks, with the approval of the Governor, may permit any or all such banking institutions to perform any or all of the usual banking functions.

The banking holiday heretofore proclaimed by the Governor of this State for Monday, Tuesday and Wednesday, March 6, 7, and 8, 1933, is hereby approved and validated, and the said days are hereby declared to be banking holidays in the State of North Carolina. (1933, c. 120, ss. 1, 2.)

Editor's Note. — For discussion of section, see 11 N.C.L. Rev. 195.

Cited in Hood v. Clark, 211 N.C. 693, 191 S.E. 732 (1937).

§ 53-77.1. Operation of banks on five-day week basis. — (a) Any bank as defined by G.S. 53-1 or 53-136, including national banking associations and federal reserve banks, or any branch or office of any of the foregoing, located in this State, may operate on a five-day week basis upon receiving the written permission of the Commissioner of Banks to do so. Such permission shall not be granted until after 10 days' notice published in a newspaper of general circulation in the community where the bank is located, and unless the Commissioner shall find that the best interests of the public and the bank will be served by a five-day week. The Commissioner of Banks may within his discretion hold a hearing in the community where the bank is located to determine whether the bank should be permitted to operate on a five-day week basis.

(b) The request of a bank desiring permission so to operate shall specify which day of the week it shall be closed and the notice published shall also specify the day of the week upon which the bank shall be closed.

(c) At the hearing the Commissioner shall hear all evidence offered and if he shall find that the best interests of the bank and the public will be served by a five-day week, he shall enter an order directing that the bank shall be closed upon the day of the week specified in the original request.

(d) A bank operating on a five-day week under the provisions of this Article shall comply with the following provisions:

(1) On one day of the week such bank shall remain open for not less than seven hours, three of which shall be after 3:00 P.M.

(2) The bank shall remain open on each of the following State holidays: Lee-Jackson Day, Halifax Day, Confederate Memorial Day, Mecklenburg Declaration of Independence Day, Memorial Day and Election Day, unless such holiday falls on the day on which said bank is otherwise closed under the provisions of this section.

(e) Any day on which a bank or branch or office thereof shall remain closed as herein permitted, shall, as to such closed bank or branch or office constitute a legal holiday, and any act authorized, required, or permitted to be performed at, by or with respect to any such bank or branch or office on a day when it is closed may be performed on the next succeeding business day and no liability or loss of rights of any kind shall result from such delay.

(f) After a five-day week basis has been ordered pursuant to this section with respect to any bank, the above procedure shall be applicable with respect to any subsequent request to revert to a six-day week basis, and such reversion may be ordered by the Commissioner if he shall find that the best interest of the bank and the public will be served by a six-day week.

(g) Every bank in the State shall continue to observe the same days of closing as are observed by the bank on May 6, 1971 until a change is authorized pursuant to this section. (1953, c. 965; 1955, cc. 546, 1220; 1957, c. 350, s. 1; c. 687; 1959, c. 156; 1971, c. 319, s. 1.)

Local Modification. — Craven: 1971, c. 34.

§ 53-77.2: Repealed by Session Laws 1971, c. 319, s. 2.

Cross Reference. — For present provisions as to operation of banks on a five-day week basis, see § 53-77.1.

§ 53-77.3. Banks suspending business during an emergency. — (a) As used in this section, unless the context otherwise requires:

(1) "Bank" includes commercial banks, industrial banks, savings banks, trust companies, any branch or agency of a foreign banking organization, any person or association of persons lawfully carrying on the business of banking, whether incorporated or not, and, to the extent that the provisions hereof are not inconsistent with and do not infringe upon paramount federal law, also includes national banks.

(2) "Emergency" means any condition or occurrence, which may interfere physically with the conduct of normal business operations at one or more or all of the offices of a bank, or which poses an imminent or existing threat to the safety or security of persons or property, or both. Without limiting the generality of the foregoing, an emergency may arise as a result of any one or more of the following: fire; flood; earthquake; hurricanes; wind, rain, or snow storms; labor disputes and strikes; power failures; transportation failures; interruption of communication facilities; shortages of fuel, housing, food, transportation or labor; robbery or attempted robbery; actual or threatened enemy attack; epidemics or other castastrophes; riots, civil commotions, and other acts of lawlessness or violence, actual or threatened.

(3) "Office" means any place at which a bank transacts its business or conducts operations related to its business.

(4) "Officers" means the person or persons designated by the board of directors, board of trustees, or other governing body of a bank, to act for the bank in carrying out the provisions of this section or, in the absence of any such designation or of the officer or officers so designated, the president or any other officer currently in charge of the bank or of the office or offices in question.

(b) Whenever the Commissioner of Banks is of the opinion that an emergency exists, or is impending, in this State or in any part or parts of this State, he may authorize banks located in the affected area or areas to close any or all of their offices. In addition, if the Commissioner is of the opinion that an emergency exists, or is impending, which affects, or may affect, a particular bank or banks, or a particular office or offices thereof, but not banks located in the area generally, he may authorize the particular bank or banks, or office or offices so affected, to close. The office or offices so closed shall remain closed until the Commissioner declares that the emergency has ended, or until such earlier time as the officers of the bank determine that one or more offices, theretofore closed because of the emergency, should reopen, and, in either event, for such further time thereafter as may reasonably be required to reopen.

In the event communications systems should be so disrupted as to make it impossible or impractical for a bank official to communicate with the Commissioner of Banks, the bank officer or manager or other person in charge of any such bank or branch bank may close said office without prior approval of the Commissioner of Banks provided he gives prompt notice thereof to the Commissioner as soon as communications have been restored.

(c) Any day on which a bank, or any one or more of its offices, is closed during all or any part of its normal banking hours pursuant to the authorization granted under this section shall be, with respect to such bank or, if not all of its offices are closed, then with respect to any office or offices which are closed, a legal holiday for all purposes with respect to any banking business of any character. No liability, or loss of rights of any kind, on the part of any bank, or director, officer, or employee thereof, shall accrue or result by virtue of any closing authorized by this section.

(d) The provisions of this section shall be construed and applied as being in addition to, and not in substitution for or limitation of, any other law of this State or of the United States authorizing the closing of a bank or excusing the delay by a bank in the performance of its duties and obligations because of emergencies or conditions beyond the bank's control, or otherwise. (1971, c. 465.)

ARTICLE 7.

Officers and Directors.

§ 53-78. Appointment of executive and loan committees by directors. — The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or bylaws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe.

The board of directors may appoint, in addition to the executive committee or committees, a general loan committee, the membership of which shall include at least three directors and such officers of the bank as may be appointed, with such duties and powers with respect to making loans and investments as are defined in the bylaws or by resolution of the board of directors, the members of such general loan committee to serve until their successors are appointed. Such general loan committee, if appointed, shall meet as often as the bylaws or resolution of the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all such loans and investments as may be required by the bylaws or by resolution of the board of directors to be submitted to the general loan committee. The board of directors of any bank, which has branches, may appoint, in addition to a general loan committee, a loan committee for the parent bank and for any branch, each of which committees shall include at least three members who are officers or members of the board of managers for such parent bank or branch, with such duties and powers with respect to approving or disapproving loans and investments as may be defined in the bylaws or by resolution of the board of directors, and under such rules and regulations as the board of directors may prescribe. Such loans and investments as are authorized or approved by a general loan committee or either of the other loan committees hereinabove provided for may, but neet not, be approved or disapproved by the executive committee or committees. All loans and investments made, however, shall be authorized or approved by either the executive committee or committees, a general loan committee, or one of the other loan committees herein provided for. (1921, c. 4, s. 49; C. S., s. 221(a); 1951, c. 167, s. 1.)

§ 53-79. Minutes of meetings of directors and executive and loan committees. — Minutes shall be kept of all meetings of the board of directors, executive committee or committees, and of the loan committee or committees, if appointed, and the same shall be recorded in a book or books which shall be kept for that purpose; which book or books shall be kept on file in the bank. Such minutes shall show a record of the action taken by the board of directors, the executive committee or committees and the loan committee or committees on all loans, discounts, and investments made, authorized or approved, and such further action as the board of directors and the executive committee or committees shall take concerning the conduct, management and welfare of the bank. The minutes of the executive committee and all committees authorizing or approving loans and investments, showing the actions taken by such

committees since the last meeting of the board of directors, shall be submitted to the board of directors at each meeting of the board. (1921, c. 4, s. 50; C. S., s. 221(b); 1951, c. 167, s. 2.)

Effect of Not Writing Minutes. — The plaintiffs cannot be deprived of their right by reason of failure of the proper officer to actually make a written minute or record of the proceedings for the reason that proceedings of a corporate meeting of stockholders or directors are facts, and that they may be proved by parol testimony where they are not so recorded. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922). And this notwithstanding this section, there being no objection appearing in the record to the testimony of the plaintiff and other witnesses as to what transpired among the directors about this transaction. Everett v. Staton, 192 N.C. 216, 134 S.E. 492 (1926).

§ 53-80. Qualifications of directors. — Every director of a bank doing business under this Chapter shall be the owner and holder of shares of stock in the bank having a par value of not less than five hundred dollars ($500.00), provided such bank shall have a capital stock of more than fifteen thousand dollars ($15,000), and not less than two hundred dollars ($200.00), if such bank shall have a capital stock of fifteen thousand dollars ($15,000) or less. And every such director shall hold such shares in his own name unpledged and unencumbered in any way. The office of any director at any time violating any of the provisions of this section shall immediately become vacant, and the remaining directors shall declare his office vacant and proceed to fill such vacancy forthwith. Not less than three fourths of the directors of every bank doing business under this Chapter shall be residents of the State of North Carolina: Provided, that as to banks doing business before February 18, 1921, the requirements as to amount of stock owned by a director shall not apply unless the Commissioner of Banks shall rule that such director is not bona fide discharging his duties. (1921, c. 4, s. 51; C. S., s. 221(c); 1931, c. 243, s. 5.)

§ 53-81. Directors shall take oath. — Every director shall, within 30 days after his election, take and subscribe, in duplicate, an oath that he will diligently and honestly perform his duties in such office; and that he is the owner in good faith of the shares of stock of the bank required to qualify him for such office, standing in his own name on its books, and one of such oaths shall forthwith be filed with the Commissioner of Banks, and the other shall be kept on file in the bank. (1921, c. 4, s. 52; C. S., s. 221(d); 1931, c. 243, s. 5.)

§ 53-82. Liability of directors. — Any director of any bank who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents, or employees of such bank, any of the provisions of this Chapter shall be held personally and individually liable for all damages which the bank, its stockholders or any other person shall have sustained in consequence of such violation. Any aggrieved stockholder in any bank in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow as nearly as may be that prescribed by G.S. 44-14, relative to suits on bonds of contractors with municipal corporations. (1921, c. 4, s. 53; C. S., s. 221(e); 1935, c. 464.)

Cross References. — As to criminal liability, see §§ 53-126 to 53-134. And see notes to §§ 53-48 and 53-111.

Liability Where False Statement Misleads. — A false and misleading statement made by the directors by which one was led to make deposits gave a cause of action against the directors. It was also held that the directors are presumed to know the condition of the bank. Tate v. Bates, 118 N.C. 287, 24 S.E. 482 (1896); Townsend v. Williams, 117 N.C. 330, 23 S.E. 461 (1895); Solomon v. Bates, 118 N.C. 311, 24 S.E. 478 (1896); Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898).

Who May Prosecute Action. — An action for damage against the directors for false state-

ments as to the bank's solvency, made to private persons and in the bank's report to the Commission, is solely maintainable by the receiver of the bank unless the private person can show an injury peculiar to him as distinguished from the loss among the creditors generally. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

Cited in State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-83. Examining committee of directors. — A committee of at least three directors or stockholders shall be appointed annually to examine, or to superintend the examination of the assets and the liabilities of the bank, and to report to the board of directors the result of such examination. The committee, with the approval of the board of directors, may provide for such examinations by a certified public accountant or clearinghouse examiner in any city where such examination is provided for by the rules of such clearinghouse association. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signature of at least three members of such committee, shall forthwith be filed with the Commissioner of Banks. (1921, c. 4, s. 54; C. S., s. 221(f); 1931, c. 243, s. 5.)

§ 53-84. Depositories designated by directors. — By resolution of the board of directors, other banks organized under the laws of this State, or of another state, or of the National Banking Act of the United States, shall be designated as depositories or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the Commissioner of Banks and the depository so designated shall be subject to the approval of the Commissioner of Banks. For causes which he may deem adequate, the Commissioner of Banks shall have authority at any time to withdraw such approval.

A bank may deposit funds in a bank of a foreign country, but such deposits shall not constitute any part of its reserve as defined in G.S. 53-51. (1921, c. 4, s. 55; C. S., s. 221(g); 1931, c. 243, s. 5; 1967, c. 789, s. 14.)

Local Modification. — Guilford; Nash, Town of Spring Hope: 1933, c. 568; Halifax, Town of Hobgood; Haywood; Nash, Town of Bailey: 1935, c. 95.

Cross Reference. — As to the amount, etc., of the reserve, see § 53-50.

Cited in State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-85. Stockholders' book. — The directors shall provide a book in which shall be kept the name and resident address of each stockholder, the number of shares held by each, the time when such person became a stockholder, together with all transfer of stock, stating the time when made, the number of shares and by whom transferred, which book shall be subject to the inspection of the directors, officers, and stockholders of the bank at all times during the usual hours for the transaction of business. (1921, c. 4, s. 56; C. S., s. 221(h).)

Right to Inspect. — Under this section the right to inspect stock books in banks is specifically given. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Cited in Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-86. Directors, officers, etc., accepting fees, etc. — No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing business under this Chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this Chapter. Nothing

in this section shall be construed to prevent the payment of necessary and proper fees to any licensed attorney or licensed real estate broker or salesman, who is a director but not an officer or employee of the bank for professional services rendered, and nothing in this section shall be construed to apply to commissions on insurance and surety bond premiums. (1921, c. 4, s. 57; C. S., s. 221(i); 1947, c. 695; 1971, c. 272.)

§ 53-87. Directors may declare dividends. — The board of directors of any bank may declare a dividend of so much of its undivided profits as they may deem expedient, subject to the requirements hereinafter provided. When the surplus of any bank having a capital stock of fifteen thousand dollars ($15,000) or more is less than fifty percent (50%) of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus twenty-five percent (25%) of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to fifty percent (50%) of the paid-in capital stock. When the surplus of any bank having a capital stock of less than fifteen thousand dollars ($15,000) is less than one hundred percent (100%) of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus fifty percent (50%) of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to one hundred percent (100%) of the paid-in capital stock. In order to ascertain the undivided profits from which such dividend may be made, there shall be charged and deducted from the actual profits:

(1) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank;
(2) Interest paid or then due on debts which it owes;
(3) All taxes due;
(4) All overdrafts which have been standing on the books of the bank for a period of 60 days or longer;
(5) All losses sustained by the bank. In computing the losses, there shall be included debts owing the bank which have become due and are not in process of collection, and on which interest for one year or more is due and unpaid, unless said debts are well secured; and debts reduced to final judgments which have been unsatisfied for more than one year and on which no interest has been paid for a period of one year, unless said judgments are well secured.
(6) All investments carried on its books, which are prohibited under the provisions of this Chapter, or rules and regulations made by the Commissioner of Banks, pursuant to the powers conferred under this Chapter. (1921, c. 4, s. 58; C. S., s. 221(j); 1927, c. 47, s. 10; 1931, c. 243, s. 5.)

§ 53-88. Use of surplus. — The surplus of any bank doing business under this Chapter shall not be used for the purpose of paying expenses or losses until the credit to undivided profits has been exhausted. But any portion of such surplus may be converted into capital stock and distributed as a stock dividend, provided that such surplus shall not thereby be reduced below fifty percent (50%) of the paid-in capital of such bank, having a paid-in capital of fifteen thousand dollars ($15,000) or more. When the surplus of any bank having a capital stock of less than fifteen thousand dollars ($15,000) shall reach an amount equal to one hundred percent (100%) of its paid-in capital, the board of directors of such bank shall declare a dividend of fifty percent (50%) of said surplus and distribute the same as a stock dividend: Provided, that where the distribution of such a stock dividend would increase the capital stock of any bank to an amount greater than fifteen thousand dollars ($15,000), the board of directors of such bank may, in its discretion, declare a stock dividend of only so much of said surplus as will

be necessary to increase the stock of the said bank to fifteen thousand dollars ($15,000). (1921, c. 4, s. 59; C. S., s. 221(k).)

Cross Reference. — As to definition of "surplus," see § 53-1.

§ 53-89. Overdrafts, payment by officer, etc. — Any officer (other than a director), or employee of a bank, who shall permit any customer or other person to overdraw his account, or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amounts of such overdrafts. (1921, c. 4, s. 60; C. S., s. 221(l).)

§ 53-90. Officers and employees shall give bond. — The active officers and employees of any bank before entering upon their duties shall give bond to the bank in a bonding company authorized to do business in North Carolina, in the amount required by the directors and upon such form as may be approved by the Commissioner of Banks, the premium for same to be paid by the bank. The Commissioner of Banks or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained. (1921, c. 4, s. 61; Ex. Sess., 1921, c. 18; C. S., s. 221(m); 1927, c. 47, s. 11; 1929, c. 72, s. 2; 1931, c. 243, s. 5.)

Statute Enters into and Forms Part of Bond. — The provision of this section requiring officers and employees of a bank to give bond in an amount required by the directors and upon such form as may be approved by the Commissioner of Banks, is the only statutory provision which becomes a part of the bond. Hartford Accident & Indem. Co. v. Hood, 226 N.C. 706, 40 S.E.2d 198 (1946). See Hood v. Simpson, 206 N.C. 748, 175 S.E. 193 (1934).

Effect of Renewal of Bond. — When a bond, which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, for each year the officer was reelected, then each and every renewal thereof is a separate and distinct bond or independent contract. Hood v. Simpson, 206 N.C. 748, 175 S.E. 193 (1934).

Where a bond guaranteeing the payment of any loss sustained through the dishonesty of a bank official, while "in the continuous employment of a bank" after a specified date, is kept in force for a period of years by the payment of the stipulated annual premium, recovery on the bond is limited to the maximum liability, therein stipulated for losses, occurring during the life of the bond, and the contention that the surety is liable for defalcations to the amount of the penal sum of the bond for each of the years during which the bond is kept in force, is untenable. Hartford Accident & Indem. Co. v. Hood, 226 N.C. 706, 40 S.E.2d 198 (1946), distinguishing Hood v. Simpson, 206 N.C. 748, 175 S.E. 193 (1934).

§ 53-91. When officers and employees may borrow. — No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness: Provided, however, this section shall not apply to directors who are neither officers nor

employees of the bank; provided, further, that it shall not be necessary to require collateral or other security with respect to loans, the total of which to an individual borrower, does not exceed twenty-five hundred dollars ($2,500) made pursuant to this section; provided, further, that in no event shall a loan in excess of forty-five thousand dollars ($45,000) be made by any bank to any officer of such bank. (1921, c. 4, s. 62; C. S., s. 221(n); 1925, c. 119, s. 2; 1927, c. 47, s. 12; 1967, c. 789, s. 15; 1969, c. 41.)

ARTICLE 8.

Commissioner of Banks and State Banking Commission.

§ 53-92. Appointment of Commissioner of Banks; State Banking Commission. — On or before April 1, 1931, after the ratification of this section, and quadrennially thereafter, the Governor, with the advice and consent of the Senate, shall appoint a Commissioner of Banks who shall hold his office for a term of four years or until his successor has been appointed and has qualified, subject, however, to the provisions herein made as to his removal. The Commissioner of Banks shall, before entering upon the discharge of his duties, enter into bond with some surety company authorized to do business in the State of North Carolina, in the sum of not less than fifty thousand dollars ($50,000), conditioned upon the faithful and honest discharge of all duties and obligations imposed by statute upon him. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8.

The State Banking Commission, which has heretofore been created, shall hereafter consist of the State Treasurer, who shall serve as an ex officio member thereof, and 12 members who shall be appointed by the Governor. Not more than five members of the said Commission shall be practical bankers, and the remainder of the membership of the said Commission shall be selected so as to fully represent the consumer, industrial, manufacturing, professional, business and farming interests of the State. At least two members shall be selected primarily as representative of the borrowing public, and they shall have no interest in any regulated financial institution other than as a depositor or borrower and shall not be primarily engaged in any business involving retail credit sales. The terms of office of the two additional members who are now to be appointed shall expire on the first day of April, 1957, and thereafter their successors shall be appointed by the Governor for terms of four years each and shall serve until their successors are appointed and qualified. One member shall be appointed for a four-year term commencing April 1, 1961, and his successor shall be appointed quadrennially thereafter. Successors to members whose terms expired on the first of April, 1953, shall be filled by the Governor for the unexpired portion of the four-year terms which began on said date. Members of the Commission whose present terms expire on the first day of April, 1955, shall continue in office until the expiration of their respective terms and until their successors are appointed and qualified. The two members appointed pursuant to the action of the 1969 General Assembly shall serve until April 1, 1973, and their successors shall serve for four-year terms as is hereinafter provided for other members of the Commission. As the terms of office of the appointive members of the Commission expire, their successors shall be appointed by the Governor for terms of four years each. Any vacancy occurring in the membership of the Commission shall be filled by the Governor for the unexpired term. The appointive members of said Commission shall be filled by the Governor for the unexpired term. The appointive members of said Commission shall receive as compensation for their services the same per diem and expenses as is paid to the members of the Advisory Budget Commission,

which compensation shall be paid from the fees collected from the examination of banks as provided by law.

The Banking Commission shall meet at such time or times, and not less than once every three months, as the Commission shall, by resolution, prescribe, and the Commission may be convened in special session at the call of the Governor, or upon the request of the Commissioner of Banks. The State Treasurer shall be chairman of the said Commission.

No member of said Commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said Commission shall divulge or make use of any information coming into his possession as a result of his service on such Commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such Commission in connection with the condition of any State banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State; any party to a proceeding before the Banking Commission may, within 20 days after final order of said Commission and by written notice to the Commissioner of Banks, appeal to the Superior Court of Wake County for a final determination of any question of law which may be involved. The cause shall be entitled "State of North Carolina on Relation of the Banking Commission against (here insert name of appellant)." It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. In the event of an appeal the Commissioner shall certify the record to the clerk of Superior Court of Wake County within 15 days thereafter. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1; 1949, c. 372; 1953, c. 1209, ss. 4, 6; 1961, c. 547, s. 2; 1967, c. 789, s. 16; 1969, c. 844, s. 6; c. 920.)

Cross Reference. — See note under § 53-2.

State Government Reorganization. — The State Banking Commission and Commissioner of Banks were transferred to the Department of Commerce by § 143A-177, enacted by Session Laws 1971, c. 864.

Commissioner Succeeds to Judicial Powers of Corporation Commission. — Had the Banking Department been created as a purely administrative agency it might fairly be contended that the finality of its actions would be in an administrative sense only and appropriate legal proceedings could be had to test them. But the former Corporation Commission had judicial powers in dealing with banks — its stock assessments were, for example, given the effect of superior court judgments. Corporation Comm'n v. Murphey, 197 N.C. 42, 147 S.E. 667 (1929), aff'd, 280 U.S. 534, 50 S. Ct. 161, 74 L. Ed. 598 (1930). See also Corporation Comm'n v. Bank of Vanceboro, 200 N.C. 422, 157 S.E. 59 (1931). And the Commissioner of Banks succeeded to those judicial powers so that he is obviously not a purely administrative official. There still remains the possibility that as to certain matters his rulings are administrative and that it is in respect to such rulings only that the decisions of the State Banking Commission as an appellate administrative body are final. 9 N.C. L. Rev. 348.

Section 53-4 and this section are construed in pari materia. Young v. Roberts, 252 N.C. 9, 112 S.E.2d 758 (1960).

Quoted in Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-92.1. Commission bound by requirements imposed on Commissioner as to certification of new banks, establishment of branches, etc. — Notwithstanding any other provisions of this Chapter, the State Banking

Commission, in the exercise of its authority to review the action of the Commissioner of Banks, shall be bound by the requirements, conditions and limitations imposed in this Chapter on said Commissioner as to the certification of new banks or the establishments of branch banks or teller's windows. (1963, c. 793, s. 4.)

§ 53-93. Powers and duties of Commissioner. — The Commissioner of Banks shall have the powers, duties and functions herein given, and in addition thereto such other powers and rights as may be necessary or incident to the proper discharge of his duties. (1931, c. 243, s. 2.)

Cross Reference. — For validation of foreclosures and executions of deeds of trust by the Commissioner of Banks, see § 53-35.

Liquidation of Insolvent Banks. — The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the court. His power and authority, both to take possession of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. In re Central Bank & Trust Co., 206 N.C. 251, 173 S.E. 340 (1934).

§ 53-93.1. Deputy commissioner. — The Commissioner of Banks shall appoint, with approval of the Governor, and may remove at his discretion a deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner of Banks, or in case the office of commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner of Banks. He shall receive such compensation as shall be fixed by the Governor with the approval of the Advisory Budget Commission.

Irrespective of the conditions under which the deputy commissioner may exercise the powers and perform the duties of the Commissioner of Banks, pursuant to the preceding paragraph, such deputy commissioner, in addition thereto, is hereby authorized and empowered at any and all times, at the discretion of the Commissioner of Banks, to perform such duties and exercise such powers of the Commissioner of Banks in the name of and on behalf of the Commissioner as the Commissioner, in his discretion, may direct.

This section is not to be construed to modify the provisions of G.S. 53-97. (1959, c. 273.)

§ 53-94. Right to sue and defend in actions involving banks; liability to suit. — As Commissioner of Banks he is empowered to sue and prosecute or defend in any action or proceeding in any courts of this State or any other state and in any court of the United States for the enforcement or protection of any right or pursuit of any remedy necessary or proper in connection with the subjects committed to him for administration or in connection with any bank or the rights, liabilities, property or assets thereof, under his supervision; but nothing herein shall be construed to render the Commissioner of Banks liable to be sued except as other departments and agencies of the State may be liable under the general law. (1931, c. 243, s. 3.)

§ 53-95. Commissioner to exercise powers under supervision of Banking Commission. — All the powers, duties, and functions granted to or imposed upon the Commissioner of Banks by law shall be exercised by him under the direction and supervision of the Banking Commission, and wherever provision is made in any law now in effect authorizing and permitting the Commissioner of Banks to make rules and regulations with respect to any actions or things required to be done under the banking laws of this State, such rules and regulations shall be made by the Banking Commission, and the words "the Commissioner of Banks," used in such statutes authorizing him to make rules

and regulations, shall be construed to mean the Banking Commission, and the words "Banking Commission" substituted in such statutes for "Commissioner of Banks." (1931, c. 243, s. 4; 1939, c. 91, s. 2.)

§ 53-96. Salary of Commissioner; legal assistance and compensation. — The salary of the Commissioner of Banks shall be fixed by the Governor subject to the approval of the Advisory Budget Commission. The Governor may in his discretion appoint and assign to the Commissioner of Banks such legal assistance as in his judgment may be necessary; and compensation therefor, when permanent, shall be fixed in like manner. (1931, c. 243, s. 6; 1957, c. 541, s. 3.)

§ 53-97. Vacancy appointments and removal. — Vacancies existing in the office of Commissioner of Banks by death, resignation or otherwise shall be filled by the Governor; and he shall have the power of removal for sufficient cause. (1931, c. 243, s. 8.)

§ 53-98. Seal of office of Commissioner; certification of documents. — The Commissioner of Banks shall have a seal of office bearing the legend "State of North Carolina — Commissioner of Banks," with such other appropriate device as he may adopt. (1931, c. 243, s. 9.)

§ 53-99. Official records. — The Commissioner of Banks shall keep a record in his office of his official acts, rulings and transactions: Provided, however, that where any disclosure of the records in his office, or of any report or other transaction, might injuriously affect any bank actually operating, such disclosure shall not be made or required except as may now be done under the provisions of law in similar cases. (1931, c. 243, s. 10.)

§ 53-100. General or special investigations of insolvent banks. — Whenever it may appear to be to the public interest, the Governor may cause a general or special investigation to be made of the affairs of any insolvent bank or banks, singly or in related groups, with a view to discovering and establishing the causes of the failure of such bank or banks, and responsibility therefor; and of discovering the dealings with such banks of persons, officers, corporations or municipalities which may have led to such insolvency or which may have endangered or involved any public funds therein. The Governor may assign counsel who shall prosecute such inquiry before the Commissioner of Banks, or a deputy or commissioner appointed by the Commissioner of Banks for the purpose; and the Commissioner of Banks is hereby empowered to conduct such investigation either in person or through such commissioner or deputy appointed by him. The inquiry shall be held at the office of the Commissioner of Banks in the City of Raleigh or at any other place or places in the State designated by the Commissioner of Banks under such rules and regulations as the State Banking Commission may prescribe and may be adjourned from time to time as convenience may require. Attendance of witnesses and production of papers may be required by subpoena under the hand of the Commissioner or his deputy, and on failure of any witness to appear as subpoenaed or his or her failure to produce any books or papers, as called for by such Commissioner or deputy on subpoena or other order due notice shall be served, at the instance of such Commissioner or deputy, of not less than three days to appear before a judge of the superior court residing in or holding courts within the district wherein such witness is subpoenaed or notified to appear or produce such records or papers, on a day certain and a place named, when such judge shall hear the matter and is authorized to punish such witness as for contempt as he may find on such hearing.

A summary of such investigation shall be made with the findings and recommendations of the Commissioner thereon, and a copy thereof submitted

to the Governor, and when the facts shall disclose that any person or persons are criminally responsible, a summary shall be sent to the district attorney of the judicial district likely to have jurisdiction of the matter, whose duty it shall be to have the matter presented to the grand jury for its action. The Governor may employ counsel to assist in the prosecution of any person or persons criminally responsible and fix his compensation and the manner of its payment. (1931, c. 243, s. 11; 1973, c. 47, s. 2.)

Editor's Note. — The 1973 amendment substituted "district attorney" for "solicitor" in the last paragraph.

§ 53-101. Clerical help. — The Commissioner of Banks is empowered to employ sufficient clerical and secretarial help, and other necessary labor to conduct the affairs of his office with economy and efficiency. Persons so employed shall be paid as other employees in the departments of the State and shall be under the same rules and regulations. (1931, c. 243, s. 12.)

§ 53-102. Offices. — Suitable offices shall be provided for the Commissioner of Banks in some state-owned public building in Raleigh. (1931, c. 243, s. 13.)

§ 53-103: Repealed by Session Laws 1945, c. 743, s. 1.

§ 53-104. Commissioner of Banks shall have supervision over, etc. — Every bank or corporation transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this State, and any individual, partnership, association, or corporation which undertakes or attempts to transact the business of banking, or do a banking business in connection with any other business, shall be under the supervision of the Commissioner of Banks. It shall be his duty to execute and enforce through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this Chapter. For the more complete and thorough enforcement of the provisions of this Chapter, the State Banking Commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this Chapter, as may in its opinion be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure such safe and conservative management of the banks under its supervision as will provide adequate protection for the interests of the depositories, creditors, stockholders, and public in their relations with such banks. All banks doing business under the provisions of this Chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the State Banking Commission. (1921, c. 4, s. 63; C. S., s. 222(a); 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1945, c. 743, s. 1.)

Editor's Note. — For discussion of section, see 3 N.C.L. Rev. 81.

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961); Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-105. Reports of condition. — Every bank shall make to the Commissioner of Banks not less than three reports during each year, according to the form which may be prescribed by said Commissioner of Banks; which report shall be verified by the oath or affirmation of the president, vice-president, cashier, secretary, or treasurer of said bank, and in addition

thereto, two of the directors. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the Commissioner of Banks specified, and shall be transmitted to the Commissioner of Banks within 10 days after the receipt of a request or requisition therefor from the Commissioner of Banks; and in a form prescribed by the Commissioner of Banks; a summary of such report shall be published in a newspaper published in the place where the bank is located, or if there is no newspaper in the place, then in the nearest one published thereto in the county in which such bank is established. Proof of such publication shall be furnished the Commissioner of Banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; C. S., s. 222(b); 1931, c. 243, s. 5.)

§ 53-106. Special reports. — The Commissioner of Banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the Commissioner of Banks, and shall be verified in the manner provided in G.S. 53-105, and shall be published as therein provided, if required by the Commissioner of Banks so to be. (1921, c. 4, s. 66; C. S., s. 222(d); 1931, c. 243, s. 5.)

§ 53-107. Penalty for failure to make report. — Every bank failing to make and transmit any report which the Commissioner of Banks is authorized to require by this Chapter, and in and according to the form prescribed by said Commissioner of Banks, within 10 days after the receipt of a request or requisition therefor, or failing to publish the reports as required, shall forthwith be notified by the Commissioner of Banks, and if such failure continue for five days after the receipt of such notice, such delinquent bank shall be subject to a penalty of two hundred dollars ($200.00). The penalty herein provided for shall be recovered in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions. (1921, c. 4, s. 67; C. S., s. 222(e); 1931, c. 243, s. 5.)

§ 53-108. List of stockholders to be kept. — Every bank doing business under this Chapter shall at all times keep a correct record of the names of all its stockholders, and once in each year, or whenever called upon, file in the office of the Commissioner of Banks a correct list of all its stockholders, the resident address of each, and the number of shares held by each. (1921, c. 4, s. 68; C. S., s. 222(f); 1931, c. 243, s. 5.)

§ 53-109. Official communications of Commissioner of Banks. — Each official communication directed by the Commissioner of Banks, or any State bank examiner, to any bank, or to any officer thereof, relating to an examination or investigation conducted or made by the Commissioner of Banks, or containing suggestions or recommendations as to the conduct of the bank shall, if required by the authority submitting same, be submitted by the officer or director receiving it, to the executive committee or board of directors of such bank and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified to the Commissioner of Banks within such time as he may require, by three members of such committee or board. (1921, c. 4, s. 69; C. S., s. 222(g); 1931, c. 243, s. 5.)

§ 53-110. Banking Commission to prescribe books, records, etc.; retention, reproduction and disposition of records. — (a) Whenever in its judgment it may appear to be advisable, the State Banking Commission may issue such rules, instructions, and regulations prescribing the manner of keeping books, accounts, and records of banks as will tend to produce uniformity in the books, accounts, and records of banks of the same class.

(b) The following provisions shall be applicable to banks and trust companies operating under Chapter 53 of the General Statutes and amendments thereto, and to national banking associations insofar as this section does not contravene paramount federal law:

(1) Each bank shall retain permanently the minute books of meetings of its stockholders and directors, its capital stock ledger and capital stock certificate ledger or stubs, and all records which the Banking Commission shall in accordance with the terms of this section require to be retained permanently.

(2) All other bank records shall be retained for such periods as the Banking Commission shall in accordance with the terms of this section prescribe.

(3) The Banking Commission shall from time to time issue regulations classifying all records kept by banks and prescribing the period for which records of each class shall be retained. Such periods may be permanent or for a lesser term of years. Such regulations may from time to time be amended or repealed, but any amendment or repeal shall not affect any action taken prior to such amendment or repeal. Prior to issuing any such regulations the Commission shall consider:

a. Actions at law and administrative proceedings in which the production of bank records might be necessary or desirable;

b. State and federal statutes of limitation applicable to such actions or proceedings;

c. The availability of information contained in bank records from other sources; and

d. Such other matters as the Banking Commission shall deem pertinent in order that its regulation will require banks to retain their records for as short a period as is commensurate with the interest of bank customers and stockholders and of the people of this State in having bank records available.

(4) Any bank may cause any or all records kept by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.

(5) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.

(6) Any bank may dispose of any record which has been retained for the period prescribed by the Banking Commission or in accordance with the terms of this section for retention of records for its class. (1921, c. 4, s. 70; C. S., s. 222(h); 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1951, c. 166, ss. 1, 2.)

§ 53-111. When reserve below legal requirement. — When the reserve of any bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits until the reserve required by law is restored. The Commissioner of Banks shall require any bank whose reserve falls below the amount herein required immediately to make good such reserve. In case the bank fails for 30 days thereafter to make good its reserve the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally

liquidated as provided for in this Chapter. (1921, c. 4, s. 71; C. S., s. 222(i); 1931, c. 243, s. 5.)

Cross References. — As to definition of reserve, see § 53-51. As to amount of reserve, see § 53-50.

Purpose of Section. — The wisdom of this provision and § 53-48 is manifest; banks, whose business is conducted in strict compliance therewith seldom become insolvent. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Criminal Liability of Officer. — A bank must act through its officers, and where they have violated the provisions of this section and § 53-48, as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by § 53-134. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Intent Not Element of Offense. — An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the unlawful act constitutes the crime declared by § 53-134 to be a misdemeanor, punishable as such in the discretion of the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

Consolidation of Indictments. — An indictment charging a bank officer of violating this section and also unlawfully making loans in violation of § 53-48, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-112. Appraisal of assets of doubtful value. — If any assets of a bank are of a doubtful or disputed value, an appraisal of such assets may be had by the Commissioner of Banks, and for the purpose of making such appraisal the Commissioner of Banks shall designate one agent as an appraiser and the bank shall designate an agent as an appraiser and the two so chosen shall designate a third. The appraisers so selected shall make an appraisal of the assets so designated as doubtful or disputed and file a written report of their appraisal with the bank and with the Commissioner of Banks. In making such appraisal the appraisers shall determine the actual cash market value of such assets. Such appraisal, when made, shall be accepted as the value of such assets for the purpose of examination or for the purpose of determining the actual cash market value of such assets. The appraisers designated shall not be interested, in any way, either in the bank or as an employee of the Commissioner of Banks and all expenses of such appraisal shall be paid by the bank whose assets are appraised. If any bank required to appoint an appraiser hereunder shall fail for 10 days to appoint an appraiser, the Commissioner of Banks may apply to the clerk of the superior court of the county in which the bank is located for the appointment of such an appraiser, and the clerk shall thereupon make the appointment for the bank. (1927, c. 47, s. 13; 1931, c. 243, s. 5.)

§ 53-113. Certified copies of records as evidence. — In all civil actions in the courts of this State wherein are involved as evidence or otherwise any of the records of the Commissioner of Banks, a certified copy over the signature and under the seal of the Commissioner of Banks shall be admissible in evidence to the same effect as if produced in court at trial by the proper custodian of the records. (1927, c. 47, s. 14; 1931, c. 243, s. 5.)

§ 53-114. Other powers of State Banking Commission. — In addition to all other powers conferred upon and vested in the State Banking Commission, the said Commission, with the approval of the Governor, is hereby authorized,

empowered and directed, whenever in its judgment the circumstances warrant it:

(1) To authorize, permit, and/or direct and require all banking corporations under its supervision, to extend for such period and upon such terms as it deems necessary and expedient, payment of any demand and/or time deposits.

(2) To direct, require or permit, upon such terms as it may deem advisable, the issuance of clearinghouse certificates or other evidences of claims against assets of such banking institutions.

(3) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as it shall designate or invested in such obligations of the United States and/or the State of North Carolina as it shall designate.

(4) To adopt for such banking institutions such regulations as are necessary in its discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks. (1933, c. 120, s. 3; 1939, c. 91, s. 2.)

§ 53-115. State Banking Commission to make rules and regulations. — The State Banking Commission is hereby authorized, empowered and directed to make all necessary rules and regulations, and to give all necessary instructions with respect to such banking corporations which the Commissioner of Banks may authorize, permit and/or direct and require to be conducted under the provisions of G.S. 53-77, 53-114, 53-115, and 53-116. And it shall be the duty of all such banking corporations and their officers, agents and employees, to comply fully with any and all such rules, regulations and instructions, established and promulgated by the State Banking Commission with respect to such banking corporations under the terms of G.S. 53-77, 53-114, 53-115, and 53-116; and such orders, rules, and regulations shall have the same force and effect as rules, regulations and instructions promulgated under the existing banking laws. (1933, c. 120, s. 4; 1939, c. 91, s. 2.)

§ 53-116. Commissioner need not take over banks failing to meet deposit demands. — The Commissioner of Banks is authorized and directed not to take possession of any banking corporation under his supervision for failure to meet its deposit liabilities during the period in which such banking corporation is operating under the terms of G.S. 53-114, subdivision (1); and he is hereby relieved from any and all liability for permitting such banking corporations to continue operations under the terms thereof. (1933, c. 120, s. 5.)

Article 9.

Bank Examiners.

§ 53-117. Appointment by Commissioner of Banks. — The Commissioner of Banks, for the purpose of carrying out the provisions of this Chapter, shall appoint from time to time such State bank examiners, assistant State bank examiners, clerks and stenographers as may be necessary to make a thorough examination of and into the affairs of every bank doing business under this Chapter, as often as the Commissioner of Banks may deem necessary, and at least once each year, provided the Commissioner of Banks may extend this period to 15 months when, in his opinion, an emergency condition exists that necessitates such action. The Commissioner of Banks may at any time remove

any person appointed by him under this Chapter. (1921, c. 4, s. 72; C. S., s. 223(a); 1931, c. 243, s. 5; 1967, c. 789, s. 17.)

Editor's Note. — For cases describing manner in which the former Corporation Commission took charge through examiner, see Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924), discussed in 3 N.C.L. Rev. 79.

§ 53-118. Duties and powers. — It shall be the duty of the examiners to verify all reports made to the Commissioner of Banks by the officers and directors, members, or individuals conducting any banking institution, as required by this Chapter or by the Commissioner of Banks. The officers of every bank shall submit and surrender its books, assets, papers, and concerns to the examiners appointed under this Chapter, who shall retain the custody and possession of such books, assets, papers, and concerns for such length of time as may be required for the purpose of making an examination as required by this Chapter. If any officer shall refuse to surrender the books, assets, papers, and concerns as herein provided, or shall refuse to be examined under oath touching the affairs of such bank, the Commissioner of Banks may forthwith take possession of the property and business of the bank and liquidate its affairs in accordance with the provisions of this Chapter. (1921, c. 4, s. 73; C. S., s. 223(b); 1931, c. 243, s. 5.)

§ 53-119. Removal of officers and employees. — The Commissioner of Banks shall have the right, and is hereby empowered, to require the immediate removal from office of any officer, director, or employee of any bank doing business under this Chapter, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or who persistently violates the laws of this State or the lawful orders, instructions, and regulations issued by the State Banking Commission. (1921, c. 4, s. 74; C. S., s. 223(c); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§ 53-120. Examiners may administer oaths; summoning witnesses. — For the purpose of making examinations as required by this Chapter, any duly appointed examiner may administer oaths to examine any officer, director, agent, employee, customer, depositor, shareholder of such bank, or any other person or persons, touching its affairs and business. Any examiner may summon in writing any officer, director, agent, employee, customer, depositor, shareholder, or any person or persons resident of this State to appear before him and testify in relation thereto. (1921, c. 4, s. 75; C. S., s. 223(d).)

§ 53-121. Examiners may make arrest. — When it shall appear to any examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder, or owner of any bank has been guilty of a violation of the criminal laws of this State relating to banks, it shall be his duty, and he is hereby empowered to hold and detain such person or persons until a warrant can be procured for his arrest; and for such purposes such examiners shall have and possess all the powers of peace officers of such county, and may make arrest without warrant for past offenses. Upon report of his action to the Commissioner of Banks, said Commissioner may direct the release of the person or persons so held, or, if in his judgment such person or persons should be prosecuted, the Commissioner of Banks shall cause the district attorney of the judicial district in which such detention is had to be promptly notified, and the action against such person or persons shall be continued a reasonable time to enable the district attorney to be present at the trial. (1921, c. 4, s. 76; C. S., s. 223(e); 1931, c. 243, s. 5; 1973, c. 47, s. 2.)

Editor's Note. — The 1973 amendment substituted "district attorney" for "solicitor" twice in the last sentence.

See 15 N.C.L. Rev. 101.

Stated in Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949).

§ 53-122. Fees for examinations and other services. — For the purpose of paying the salaries and necessary traveling expenses of the Commissioner of Banks, State bank examiners, assistant State bank examiners, clerks, stenographers and other employees of the Commissioner of Banks, the following fees shall be paid into the office of the Commissioner of Banks:

(1) Each bank and each branch of any bank which under the laws of the State of North Carolina is subject to supervision and examination by the Commissioner of Banks and is authorized to do business or is in process of voluntary liquidation shall, within 10 days after the assessment has been made, pay into the office of the Commissioner of Banks according to its total resources as shown by its report of condition made to the Commissioner of Banks at the close of business December 31, 1926, and on the thirty-first day of December, or the date most nearly approximating same of each year thereafter on which a report of condition is made to the Commissioner of Banks not in excess of the following fees for its annual examination: fifty dollars ($50.00) for the first one hundred thousand dollars ($100,000) of assets or less, seven dollars ($7.00) for each one hundred thousand dollars ($100,000) or fraction in excess thereof, and two dollars ($2.00) for each one hundred thousand dollars ($100,000) or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such; provided, however, with respect to loan agencies or brokers subject to the provisions of Article 15 of Chapter 53 of the General Statutes, the fee shall be one hundred dollars ($100.00) for the first one hundred thousand dollars ($100,000) of assets or less.

(2) All examinations made other than those provided for in subdivision (1) hereof shall be deemed special examinations and for such special examination the bank shall pay into the office of the Commissioner of Banks the following fees for each special examination: fifty dollars ($50.00) for the first one hundred thousand dollars ($100,000) of assets or less, seven dollars ($7.00) for each one hundred thousand dollars ($100,000) or fraction in excess thereof, and two dollars ($2.00) for each one hundred thousand dollars ($100,000) or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such; provided, however, with respect to loan agencies or brokers subject to the provisions of Article 15 of Chapter 53 of the General Statutes, the fee shall be one hundred dollars ($100.00) for the first one hundred thousand dollars ($100,000) of assets or less. The fees paid for special examination shall be based on the assets of the bank examined as of the date of such examination.

(3) For services performed for any bank other than examination, the Commissioner of Banks may make such charge as in his opinion is fair and just.

(4) In all criminal cases tried in any of the courts of this State wherein any of the employees of the Commissioner of Banks are used as witnesses, a fee of ten dollars ($10.00) per day and actual expenses incurred shall be allowed such witnesses and the same shall be paid to the Commissioner of Banks by the clerk of the court of the county in which the case is tried and thereafter charged in bill of costs as are other costs incurred in the trial; and in all civil actions tried in any of the courts of this State, wherein any of the employees of the Commissioner of Banks are required as witnesses, the party requiring such employee

as witness shall deposit with the Commissioner of Banks when the subpoena is served a sufficient sum to cover the witness fee of ten dollars ($10.00) per day and expenses, and such sums as may thus be advanced shall thereafter be charged in the bill of costs as other costs are charged.

All sums paid under this subdivision shall be paid to the Commissioner of Banks as are fees for examination and used in like manner.

(5) The total compensation and necessary traveling expenses of the employees of the Commissioner of Banks shall not in any one year exceed the total fees collected under the provisions of this section, provided such expenses and compensation may exceed the total fees collected in any year when surplus funds are available.

(6) In the first half of each calendar year, the State Banking Commission shall review the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. If the estimated fees provided for under subdivisions (1) and (2) shall exceed the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may reduce by uniform percentage the fees provided for in subdivisions (1) and (2) of this section but not in a percentage greater than fifty percent (50%) nor to an amount which will reduce the amount of the fees to be collected below the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. If the estimated fees provided for under subdivisions (1) and (2) shall be less than the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may increase by uniform percentage the fees provided for in subdivisions (1) and (2) of this section to an amount which will increase the amount of the fees to be collected to an amount at least equal to the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. Such fees shall be reduced whenever a surplus exists which exceeds the estimated cost of operating the office of the Commissioner of Banks for one year, even if such reduction shall result in the collection of a smaller sum than the estimated cost of maintaining the office of the Commissioner of Banks for that year. In no event shall any surplus at the end of any fiscal year resulting from the collection of fees pursuant to this section revert to the general fund. (1921, c. 4, s. 77; C. S., s. 223(f); 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 733; 1945, c. 467; 1955, c. 640, ss. 1, 2; 1957, c. 1443, s. 1; 1969, c. 229.)

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-123. Examiners shall make report. — Examiners shall make a full and detailed report in writing to the Commissioner of Banks of the condition of each bank within 10 days after each and every examination made by them. (1921, c. 4, s. 78; C. S., s. 223(g); 1931, c. 243, s. 5.)

ARTICLE 10.

Penalties.

§ 53-124. Examiner making false report. — If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet

the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the State prison for not less than four months nor more than 10 years. (1921, c. 4, s. 79; C. S., s. 224(a).)

Cross References. — See § 14-254. For identical section, see § 14-233.

§ 53-125. Examiners disclosing confidential information. — If any bank examiner or other employee of the Commissioner of Banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not more than 12 months, or both, in the discretion of the court. Nothing in this section shall prevent the proper exchange of information with the representatives of the banking departments of other states, with the federal reserve bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary, or with the clearinghouse officials and examiners. (1921, c. 4, s. 80; C. S., s. 224(b); 1931, c. 243, s. 5.)

§ 53-126. Loans or gratuities forbidden. — No State bank, or any officer, director or employee thereof shall hereafter make any loan or grant any gratuity to the Commissioner of Banks, any bank examiner or assistant bank examiner of the Commissioner of Banks of North Carolina. Any such officer, director or employee violating this provision shall be guilty of a misdemeanor and imprisoned not exceeding one year or fined not more than one thousand dollars ($1,000), or both; and they may be fined a further sum equal to the money so loaned or gratuity given. If the Commissioner of Banks, or any bank examiner, or assistant bank examiner of the Commissioner of Banks of North Carolina shall accept a loan or gratuity from any State bank, or from any officer, director or employee thereof, he shall be guilty of a misdemeanor and imprisoned not exceeding one year, or fined not more than one thousand dollars ($1,000), or both, and may be fined a further sum equal to the money so loaned or gratuity given. (1927, c. 29, s. 1; 1931, c. 243, s. 5.)

§ 53-127. Use of "bank," "banking," or "trust" in corporate name. — No corporation shall hereafter be chartered under the laws of this State with the words "bank," "banking," or "trust" as a part of its name except corporations reporting to and under the supervision of the Commissioner of Banks, or corporations under the supervision of the Commissioner of Insurance; nor shall any corporate name be amended so as to include the words "bank," "banking," "banker," or "trust," unless the corporation be under such supervision. No person, association, firm or corporation domiciled within the State of North Carolina except corporations, persons, associations, or firms reporting to and under the supervision of the Commissioner of Banks or under the supervision of the Commissioner of Insurance, shall therein advertise or put forth any sign as bank, banking, banker or trust company, or use the word "bank," "banking," "banker," or "trust," as a part of its name and title, or in any way solicit or receive deposits or transact business as a trust company: Provided, that this Chapter shall not be held to prevent any individual as such from acting in any trust capacity as heretofore: Provided, further, that it shall be lawful for any corporation incorporated prior to January 1, 1905, to retain the word "trust" in

the name of said corporation, though it does not transact a banking business or such other business as requires its examination by the Commissioner of Banks or the Commissioner of Insurance.

Any violation of the provisions of this section shall be a misdemeanor, and upon conviction thereof the offender shall be fined in a sum not exceeding five hundred dollars ($500.00) for each offense. (1921, c. 4, s. 81; C. S., s. 224(c); 1931, c. 243, s. 5; 1943, c. 543.)

§ 53-128. Willfully and maliciously making derogatory reports. — Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any bank, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 82; C. S., s. 224(d).)

§ 53-129. Misapplication, embezzlement of funds, etc. — Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, willfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment, decree or fictitiously borrows or solicits, obtains or receives money for a bank not in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificate, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the true financial condition of such bank, shall be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars ($10,000) or imprisoned in the State's prison not more than 30 years, or both. (1921, c. 4, s. 83; C. S., s. 224(e); 1927, c. 47, s. 16.)

The intent and purpose of this section is to prevent the deception of the officers of a bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interests of the bank or deceived its officers. State v. Cole, 202 N.C. 592, 163 S.E. 594 (1932).

A specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of this section, it being sufficient if the defendant willfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent. State v. Lattimore, 201 N.C. 32, 158 S.E. 741 (1931).

In a prosecution under this section for willfully making false entries on the books of a bank an instruction which was intended to stress and in effect did stress the necessity of proving that the false entries were willfully and not inadvertently made, will not be held for error. State v. Lattimore, 201 N.C. 32, 158 S.E. 741 (1931).

Section 14-254 Not in Conflict. — Section 14-254, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in

the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section as passed in 1921. State v. Switzer, 187 N.C. 88, 121 S.E. 143 (1924).

"Abstracts" Construed. — The legal meaning of the word "abstract," as it appears in § 14-254, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. State v. Switzer, 187 N.C. 88, 121 S.E. 143 (1924).

"Embezzle" means to misappropriate as well as to convert to one's own use. State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), citing State v. Lanier, 89 N.C. 517 (1883); State v. Foust, 114 N.C. 842, 19 S.E. 275 (1894).

Conviction of Depositor. — In order to convict a depositor of a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of § 14-254, and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of this section as passed in 1921. State v. Switzer, 187 N.C. 88, 121 S.E. 143 (1924).

Same — Necessity of Being Present. — Though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. State v. Switzer, 187 N.C. 88, 121 S.E. 143 (1924).

Allegation That All Defendants Were Officers or Employees.—It is not necessary for an indictment, charging a conspiracy to violate the provisions of this section, to allege that all of the defendants were officers or employees of the bank, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act. State v. Davis, 203 N.C. 13, 164 S.E. 737 (1932).

Alleging Corporation Is a Bank. — Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn. State v. Hedgecock, 185 N.C. 714, 117 S.E. 47 (1923).

In a prosecution under this section and § 14-254 it was not necessary to aver or to prove that the money or funds had been committed by the bank to the custody of the defendant or that there had been any breach of trust or confidence except that which arose out of the relation between the bank and the defendant. Nor was it necessary to charge in the very words that the defendant had converted the property to his own use. The words "did embezzle" sufficiently indicated the criminal act. The intent to defraud was sufficiently set out, under § 15-151, without specifically naming any particular victim of the preconceived purpose. And the indictment was sufficient though there was nothing to indicate the number of abstractions, if more than one. State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), citing State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

Evidence. — In a prosecution under this section and § 14-254 expert parol evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment. In such case there was no invasion of the province of the jury by the expression of an opinion upon a fact in issue. State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928).

Variance as to Some Items. — In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of this section, a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent. State v. Davis, 203 N.C. 47, 164 S.E. 732 (1932).

§ 53-130. Making false entries in banking accounts; misrepresenting assets and liabilities of banks. — If any person shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, or shall knowingly subscribe to or exhibit false papers, with intent to deceive any person authorized to examine into the affairs of such bank, or shall willfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any bank, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the State's prison not less than four months nor more than 10 years. (1903, c. 275, s. 27; Rev., s. 3326; C. S., s. 4402.)

§ 53-131. False certification of a check. — Whoever, being an officer, employee, agent, or director of a bank, certifies a check drawn on such bank, and willfully fails to forthwith charge the amount thereof against the account of the drawer thereof, or willfully certifies a check drawn on such bank unless the drawer of such check has on deposit with the bank an amount of money subject to the payment of such check and equivalent to the amount therein specified, shall be guilty of a felony, and upon conviction shall be fined not more than five thousand dollars ($5,000) or imprisoned in the State prison for not more than five years, or both. (1921, c. 4, s. 84; C. S., s. 224(f).)

§ 53-132. Receiving deposits in insolvent banks. — Any person, being an officer or employee of a bank, who receives, or being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein when he has knowledge that such bank is insolvent, shall be guilty of a felony, and upon conviction thereof shall be fined not more than five thousand dollars ($5,000) or imprisoned in the State prison not more than five years, or both. Provided, that in any indictment hereunder, insolvency shall not be deemed to include insolvency as defined under paragraph d of subdivision (3) in the definition of insolvency under G.S. 53-1. (1921, c. 4, s. 85; C. S., s. 224(g); 1927, c. 47, s. 17.)

The word "insolvent," in this section, means when the bank cannot meet its depository liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the time on demand. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

A bank is insolvent, within the meaning of this section, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors and other creditors. State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932).

The word "knowledge," as used in the statute, is to be taken in its ordinary sense and according to its usual significance or acceptation. It means an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Who May Bring Action for Civil Liability. — A violation of this section by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong. See Townsend v. Williams, 117 N.C. 330, 23 S.E. 461 (1895); Tate v. Bates, 118 N.C. 287, 24 S.E. 482 (1896); Solomon v. Bates, 118 N.C. 311, 24 S.E. 478 (1896); Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898); State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924); Russell v. Boone, 188 N.C. 830, 125 S.E. 926 (1924); Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

The right of a depositor in a bank, who has sustained damages, peculiar to himself, by the wrongful act of the officers and directors of the bank, to recover damages in an action brought by him against the officers and directors, is not affected by the decision in Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925); the right is expressly recognized in the opinion in that case. Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

Liability Not Bank Asset. — Sums for which bank officers and directors are liable for receiving or permitting receipt of deposit with knowledge of bank's insolvency, contrary to this section, are not assets of the bank. The wrong being only to the depositor, he need not allege, to maintain an action, that bank's receiver refused to sue on demand. Bane v. Powell, 192 N.C. 387, 135 S.E. 118 (1926).

Necessary Allegations. — In order for a depositor to maintain an action against the individual officers of an insolvent bank for permitting the deposits to be received it is necessary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that it was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its receiver afterwards. Wall v. Howard, 194 N.C. 310, 139 S.E. 449 (1927).

Elements of Offense. — In order for a conviction under the provisions of this section, the State must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to

receive the deposits with knowledge of these facts. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Evidence. — For the purpose of ascertaining the solvency or insolvency of a bank, it is permissible to go into an investigation of its assets and property as of the date when the deposit was made, and, of course, their value after that, or at the time of the trial, is competent as illustrating or bearing upon their worth at the time the deposit was charged to have been received. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Same — Admissions. — Upon the trial of an officer of an insolvent bank under this section the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is competent testimony. State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932).

Same — Weight of Evidence. — Where the State bank examiner and another expert have been permitted to give their testimony as to the bank's insolvency at the time of the crime, upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Bank Examiner as Expert Witness. — In an action to convict an officer of a bank under this section, the testimony of the State bank examiner is to be received as that of an expert upon the question of the bank's insolvency. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

Certified Accountant as Witness. — Upon the trial of a bank official under the provisions of this section, testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral, that the bank was insolvent at the time in question is not objectionable. State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932).

§ 53-133. Advertising larger amount than that paid in capital stock. — It shall be unlawful for any bank to advertise in a newspaper, letterhead, or any other way, a larger capital stock than has been actually paid in in cash. Any bank violating this section shall be subject to a penalty of five hundred dollars ($500.00) for each and every offense. The penalty herein provided for shall be recovered by the State in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions. (1921, c. 4, s. 86; C. S., s. 224(h).)

§ 53-134. Offenses declared misdemeanors; prosecution; employment of counsel; punishment. — Any offense against the banking laws of the State of North Carolina which is not elsewhere specifically declared to be a crime, or for which elsewhere a penalty is not specifically provided, is hereby declared to be a misdemeanor, and shall be punishable at the discretion of the court. The Commissioner of Banks is authorized and directed to prosecute all offenses against the banking laws of the State, and to that end is expressly authorized to employ counsel to prosecute in the inferior courts and to aid the district attorney in the superior courts. The Auditor of the State shall, upon the certificate of the Commissioner of Banks, accompanied by an itemized statement of the account, draw his warrant upon the State Treasurer to compensate the counsel so employed, and the State Treasurer shall pay the same out of the funds in the treasury and not otherwise appropriated. (Ex. Sess. 1921, c. 56, s. 4; C. S., s. 224(i); 1927, c. 47, s. 18; 1931, c. 243, s. 5; 1973, c. 47, s. 2.)

Editor's Note. — The 1973 amendment substituted "district attorney" for "solicitor" in the second sentence.

Unlawful Act of Making Loans. — Under this section, the unlawful act of making loans in violation of § 53-48 or § 53-111 is made a misdemeanor, and is punishable as such at the discretion of the court. State v. Cooper, 190 N.C. 528, 130 S.E. 180 (1925). See notes to §§ 53-48 and 53-111.

§ 53-135. General corporation law to apply. — All provisions of the law relating to private corporations, and particularly those enumerated in the Chapter entitled "Corporations," not inconsistent with this Chapter or with the business of banking, shall be applicable to banks. (1921, c. 4, s. 87; C. S., s. 224(j).)

Quoted in Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Cited in Cole v. Farmers Bank & Trust Co., 221 N.C. 249, 20 S.E.2d 54 (1942).

ARTICLE 11.

Industrial Banks.

§ 53-136. Industrial bank defined. — The term "industrial bank," as used in this Article shall be construed to mean any corporation organized or authorized under this Article which is engaged in receiving, soliciting or accepting money or its equivalent on deposit and in lending money to be repaid in weekly, monthly, or other periodical installments or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, commercial banks, or credit unions. (1923, c. 225, s. 1; C. S., s. 225(a); 1945, c. 743, s. 1.)

§ 53-137. Manner of organization. — Any number of persons, not less than five, may organize an industrial bank by setting forth in a certificate of incorporation, under their hands and seals, the following:

(1) The name of the industrial bank.
(2) The location of its principal office in this State.
(3) The nature of its business.
(4) The amount of its authorized capital stock which shall be divided into shares of ten ($10.00), twenty ($20.00), twenty-five ($25.00), fifty ($50.00) or one hundred dollars ($100.00) each: Provided, fractional shares may be issued for the purpose of complying with the requirements of G.S. 53-88.
(5) The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each. The aggregate of such subscription shall be the amount of the capital with which the industrial bank will begin business.
(6) Period, if any, limited for the duration of the industrial bank.

This section shall not apply to banks organized and doing business prior to the adoption of this section. (1923, c. 225, s. 2; C. S., s. 225(b); 1945, c. 743, s. 1.)

Suit to Compel Issuance of Charter. — Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with the statutes, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

§ 53-138. Corporate title. — Every corporation incorporated or reorganized pursuant to the provisions of this Article shall be known as an industrial bank, and may use the word "bank" as part of its corporate title. (1923, c. 225, s. 3; C. S., s. 225(c).)

§ 53-139. Capital stock. — The amount of capital stock with which any industrial bank shall commence business shall not be less than fifty percent (50%) of that which would be required of a commercial bank under the provisions of G.S. 53-2. (1923, c. 225, s. 4; C. S., s. 225(d); 1967, c. 789, s. 18.)

§ 53-140. Sales of capital stock; accounting; fees. — The capital stock sold by any industrial bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation

for selling such stock. The Commissioner of Banks shall refuse authority to commence business to any industrial bank where commissions or fees have been paid, or have been contracted to be paid by it, or by anyone in its behalf to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1923, c. 225, s. 5; C. S., s. 225(e); 1931, c. 243, s. 5.)

§ 53-141. Powers. — Industrial banks shall have the powers conferred by paragraphs 1, 2, 3, 5 and 7 of G.S. 55-17, and subdivision (3) of G.S. 53-43, such additional powers as may be necessary or incidental for the carrying out of their corporate purposes, and in addition thereto the following powers:

(1) To discount and negotiate promissory notes, drafts, bills of exchange and other evidences of indebtedness, and to loan money on real or personal security, and to purchase notes, bills of exchange, acceptances or other choses in action, and to take and receive interest or discounts subject to G.S. 53-43(1).

(2) To make loans and charge and receive interest at rates not exceeding the rates of interest provided in G.S. 24-1.1 and 24-1.2.

(3) To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the State, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find

a. That the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and

b. That the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.

Provided, that the Commissioner of Banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for capital in an amount equal to that required with respect to the establishment of branches of commercial banks under the provisions of G.S. 53-62. For the purposes of this paragraph, the provisions of G.S. 53-62 as to the meaning of the word "capital" shall be applicable.

A bank may discontinue a branch office upon resolution of its board of directors or board of managers. Upon the adoption of such a resolution, the bank shall file a certification with the Commissioner of Banks specifying the location of the branch office to be discontinued and the date upon which it is proposed that the discontinuance shall be effective. This certificate must state the reasons for the closing of such branch and indicate that the needs and convenience of the community would still be adequately met. Notice stating the intention to discontinue the said branch shall be published in a newspaper serving said community once a week for four consecutive weeks before a certificate requesting a discontinuance is filed with the Commissioner of Banks. No such branch may be discontinued until approved by the Commissioner of Banks, who shall first hold a public hearing thereon, if so requested by any interested party.

(4) Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into

such contract, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of 1933 (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporations.

(5) To solicit, receive and accept money or its equivalent on deposit both in savings accounts and upon certificates of deposit.

(6) Subject to the approval of the State Banking Commission, to solicit, receive and accept money or its equivalent on deposit subject to check; provided, however, no such approval shall be given unless and until such industrial bank meets the capital requirements of a commercial bank as set forth in G.S. 53-2. (1923, c. 225, s. 6; C. S., s. 225(f); 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss. 1, 2; 1943, c. 233; 1945, c. 283; 1949, c. 952, ss. 1, 2; 1959, c. 365; 1967, c. 789, s. 19; 1969, c. 1303, ss. 10-12.)

Editor's Note. — The reference in the introductory paragraph to "paragraphs 1, 2, 3, 5 and 7 of G.S. 55-17" can be translated to subdivisions 1, 2, 3, 5 and 7 of subsection (a) of G.S. 55-17.

For comment on the 1949 amendment, see 27 N.C.L. Rev. 425. For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-142. Restriction on powers. — No industrial bank shall deposit any of its funds in any banking corporation unless such corporation has been designated as such depositary by a vote of a majority of the directors, or of the executive committee, exclusive of any director who is an officer, director, or trustee of the depositary so designated, present at any meeting duly called at which a quorum is in attendance, and approved by the Commissioner of Banks. (1923, c. 225, s. 7; C. S., s. 225(g); 1931, c. 243, s. 5; 1937, c. 220.)

§ 53-143. Investments; securities; loans; limitations. — The provisions of G.S. 53-46, 53-48 and 53-49, with reference to the limitations of investments in securities, limitations of loans and suspensions of investment and loan limitations, shall be applicable to industrial banks. (1923, c. 225, s. 8; C. S., s. 225(h); 1945, c. 127, s. 2.)

§ 53-144. Supervision and examination. — Every industrial bank now or hereafter transacting the business of an industrial bank as defined by this Article, whether as a separate business or in connection with any other business under the laws of and within this State, shall be subject to the provisions of this Article, and shall be under the supervision of the Commissioner of Banks. The Commissioner of Banks shall exercise control of and supervision over the industrial banks doing business under this Article, and it shall be his duty to execute and enforce, through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now

or may hereafter be enacted relating to industrial banks as defined in this Article. For the more complete and thorough enforcement of the provisions of this Article, the State Banking Commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this Article, as may, in its opinion, be necessary to carry out the provisions of the laws relating to industrial banks as in this Article defined, and as may be further necessary to insure such safe and conservative management of industrial banks under the supervision of the Commissioner of Banks as may provide adequate protection for the interest of creditors, stockholders, and the public, in their relations with such institutions. All industrial banks doing business under the provisions of this Article shall conduct their business in a manner consistent with all laws relating to industrial banks, and all rules, regulations and instructions that may be promulgated or issued by the State Banking Commission. (1923, c. 225, s. 11; C. S., s. 225(k); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§ 53-145. Sections of general law applicable. — Sections 53-1, 53-3, 53-4, 53-5, 53-6, 53-7, 53-8, 53-9, 53-10, 53-11, 53-12, 53-13, 53-18, 53-20, 53-22, 53-23, 53-42, 53-47, 53-50, 53-51, 53-54, 53-63, 53-64, 53-67, 53-68, 53-70, 53-71, 53-72, 53-73, 53-74, 53-78, 53-79, 53-80, 53-81, 53-82, 53-83, 53-85, 53-87, 53-88, 53-90, 53-91, 53-105, 53-106, 53-107, 53-108, 53-109, 53-110, 53-111, 53-112, 53-117, 53-118, 53-119, 53-120, 53-121, 53-122, 53-123, 53-124, 53-125, 53-126, 53-128, 53-129, 53-132, 53-133, 53-134, relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this Article. Sections 53-19, 53-24, 53-37, 53-39, 53-40, 53-41, 53-44, 53-45, 53-58, 53-59, 53-61, 53-66, 53-75, 53-76, 53-77, 53-86, 53-113, 53-114, 53-115, 53-116, 53-135, 53-146, and 53-148 through 53-158, relating to commercial banks, shall be construed to be applicable to industrial banks. (1923, c. 225, s. 13; C. S., s. 225(m); 1927, c. 141; 1939, c. 244, s. 3; 1945, c. 743, s. 1.)

Editor's Note. — Sections 53-72 and 53-74 referred to in the first sentence of the section were repealed by Session Laws 1971, c. 244, s. 3, and § 53-58, referred to in the second sentence of this section, was repealed by Session Laws 1965, c. 700, s. 2.

ARTICLE 12.

Joint Deposits.

§ 53-146. Deposits in two names. — When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this State, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made. (1917, c. 243, s. 1; C. S., s. 230.)

Editor's Note. — For discussion of section, see 9 N.C.L. Rev. 14.

For note on rights of a survivor to a joint bank account, see 31 N.C.L. Rev. 95 (1952); 35 N.C.L. Rev. 75 (1956).

For note on joint bank accounts without survivorship provision in joint account agreement, see 35 N.C.L. Rev. 352 (1957).

For note on joint bank accounts with the right of survivorship in North Carolina, see 46 N.C.L. Rev. 669 (1968).

When Statute Applicable. — The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of this section. The statute applies only where the deposit is made in the names of two persons and payable to either, nor can construing the word "or" as meaning "and"

have the effect of creating a tenancy in common. Jones v. Fullbright, 197 N.C. 274, 148 S.E. 229 (1929).

Cited in Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

§ 53-147: Repealed by Session Laws 1943, c. 543.

ARTICLE 13.

Conservation of Bank Assets and Issuance of Preferred Stock.

§ 53-148. Provision for bank conservators; duties and powers. — Whenever he shall deem it necessary, in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Commissioner of Banks may (with the approval of the Governor), appoint a conservator for such bank and require of such conservator such bond with such security as he may deem necessary and proper. The conservator, under the direction of the Commissioner of Banks, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all such rights, powers and privileges, subject to the Commissioner of Banks, now possessed by or hereafter given to the Commissioner of Banks under G.S. 53-20, as amended, as are necessary to conserve the assets of said bank. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall be the same as those provided in G.S. 53-20, as amended. All expenses of any such conservator shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this Article or otherwise. The conservator shall receive as salary an amount no greater than that paid at the present time to employees of departments of the State government for similar services. (1933, c. 155, s. 1.)

Editor's Note. — For similarity to federal act, see 11 N.C.L. Rev. 196.

§ 53-149. Examination of bank. — The Commissioner of Banks shall cause to be made such examination of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank. (1933, c. 155, s. 2.)

§ 53-150. Termination of conservatorship. — If the Commissioner of Banks shall become satisfied that it may safely be done, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe. (1933, c. 155, s. 3.)

§ 53-151. Special funds for paying depositors and creditors ratably; new deposits. — While such bank is in the hands of the conservator appointed by the Commissioner of Banks, the Commissioner of Banks may require the conservator to set aside from unpledged assets and make available for withdrawal by depositors and payment to other creditors on a ratable basis, such amounts as, in the opinion of the Commissioner of Banks, may safely be used for this purpose; and the Commissioner of Banks, may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator (as well as special or trust deposits received by any bank, under the orders of the Commissioner of Banks, since March 2, 1933), shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such

bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of said bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator, as well as the special or trust deposits received since March 2, 1933, shall be kept on hand in cash or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

§ 53-152. Reorganization on agreement of depositors and stockholders. — By the agreement of (i) depositors and other creditors of any bank representing at least seventy-five percent (75%) in amount of its total deposits and other liabilities as shown by the books of the banks, or (ii) stockholders owning at least two thirds of each class of its outstanding capital stock as shown by the books of the bank, or (iii) both depositors and other creditors representing at least seventy-five percent (75%) in amount of the total deposits and other liabilities, and stockholders owning at least two thirds of its outstanding capital stock as shown by the books of the bank, any bank may effect such reorganization with the consent and approval of the Commissioner of Banks as by such agreement may be determined: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the percent thereof as above provided.

When such reorganization becomes effective, all books, records and assets of such bank shall be disposed of in accordance with the provisions of the plan, and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the Commissioner of Banks. In any reorganization which shall have been approved, and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of organization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization: Provided, however, that no reorganization shall affect the lien of secured creditors. (1933, c. 155, s. 5.)

Editor's Note. — The provision in the second paragraph is identical with the federal act but its validity may be questioned on a constitutional ground not applicable to the federal government, i.e., impairment of contract. 11 N.C.L. Rev. 196.

§ 53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers. — After 15 days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in G.S. 53-152 hereof, the provisions of G.S. 53-151 with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the Commissioner of Banks, a notice in form approved by the Commissioner of Banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of G.S. 53-151 will not be effective after 15 days after such date; and on the date of publication

of such notice, the conservator shall immediately send to every person who is a depositor in such bank under G.S. 53-151, a copy of such notice by registered mail, addressing it to the last known address of such persons shown by the records of the bank; and the conservator shall send similar notice in like manner to every person making deposit in such bank under G.S. 53-151, after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. (1933, c. 155, s. 6.)

§ 53-154. Issuance of preferred stock. — Notwithstanding any other provision of this Article or any other law, and notwithstanding any of the provisions of its articles of incorporation or bylaws, any bank may, with the approval of the Commissioner of Banks, and by vote of stockholders owning a majority of the stock of such bank, upon not less than two days' notice given by registered mail pursuant to action taken at a meeting of its board of directors (which may be held upon not less than one day's notice) issue preferred stock in such amount and with such par value as shall be approved by said Commissioner of Banks. A copy of the minutes of such directors' and stockholders' meetings, certified by the proper officer and under the corporate seal of the bank, and accompanied by the written approval of the Commissioner of Banks shall be immediately filed in the office of the Secretary of State, and when so filed, shall be deemed and treated as an amendment to the articles of incorporation of such bank.

No issue of preferred stock shall be valid until the par value of all stock so issued shall have been paid for in full in cash or in such manner as may be specifically approved by the Commissioner of Banks. (1933, c. 155, s. 7.)

§ 53-155. Rights and liabilities of preferred stockholders. — The holders of such preferred stock shall be entitled to cumulative dividends payable at a rate not exceeding six per centum (6%) per annum, but shall not be held individually responsible as such holders for any debts, contracts or engagements of such bank, and shall not be liable for assessments to restore impairments in the capital of such banks as now provided by law with reference to holders of common stock in banks. Notwithstanding any other provisions of law, the holders of such preferred stock shall have such voting rights and such stock shall be subject to retirement in such manner and on such terms and conditions as may be provided in the articles of incorporation or any amendment thereto, with the approval of the Commissioner of Banks.

No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and if the bank is placed in liquidation, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock and all accumulated dividends. (1933, c. 155, s. 8.)

§ 53-156. Term "stock" not to include preferred stock; latter not to be used as collateral for loans. — Wherever in existing banking law, the words "stock," "stockholders," "capital" or "capital stock" are used, the same shall not be deemed to include preferred stock: Provided, that no bank issuing preferred stock under the provisions hereof, shall be permitted at any time to make loans upon such preferred stock; provided further that in determining whether or not the minimum capital or capital stock required in G.S. 53-2, 53-11, 53-62 and 53-139, has been supplied to such bank or banking corporation, the Commissioner of Banks shall include preferred stock as capital or capital stock. (1933, c. 155, s. 9; 1935, c. 80; 1953, c. 675, s. 5.)

§ 53-157. Rights and liabilities of conservator. — The conservator appointed pursuant to the provisions of this Article shall be subject to the provisions of and to the penalties prescribed by G.S. 53-43, 53-129, and 53-131. (1933, c. 155, s. 10.)

§ 53-158. Naming of conservator not liquidation. — No power conferred in this Article upon the Commissioner of Banks, when exercised, shall be deemed an act of possession for the purposes of liquidation; and whenever the Commissioner of Banks shall, with reference to any bank for which a conservator is appointed, deem that liquidation is necessary, he shall exercise the powers for the purposes of liquidation as provided in G.S. 53-20 as amended. (1933, c. 155, s. 11.)

ARTICLE 14.

Banks Acting in a Fiduciary Capacity.

§ 53-159. Banks may act as fiduciary. — Any bank licensed by the Commissioner of Banks, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this State without giving any bond; and the clerks of the superior courts, or other officers charged with the duty or clothed with the power of making such appointments, are authorized to appoint such bank to any such office. (1945, c. 743, s. 1.)

Stated in Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

§ 53-159.1. Power of fiduciary or custodian to deposit securities in a clearing corporation. — Notwithstanding any other provision of law, any fiduciary holding securities in its fiduciary capacity, any bank or trust company holding securities in a fiduciary capacity or as a custodian or agent is authorized to deposit or arrange for the deposit of such securities in a clearing corporation as defined in G.S. 25-8-102(3). When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank or trust company acting as a fiduciary or as a custodian or managing agent shall at all times show the name of the party for whose account the securities are so deposited. Title to such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank or trust company so depositing securities pursuant to this section shall be subject to such rules and regulations as, in the case of State-chartered institutions, the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency may from time to time issue. A bank or trust company acting as custodian or agent for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary. This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank or trust company holding securities as a fiduciary or as a custodian or managing agent acting on May 15, 1973, or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not such fiduciary, custodian or agent owns capital stock of such clearing

corporation. The fiduciary shall personally be liable for any loss to the trust resulting from an act of such nominee in connection with such securities so deposited. (1973, c. 497, s. 4.)

§ 53-160. License to do business. — Before any such bank is authorized to act in any fiduciary capacity without bond, it must be licensed by the Commissioner of Banks of the State. For such license the licensee shall pay to the State Banking Commission an annual license fee of two hundred dollars ($200.00), which shall be remitted to the State Treasurer for the use of the Commissioner of Banks in the supervision of banks acting in a fiduciary capacity, insofar as it may be necessary, and the surplus, if any, shall remain in the State treasury for the use of the general fund of the State: Provided, however, that a national bank which has been granted trust powers by the Comptroller of the Currency or his duly authorized agent shall be annually licensed as required in this section and shall be granted a certificate of solvency which will meet the provisions of G.S. 53-162 without examination by the Commissioner of Banks as required in G.S. 53-161. (1945, c. 743, s. 1; 1967, c. 789, s. 20.)

§ 53-161. Examination as to solvency. — The Commissioner of Banks shall examine into the solvency of such bank, and shall, if he deem it necessary, at the expense of the bank, make or cause to be made an examination at its home office of its assets and liabilities. (1945, c. 743, s. 1.)

§ 53-162. Certificate of solvency. — After any such bank has been licensed by the Commissioner of Banks, a certificate issued by the Commissioner of Banks, showing the bank to be solvent to an amount not less than one hundred thousand dollars ($100,000), shall authorize such bank to act in a fiduciary capacity without bond. There shall be no charge for the seal of this certificate. (1945, c. 743, s. 1.)

§ 53-163. Clerk of superior court notified of license and revocation. — The Commissioner of Banks, upon granting license to any such bank, shall immediately notify the clerk of the superior court of each county in the State that such bank has been licensed under this Article, and, whenever the Commissioner of Banks is satisifed that any bank licensed by him has become insolvent, or is in imminent danger of insolvency, he shall revoke the license granted to such bank and notify the clerk of the superior court of each county in the State of the revocation. After such notification, the right of any such bank to act in a fiduciary capacity shall cease. (1945, c. 743, s. 1.)

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-164. Title. — This Article shall be known and may be cited as the North Carolina Consumer Finance Act. (1961, c. 1053, s. 1.)

Cross Reference. — As to effect of secured transaction provisions of Uniform Commercial Code, see § 25-9-201.

Editor's Note. — Session Laws 1961, c. 1053, s. 3, provides that all laws and clauses of laws in conflict with this Article are hereby repealed; provided, however, G.S. 105-88 is not hereby repealed; provided G.S. 14-391 shall not be applicable to persons licensed under this Article; and, provided, further, all other laws and provisions of laws repealed by this Article shall, notwithstanding, continue in force and effect with respect to all acts prohibited or required to be performed pursuant thereto prior to August 18, 1961.

Session Laws 1961, c. 1053, s. 4, provides that no person, as defined in G.S. 53-165, who does not have a permit or license to engage in the business regulated by Article 15 of Chapter 53 of the General Statutes on June 19, 1961, shall be issued any such permit or license within 60 days after such ratification.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-165. Definitions. — (a) "Amount of the loan" shall mean the aggregate of the cash advance and the charges authorized by G.S. 53-173.

(b) "Borrower" shall mean any person who borrows money from any licensee or who pays or obligates himself to pay any money or otherwise furnishes any valuable consideration to any licensee for any act of the licensee as a licensee.

(c) "Cash advance" shall mean the amount of cash or its equivalent that the borrower actually receives or is paid out at his discretion or on his behalf.

(d) "Commission" shall mean the State Banking Commission.

(e) "Commissioner" shall mean the Commissioner of Banks.

(f) "Deputy commissioner" shall mean the deputy commissioner of banks.

(g) "License" shall mean the certificate issued by the Commissioner under the authority of this Article to conduct a consumer finance business.

(h) "Licensee" shall mean a person to whom one or more licenses have been issued.

(i) "Loanable assets" shall mean cash or bank deposits or installment loans made as a licensee pursuant to this Article or installment loans made as a licensee pursuant to the Article which this Article supersedes or such other loans payable on an installment basis as the Commissioner of Banks may approve, or any combination of two or more thereof.

(j) "Person" shall include any person, firm, partnership, association or corporation. (1957, c. 1429, s. 1; 1961, c. 1053, s. 1.)

§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void. — (a) Scope. — No person shall engage in the business of lending in amounts of fifteen hundred dollars ($1,500) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter 24, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(b) Evasions. — The provisions of subsection (a) of this section shall apply to any person who seeks to avoid its application by any device, subterfuge or pretense whatsoever.

(c) Penalties; Commissioner to Provide and Testify as to Facts in His Possession. — Any person not exempt from this Article, or any officer, agent, employee or representative thereof, who fails to comply with or who otherwise violates any of the provisions of this Article, or any regulation of the Banking Commission adopted pursuant to this Article, shall be guilty of a misdemeanor and upon conviction shall be fined not less than five hundred dollars ($500.00) nor more than twenty-five hundred dollars ($2,500) or imprisoned not less than four months nor more than two years, or both, in the discretion of the court. Each such violation shall be considered a separate offense. It shall be the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any such offense with all facts and evidence in his actual or constructive possession, and to testify as to such facts upon the trial of any person for any such offense.

(d) Additional Penalties. — Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation shall be void and the licensee shall have no right to collect, receive or retain any principal or charges whatsoever with respect to such loan. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 14; 1973, c. 47, s. 2; c. 1042, s. 1.)

Editor's Note. — The first 1973 amendment substituted "district attorney" for "solicitor" in the third sentence of subsection (c).

The second 1973 amendment substituted "fifteen hundred dollars ($1,500)" for "nine hundred dollars ($900.00)" and "Chapter 24" for "G.S. 24-1.1" in subsection (a).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

All loan agencies subject to the provisions of § 105-88 are not subject to the provisions of the Consumer Finance Act. Section 105-88 applies to all the loan agencies specified therein, irrespective of the amounts which they loan or the interest they charge. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

And Act Does Not Apply to Insurance Premium Finance Companies. — Had the legislature intended to subject to the provisions of the Consumer Finance Act those who make loans solely to finance insurance premiums, surely it would not have enacted Article 4 of Chapter 58 in the first instance since it exempts from its provisions those subject to the Consumer Finance Act. The legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-167. Expenses of supervision. — Each licensee, for the purpose of defraying necessary expenses of the Commissioner of Banks and his agents in supervising them, shall pay to the Commissioner of Banks the fees prescribed in G.S. 53-122 at the times therein specified. (1955, c. 1279; 1957, c. 1429, s. 1; 1961, c. 1053, s. 1.)

Fee Is in Addition to Privilege Tax. — In addition to the fee required by this section, each licensee under the Consumer Finance Act also pays the $750.00 privilege tax exacted by § 105-88. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

And Is Intended to Pay Expenses of Supervision. — The fees exacted of insurance premium financiers by § 58-56 and of persons engaged in business under the Consumer Finance Act by this section are intended to pay the necessary expenses of licensing, regulating, and supervising the business. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-168. License required; showing of convenience, advantage and financial responsibility; investigation of applicants; hearings; existing businesses; contents of license; transfer; posting. — (a) Necessity for License; Prerequisites to Issuance. — No person shall engage in or offer to engage in the business regulated by this Article unless and until a license has been issued by the Commissioner of Banks, and the Commissioner shall not issue any such license unless and until he finds:

(1) That authorizing the applicant to engage in such business will promote the convenience and advantage of the community in which the applicant proposes to engage in business; and

(2) That the financial responsibility, experience, character and general fitness of the applicant are such as to command the confidence of the public and to warrant the belief that the business will be operated lawfully and fairly, within the purposes of this Article; and

(3) That the applicant has available for the operation of such business at the specified location loanable assets of at least twenty-five thousand dollars ($25,000).

(b) Investigation of Applicants. — Upon the receipt of an application, the Commissioner shall investigate the facts. If the Commissioner determines from such preliminary investigation that the applicant does not satisfy the conditions set forth in subsection (a), he shall so notify the applicant who shall then be entitled to a hearing thereon provided he so requests in writing within 30 days after the Commissioner has caused the above-referred to notification to be mailed to the applicant. In the event of a hearing, to be held in the offices of the Commissioner of Banks in Raleigh, the Commissioner shall reconsider the application and, after the hearing, issue a written order granting or denying such

application. At the time of making such application, the applicant shall pay the Banking Department the sum of one hundred dollars ($100.00) as a fee for investigating the application, which shall be retained irrespective of whether or not a license is granted the applicant.

(c) Existing Business. — Notwithstanding the provisions of this section, any person, firm or corporation which, on December 31, 1973, was a licensee under this Article either as a licensee to make loans under the provisions of G.S. 53-173 or as a motor vehicle lender under G.S. 53-176.1, may surrender such license to the Commissioner within 90 days after May 25, 1974, and elect to become a licensee to make loans under either G.S. 53-173 or G.S. 53-176.1 but not both. Such license shall be issued by the Commissioner without further application or investigation and the licensee shall be deemed a licensee under the category that it elects upon the surrender of its current license and the election.

(d) Required Assets Available. — Each licensee shall continue at all times to have available for the operation of the business at the specified location loanable assets of at least twenty-five thousand dollars ($25,000). The requirements and standards of this subsection and subsection (a)(2) of this section shall be maintained throughout the period of the license and failure to maintain such requirements or standards shall be grounds for the revocation of a license under the provisions of G.S. 53-171 of this Article.

(e) License, Posting, Continuing. — Each license shall state the address at which the business is to be conducted and shall state fully the name of the licensee, and if the licensee is a copartnership, or association, the names of the members thereof, and if a corporation, the date and place of its incorporation. Transfer or assignment of a license by one person to another by sale or otherwise is prohibited without the prior approval of the Commissioner. Each license shall be kept posted in the licensed place of business. Each license shall remain in full force and effect until surrendered, revoked, or suspended as hereinafter provided. (1961, c. 1053, s. 1; 1969, c. 1303, s. 15; 1973, c. 1042, s. 2.)

Editor's Note. — The 1973 amendment rewrote subsection (c).

§ 53-169. Application for license. — The application for license shall be made on a form prepared and furnished by the Commissioner of Banks and shall state:

(1) The fact that the applicant desires to engage in business under this Article; and
(2) Whether the applicant is an individual, partnership, association or corporation; and
(3) The name and address of the person who will manage and be in immediate control of the business; and
(4) The name and address of the owners and their percentage of equity in the company, except when the Commissioner does not deem it feasible to furnish such information because of the number of stockholders involved; and
(5) When the applicant proposes to commence doing business; and
(6) Such other information as the Commissioner of Banks deems necessary.

The statements made in such application shall be sworn to by the applicant or persons making application on the applicant's behalf. (1961, c. 1053, s. 1.)

§ 53-170. Locations; change of ownership or management. — (a) Business Location. — A licensee may conduct and carry on his business only at such location or locations as may be approved by the Commissioner of Banks, and no changes shall be made from one location to another without the approval of the Commissioner.

(b) Additional Places of Business. — Not more than one place of business shall be maintained under the same license, but the Commissioner may issue more than one license to the same licensee upon compliance with all the provisions of this Article governing issuance of a single license.

(c) Change of Location, Ownership or Management. — If any change occurs in the name and address of the licensee or of the president, secretary or agent of a corporation, or in the membership of any partnership under said sections, a true and full statement of such change, sworn to in the manner required by this Article in the case of the original application, shall forthwith be filed with the Commissioner. (1961, c. 1053, s. 1.)

§ 53-171. Revocation, suspension or surrender of license. — (a) If the Commissioner shall find, after due notice and hearing, or opportunity for hearing, that any such licensee, or an officer, agent, employee, or representative thereof has violated any of the provisions of this Article, or has failed to comply with the rules, regulations, instructions or orders promulgated by the Commission pursuant to the powers and duties prescribed therein, or has failed or refused to make its reports to the Commissioner, or has failed to pay the fees for its examination and supervision, or has furnished false information to the Commissioner or the Commission, the Commissioner may issue an order revoking or suspending the right of such licensee and such officer, agent, employee or representative to do business in North Carolina as a licensee, and upon receipt of such an order from the Commissioner, the licensee shall immediately surrender his license to the Commissioner. Within five days after the entry of such an order the Commissioner shall place on file his findings of fact and mail or otherwise deliver a copy to the licensee. Any licensee who fails to make any loans during any period of 90 consecutive days after being licensed shall surrender his license to the Commissioner.

(b) Any licensee may surrender any license by delivering it to the Commissioner with written notice of its surrender, but such surrender shall not affect his civil or criminal liability for acts committed prior thereto.

(c) No revocation, suspension or surrender of any license shall impair or affect the obligation of any preexisting lawful contract between the licensee and any obligor.

(d) The Commissioner, in his discretion, may reinstate suspended licenses or issue new licenses to a person whose license or licenses have been revoked, or surrendered if and when he determines no fact or condition exists which clearly would have justified the Commissioner in refusing originally to issue such license under this Article. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-172. Conduct of other business in same office. — No licensee shall conduct the business of making loans under this Article within any office, suite, room, or place of business in which any other business is solicited or engaged in unless, in the opinion of the Commissioner, such other business would not be contrary to the best interests of the borrowing public and is authorized by the Commissioner in writing.

If the conduct of any other business authorized by the Commissioner should, in the opinion of the Commissioner, prove contrary to the best interests of the borrowing public, the authority granted to conduct such business shall be withdrawn in writing by the Commissioner.

Installment paper dealers as defined in G.S. 105-83, and the collection by a licensee of loans legally made in North Carolina, or another state by another government regulated lender or lending agency, shall not be considered as being any other business within the meaning of this section. This section shall not be construed as authorizing the collection of any loans or charges in violation of the prohibitions contained in G.S. 53-190. The books, records, and accounts relating to loans shall be kept in such manner as the Commissioner of Banks

prescribes as to delineate clearly the loan business from any other business authorized by the Commissioner. (1961, c. 1053, s. 1; 1967, c. 769, s. 1; 1971, c. 1212.)

§ 53-173. Maximum rate of charge; computation of charges; limitation on interest after judgment; limitation on interest after maturity of the loan; inapplicability of other sections. — (a) Maximum Rate of Charge. — Every licensee hereunder may contract for, compute, and receive on any loan of money, not exceeding fifteen hundred dollars ($1,500) in amount, charges at rates not exceeding two and one-half percent (2 1/2%) per month on that part of the unpaid principal balance of any loan not in excess of three hundred dollars ($300.00) and one and one-half percent (1 1/2%) per month on any remainder of such unpaid principal balance.

(b) Computation of Charges. — Charges on loans made pursuant to this section shall not be paid, deducted, or received in advance. Such charges shall not be compounded but charges on loans shall (i) be computed and paid only as a percentage of the unpaid principal balance or portion thereof and (ii) computed on the basis of the number of days actually elapsed; provided, however, if part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan, then the principal amount payable under the loan contract may include any unpaid charges on the prior loan which have accrued within 90 days before the making of the new loan contract. For the purpose of computing charges, a month shall be that period of time from one date in a month to the corresponding date in the following month but if there is no corresponding date, then to the last day of such following month, and a day shall be one thirtieth of a month where computation is made for a fraction of a month. Any payment made on a loan shall be applied first to any accrued interest and then to principal, and any portion or all of the principal balance may be prepaid at any time without penalty.

(c) Limitation on Interest after Judgment. — If judgment be obtained against any party on any loan made under the provisions of this section neither the judgment nor the loan shall carry, from the date of the judgment, any interest in excess of six percent (6%) per annum.

(d) Limitation of Interest after Maturity of Loan. — After the maturity date of any loan contract made under the provisions of this section and until the loan contract is paid in full by cash, new loan, refinancing or otherwise, no charges other than interest at six percent (6%) per annum shall be computed or collected from any party to the loan upon the unpaid principal balance of the loan.

(e) Inapplicability of Other Sections. — The provisions of G.S. 53-173.1, G.S. 53-174 and G.S. 53-175 shall not apply to any loan made pursuant to the provisions of this section.

(f) Subject to the limitations contained in this Article as to maximum rates, the Commission may from time to time, upon the basis of changed conditions or facts, redetermine and refix any such maximum rates of charge, but, before determining or redetermining any such maximum rates, the Commission shall give reasonable notice of its intention to consider doing so to all licensees and a reasonable opportunity to be heard and introduce evidence with respect thereto. The notice herein required may be given by mailing such notice to the offices of the licensees as shown in the records of the Commissioner of Banks. Any such changed maximum rates of charge shall not affect preexisting loan contracts lawfully entered into between any licensee and any borrower. (1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 17-22; 1973, c. 1042, s. 3.)

Editor's Note. — The 1973 amendment rewrote this section.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 76 (1969). For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

Small loan operations are subject to state regulation, and enjoy the higher interest rates

allowed by this section. Generally speaking, their loans under $900 are allowed to be made at interest rates substantially higher than rates allowed to other lenders. United States v. Wachovia Corp., 313 F. Supp. 632 (W.D.N.C. 1970).

§ 53-173.1. Computations; other procedures. — Every loan made pursuant to the provisions of this Article other than G.S. 53-173 shall be repayable in substantially equal consecutive monthly installments, and subject to the following:

(1) The charge for payment according to schedule shall be computed at the time the loan is made and when computed shall be added to the cash advance. A licensee shall compute monthly charges for a period of time less than one year at one twelfth of the annual rate for each loan month and shall compute charges for a period of less than one loan month at one thirtieth of one twelfth of the annual rate for each day. A loan month is that period of time from one date in the month through the corresponding date in the next month. If there is no corresponding date, then the last day of the next month will be used. All payments made on account, except those applied to default or deferment charges, shall be applied to the unpaid installments in the order in which they are due.

(2) The licensee shall not fix a due date of the first installment of any loan contract providing for monthly installments for a term exceeding 45 actual days from the date of the loan. When the first payment of any such contract may be due on a date beyond a loan month defined above, a licensee will be permitted to make an additional charge for the number of days in excess of 30 or the number of days in excess of one loan month from the date of the loan, whichever is less. The charge for the extra days may be added to the amount of the first installment and shall be excluded in computing any rebate.

(3) If, as of an installment due date the payment dates of all unpaid installments are deferred for one or more full months and the maturity of the contract is extended for a corresponding period, the licensee may charge and collect a deferment charge, which shall not exceed that portion of the charge for payment according to schedule originally added to the cash advance attributable under the rule of 78's or the sum of the digits principle to the first of the deferred monthly installment periods multiplied by the number of months in which no schedule payment has been made or in which no payment is required by reason of the deferment. The Banking Commission may promulgate any further rules and regulations which may be necessary with regard to the provisions of this subdivision. (1973, c. 1042, s. 4.)

§ 53-173.2. Special rate. — In lieu of making loans pursuant to G.S. 53-173, a licensee may make loans at a rate not in excess of one dollar ($1.00) for each five dollars ($5.00) of cash advance to the borrower up to the amount of one hundred dollars ($100.00) and a period of at least 15 days must be allowed for repayment of each five dollars' ($5.00) cash advance. Such charges shall not be assessed by any subterfuge or device on any loan over one hundred dollars ($100.00) or on any balance of one hundred dollars ($100.00) or less when the original loan was greater than one hundred dollars ($100.00). Provided, however, that if there is an unpaid balance on a loan made under this section, no further loan can be made by the licensee to the borrower until the unpaid balance has been paid in full. (1973, c. 1042, s. 9.)

§ 53-174. Refund. — When any loan contract is paid in full by cash, a new loan, renewal or otherwise, after three loan months have expired, the licensee shall refund or credit the borrower with that portion of the total charges which

shall be due the borrower as determined by schedules prepared under the rule of 78's or sum of the digits principle as follows:

"The amount of the refund or credit shall be at least as great a proportion of the total charges originally contracted for, excluding any adjustment made for a first period of more than one month, as the sum of the consecutive monthly balances of the contract schedules to follow the date of prepayment bears to the sum of all the consecutive monthly balances of the contract, those sums to be determined according to the payment schedule originally contracted for." If a loan is prepaid in full by cash, a new loan, renewal or otherwise, two loan months or less from the date of the contract, the licensee shall make a pro rata refund of the charges to the borrower or shall credit such amount to the borrower. In computing any required refund, any prepayment made on or before the 15th day following an installment date shall be deemed to have been made on the installment date preceding such prepayment and any prepayment made after the 15th day following an installment date shall be deemed to have been made on the installment date following such installment; provided, such computation shall not result in refunds by the rule of 78's method on loans prepaid three loan months or less from the date of the contract. When loans are prepaid 15 days or less from the date the loan is made, licensees are authorized in computing refunds to divide the original add-on charge by that figure which represents the number of loan months in the contract. The original add-on charges less the resultant quotient shall constitute the amount of the refund; provided, whenever the resultant quotient is less than two dollars ($2.00), the minimum charge shall be fixed at two dollars ($2.00) or the total original add-on charges, whichever is the lesser. The tender by the borrower, or at his request, of an amount equal to the unpaid balance less the required refund must be accepted by the licensee in full payment of the contract. (1961, c. 1053, s. 1; 1969, c. 1303, s. 14.1.)

§ 53-175. Default charge. — (a) If the contract so provides, an additional charge for any installment past due 10 days or more according to the original terms of the contract by reason of default may be made in an amount not to exceed five percent (5%) of the amount of the installment past due and said amount may be charged once and no more on the same default; provided, that if such charge is deducted from a payment made on the loan and such deduction results in a default of a subsequent installment, no charge shall be made for such subsequent default; provided, further, that once a borrower has incurred a default charged pursuant to this section, no default charge shall be incurred with respect to any future payments which would not have been in default except for the previous default.

(b) If there is an unpaid balance on a loan at the maturity date as originally scheduled or as deferred, an additional charge at a rate not to exceed six percent (6%) per annum may be charged on the outstanding balance until the loan is paid in full by cash, a new loan, renewal or otherwise. (1961, c. 1053, s. 1; 1969, c. 1303, s. 23.)

§ 53-176. Optional rates, maturities and amounts. — In lieu of making loans in the amount, for the term and at the charges stated respectively in G.S. 53-166, 53-173 and 53-180, a licensee may at any time elect to make loans in installments not exceeding five thousand dollars ($5,000) and which shall not be repayable in less than six months or more than 60 months and which shall not be secured by first deeds of trust or first mortgages on real estate and which are repayable in substantially equal consecutive monthly payments and to charge and collect interest in connection therewith which shall not exceed an effective rate of fifteen percent (15%) per annum upon the outstanding balance: Provided, however, a minimum charge of ten dollars ($10.00) or one dollar ($1.00) per payment may be agreed to and charged in lieu of interest. The due date of the

first monthly payment shall not be more than 45 days following the disbursement of funds under any such installment loan. A borrower under this section may prepay all or any part of a loan made under this section without penalty. Such election shall be made by the filing of a written statement to that effect by the licensee with the Commissioner and can be terminated by cancellation notice filed by the licensee in writing with the Commissioner.

No individual, partnership, or corporate licensee and no corporation which is the parent, subsidiary or affiliate of a corporate licensee which is making loans under this Article otherwise than as authorized specially in this section, shall be permitted to make loans under the provisions of this section. Any corporate licensee or individual or partnership licensee making an election to make loans in accordance with the provisions of this section shall respectively be bound by such election with respect to all of its offices and locations in this State and all offices and locations in this State of its parent, subsidiary or affiliated corporate licensee, or with respect to all of his or their offices and locations in this State. (1961, c. 1053, s. 1; 1969, c. 1303, s. 12.1.)

§ 53-176.1. Motor vehicle lenders. — (a) Any person applying for a license as a motor vehicle lender shall meet all the requirements of G.S. 53-168. A "motor vehicle lender" shall mean any person, firm or corporation licensed under this Article to make loans to borrowers, as authorized in this section, secured by a security interest in a motor vehicle, and whose license shall indicate on the face thereof that such licensee is a motor vehicle lender. A motor vehicle lender is permitted to make loans only under the provisions of this section. No office holding a license under the provisions of this section and making loans secured by motor vehicles may make loans under the provisions of G.S. 53-166, G.S. 53-173, G.S. 53-180, or G.S. 53-141, nor shall such office allow or permit loans under the other provisions of this Article to be made on its premises or any connecting premises. All other provisions of this Article not inconsistent with this section shall apply to a "motor vehicle lender."

(b) A motor vehicle lender may make loans in any amount at rates not exceeding fifteen dollars ($15.00) per hundred dollars per annum on that part of the cash advance not exceeding five hundred dollars ($500.00); eleven dollars ($11.00) per one hundred dollars per annum on that part of the cash advance exceeding five hundred dollars ($500.00) but not exceeding one thousand dollars ($1,000); and nine dollars ($9.00) per one hundred dollars per annum on that part of the cash advance exceeding one thousand dollars ($1,000) but not exceeding fifteen hundred dollars ($1,500). Rates on any cash advance in excess of fifteen hundred dollars ($1,500) shall not exceed the equivalent of sixteen percent (16%) simple interest per annum on the entire amount of the cash advance, provided, that loans made pursuant to this section shall not exceed the sum of five thousand dollars ($5,000) and shall not exceed a term of 48 months, and shall be secured solely by motor vehicles. (1969, c. 1303, s. 16; 1973, c. 1042, s. 5.)

Editor's Note. — The 1973 amendment deleted the former first sentence of subsection (a), relating to persons holding a license on Jan. 1, 1969, issued pursuant to § 105-88, and deleted "Following such sixty-day period" at the beginning of the present first sentence of subsection (a).

§ 53-177. Recording fees. — The licensee may collect from the borrower the actual fees paid a public official or agency of a county or the State, for filing, recording, or releasing any instrument securing the loan. A licensee shall not collect or permit to be collected any notary fee in connection with any loan made under this Article. In lieu of recording any instrument and in lieu of collecting any recording fee herein authorized, a lender may take out nonrecording or nonfiling insurance on the instrument securing the loan and charge to the

borrower the amount of the premium as fixed by the Commissioner of Insurance, but the amount so charged to the borrower shall not in any event exceed sixty cents (60¢) with respect to any one loan. (1961, c. 1053, s. 1.)

§ 53-178. No further charges; no splitting contracts; certain contracts void. — No further or other charges or insurance commissions shall be directly or indirectly contracted for or received by any licensee except those specifically authorized by this Article. No licensee shall divide into separate parts any contract made for the purpose of or with the effect of obtaining charges in excess of those authorized by this Article. All balances due to a licensee from any person as a borrower or as an endorser, guarantor or surety for any borrower or otherwise, or due from any husband or wife, jointly or severally, shall be considered a part of any loan being made by a licensee to such person for the purpose of computing interest or charges. (1961, c. 1053, s. 1.)

Editor's Note. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-179. Multiple-office loan limitations. — A licensee shall not grant a loan in one office to any borrower who already has a loan in another office operated by the same entity or by an affiliate, parent, subsidiary or under the same ownership, management or control, whether partial or complete. This section shall apply to intrastate and interstate operations. A licensee shall take every reasonable precaution to prevent granting loans in violation of this section. Such loans granted inadvertently resulting in a total liability of fifteen hundred dollars ($1,500) or less, shall be adjusted to the rates applicable under the Article to a single loan of equivalent amount, and when the total liability on such loans is in excess of fifteen hundred dollars ($1,500), interest shall be adjusted to simple interest at six percent (6%) per annum on the entire obligation. (1961, c. 1053, s. 1; 1969, c. 1303, s. 13; 1973, c. 1042, s. 6.)

Editor's Note. — The 1973 amendment substituted "fifteen hundred dollars ($1,500)" for "nine hundred dollars ($900.00)" in two places in the last sentence and made minor changes in wording in that sentence.

§ 53-180. Limitations and prohibitions on practices and agreements. — (a) Time and Payment Limitation. — Except as otherwise provided in this Article, no licensee making a loan pursuant to G.S. 53-173 shall enter into any contract of loan under this Article providing for any scheduled repayment of principal more than 25 months from the date of making the contract if the cash advance is six hundred dollars ($600.00) or less; nor more than 37 months from the date of making the contract if the cash advance is in excess of six hundred dollars ($600.00). Every loan contract shall provide for repayment of the amount loaned in substantially equal installments, either of principal or of principal and charges in the aggregate, at approximately equal periodic intervals of time. Nothing contained herein shall prevent a loan being considered a new loan because the proceeds of the loan are used to pay an existing contract.

(b) No Assignment of Earnings. — A licensee may not take an assignment of earnings of the borrower for payment or as security for payment of a loan. An assignment of earnings in violation of this section is unenforceable by the assignee of the earnings and is revocable by the borrower. A sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings is deemed to be a loan to the seller by an assignment of earnings.

(c) Limitation on Default Provisions. — An agreement between a licensee and a borrower pursuant to a loan under this Article with respect to default by the borrower is enforceable only to the extent that (i) the borrower fails to make a payment as required by the agreement, or (ii) the prospect of payment, performance, or realization of collateral is significantly endangered or impaired, the burden of establishing the prospect of a significant endangerment or impairment being on the licensee.

(d) Prohibitions on Discrimination — No licensee shall deny any extension of credit or discriminate in the fixing of the amount, duration, application procedures or other terms or conditions of such extension of credit because of the race, color, religion, national origin, sex or marital status of the applicant or any other person connected with the transaction.

(e) Limitation on Attorney's Fees. — With respect to a loan made pursuant to the provisions of G.S. 53-173, the agreement may not provide for payment by the borrower of attorney fees.

(f) No Real Property as Security. — No loan made pursuant to the provisions of G.S. 53-173 shall be secured in any way by an interest in real property.

(g) Deceptive Acts or Practices. — No licensee shall engage in any unfair method of competition or unfair or deceptive trade practices in the conduct of making loans to borrowers pursuant to this Article or in collecting or attempting to collect any money alleged to be due and owing by a borrower. (1961, c. 1053, s. 1; 1969, c. 1303, s. 24; 1973, c. 1042, s. 7.)

Editor's Note. — The 1973 amendment rewrote the former provisions of this section as present subsection (a) and added the remainder of the section.

§ 53-181. Statements and information to be furnished to borrowers; power of attorney or confession of judgment prohibited. — (a) Contents of Statement Furnished to Borrower. — At the time a loan is made, the licensee shall deliver to the borrower, or if there be two or more borrowers, to one of them a copy of the loan contract, or a written statement, showing in clear and distinct terms:

(1) The name and address of the licensee and one of the primary obligors on the loan;
(2) The date of the loan contract;
(3) Schedule of installments or descriptions thereof;
(4) The cash advance;
(5) The face amount of the note evidencing the loan;
(6) The amount collected or paid for insurance, if any;
(7) The amount collected or paid for filing or other fees allowed by this Article;
(8) The collateral or security for the loan.

(b) Schedule of Charges, etc., to Be Made Available; Copy Filed with Commissioner. — Each licensee doing business in North Carolina shall make readily available to the borrower at each place of business such full and accurate schedule of charges and insurance premiums, including refunds and rebates, on all classes of loans currently being made by such licensee, as the Commissioner shall prescribe, and a copy thereof shall be filed in the office of the Commissioner of Banks.

(c) Power of Attorney or Confession of Judgment Prohibited. — No licensee shall take any confession of judgment or permit any borrower to execute a power of attorney in favor of any licensee or in favor of any third person to confess judgment or to appear for the borrower in any judicial proceeding and any such confession of judgment or power of attorney to confess judgment shall be absolutely void. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-182. Payment of loans; receipts. — (a) After each payment made on account of any loan, the licensee shall give to the person making such payment a signed, dated receipt showing the amount paid and the balance due on the loan. No receipt shall be required in the case of payments made by the borrower's check or money order, where the entire proceeds of the check or money order are applied to the loan. The use of a coupon book system shall be deemed in compliance with this section.

(b) Upon payment of any loan in full, a licensee shall cancel and return to the borrower, within a reasonable length of time, any note, assignment, mortgage, deed of trust, or other instrument securing such loan, which no longer secures any indebtedness of the borrower to the licensee. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-183. Advertising, broadcasting, etc., false or misleading statements. — No licensee subject to this Article shall advertise, display, distribute, telecast, or broadcast or cause or permit to be advertised, displayed, distributed, telecasted, or broadcasted, in any manner whatsoever, any false, misleading, or deceptive statement or representation with regard to the rates, terms, or conditions of loans. The Commissioner may require that charges or rates of charge, if stated by a licensee, be stated fully and clearly in such manner as he may deem necessary to prevent misunderstanding thereof by prospective borrowers. The Commissioner may permit or require licensees to refer in their advertising to the fact that their business is under State supervision, subject to conditions imposed by him to prevent an erroneous impression as to the scope or degree of protection provided by this Article. (1957, c. 1429, s. 3; 1961, c. 1053, s. 1.)

§ 53-184. Securing of information; records and reports; allocations of expense. — (a) Each licensee shall maintain in his local office all records required by the Commissioner of Banks to be kept, and the Commissioner, his deputy, or duly authorized examiner or agent or employee is authorized and empowered to examine such records at any reasonable time.

(b) Each licensee shall file annually with the Commissioner of Banks on or before the thirty-first day of March for the 12 months' period ending the preceding December 31, reports on forms prescribed by the Commissioner. Such reports shall disclose in detail and under appropriate headings the resources, assets and liabilities of such licensee at the beginning and at the end of the period, the income, expense, gain, loss, and a reconciliation of surplus or net worth with the balance sheets, the ratios of the profits to the assets reported, the monthly average number and amount of loans outstanding and a classification of loans made, by size and by security, and such other information as the Commissioner may require. Such reports shall be verified by the oath or affirmation of the owner, manager, president, vice-president, cashier, secretary or treasurer of such licensee.

(c) If a licensee conducts another business or is affiliated with other licensees under this Article, or if any other situation exists under which allocations of expense are necessary, the licensee or licensees shall make such allocation according to appropriate and reasonable accounting principles.

(d) If a licensee is affiliated with other licensees, all of the affiliated lenders shall file composite annual reports in addition to the separate reports required in subsection (b) of this section, in such form as the Commissioner may require. (1955, c. 1279; 1957, c. 1429, s. 4; 1961, c. 1053, s. 1.)

§ 53-185. Rules and regulations by Banking Commission and Commissioner. — The State Banking Commission is hereby authorized, empowered and directed to make all rules and regulations deemed by the Commission to be necessary in implementing this Article and in providing for the protection of the borrowing public and the efficient management of such

licensees and to give all necessary instructions to such licensees for the purpose of interpreting this Article; provided, the Commissioner is hereby authorized to make such rules and regulations and issue such orders as he deems necessary and desirable in implementing and carrying out the provisions of G.S. 53-184. And it shall be the duty of all such licensees, their officers, agents and employees, to comply fully with all such rules, regulations and instructions. When promulgated, any rule or regulation shall be forwarded by mail to each licensee at its licensed place of business at least 20 days prior to its effective date. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-186. Commissioner to issue subpoenas, conduct hearings, give publicity to investigations, etc. — The Commissioner of Banks shall have the power and duty to issue subpoenas including subpoenas duces tecum, and compel attendance of witnesses, administer oaths, conduct hearings and transcribe testimony in making the investigations and conducting the hearings provided for herein or in the other discharge of his duties, and to give such publicity to his investigations and findings as he may deem best for the public interest. (1957, c. 1429, s. 5; 1961, c. 1053, s. 1.)

§ 53-187. Injunctive powers; receivers. — Whenever the Commissioner has reasonable cause to believe that any person is violating or is threatening to violate any provision of this Article, he may in addition to all actions provided for in this Article, and without prejudice thereto, enter an order requiring such person to desist or to refrain from such violation; and an action may be brought in the name of the Commissioner on the relation of the State of North Carolina to enjoin such person from engaging in or continuing such violation or from doing any act or acts in furtherance thereof. In any such action an order or judgment may be entered awarding such preliminary or final injunction as may be deemed proper. In addition to all other means provided by law for the enforcement of a restraining order or injunction, the court in which such action is brought shall have power and jurisdiction to impound, and to appoint a receiver for the property and business of the defendant, including books, papers, documents and records pertaining thereto or so much thereof as the court may deem reasonably necessary to prevent violations of this Article through or by means of the use of said property and business. Such receiver, when appointed and qualified, shall have such powers and duties as to custody, collection, administration, winding up, and liquidation of such property and business as shall from time to time be conferred upon him by the court. (1957, c. 1429, s. 6; 1961, c. 1053, s. 1.)

§ 53-188. Review of regulations, order or act of Commission or Commissioner. — The Commission shall have full authority to review any rule, regulation, order or act of the Commissioner done pursuant to or with respect to the provisions of this Article and any person aggrieved by any such rule, regulation, order or act may appeal to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order or act complained of is adopted, issued or done. The validity of any rule, regulation, order or act of the Commission shall be subject to judicial review as provided in Chapter 150[A] of the General Statutes of North Carolina. (1957, c. 1429, s. 6; 1961, c. 1053, s. 1; 1973, c. 1331, s. 3.)

Editor's Note. — Pursuant to Session Laws 1973, c. 1331, s. 3, effective July 1, 1975, the reference to Chapter 150[A] has been substituted for a reference to Article 33, Chapter 143.

Cited in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965).

§ 53-189. Insurance. — (a) Credit Life Insurance. — The amount of credit life insurance shall not exceed the original indebtedness, but this insurance may be carried on the loan to maturity at level term.

(b) Credit Accident and Health Insurance. — The amount of periodic indemnity payable with respect to any one installment payment period by credit accident and health insurance in the event of disability, as defined in the policy, shall not exceed the original amount of the loan divided by the number of periodic installment payment periods, and such insurance shall not extend over any longer period of time than the loan contract.

(c) Group Contracts for Insurance; Insurance to Be Required of Only One Obligor. — Notwithstanding any other provision of this Article, a licensee may sell such insurance or provide the same under a group contract, subject to the applicable laws of the State relating to insurance. Any gain or advantage in the form of commission or otherwise, to the licensee or to any employee, affiliate, or associate of the licensee from such above-described insurance or its sale shall not be deemed to be an additional or further charge in connection with the contract of loan. No insurance authorized by subsections (a) and (b) of this section shall be required with respect to more than one obligor of any one loan contract.

(d) When Credit, etc., Insurance Not to Be Required.—Notwithstanding any other provisions of this Article, no licensee shall require any borrower to obtain credit accident and health insurance when a loan is secured by collateral consisting of personal property with respect to which property loss insurance has been required to be obtained.

(e) Credit Life and Property Loss Insurance. — No licensee shall, directly or indirectly, receive any commission, premium or profit from the sale of credit insurance except when issued in connection with a loan made pursuant to the provisions of this Article, nor shall any licensee directly or indirectly receive any commission, premium or profit from the sale of any property loss insurance except on property used as collateral to secure any such loan; provided, where a licensee requires any such insurance, the borrower may, if he chooses, purchase such insurance from a source other than the licensee; provided further, that property loss insurance can be required only on a loan secured by a motor vehicle or improved real estate.

(f) Sale to Comply with Chapter 58 of General Statutes. — Notwithstanding any other provisions of this section or Article, nothing herein contained shall be construed to authorize the sale of insurance in violation of any of the provisions of Chapter 58 of the General Statutes or the rules and regulations promulgated pursuant thereto. (1961, c. 1053, s. 1; 1969, c. 1303, s. 25.)

§ 53-190. Loans made elsewhere. — No loan contract made outside this State in the amount or of the value of fifteen hundred dollars ($1,500) or less for which a greater consideration or charges than are authorized by G.S. 53-173 of this Article have been charged, contracted for, or received shall be enforced in this State and every person in anywise participating therein in this State shall be subject to the provisions of this Article; provided, that the foregoing shall not apply to loans legally made in another state. No lender licensed to do business under this Article may collect, or cause to be collected, any loan made by a lender in another state to a borrower who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition. (1961, c. 1053, s. 1; 1967, c. 769, s. 2; 1969, c. 1303, s. 13; 1973, c. 1042, s. 8.)

Editor's Note. — The 1973 amendment substituted "fifteen hundred dollars ($1,500)" for "nine hundred dollars ($900.00)" near the beginning of the section.

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 53-191. Businesses exempted. — Nothing in this Article shall be construed to apply to any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations organized under the laws of North Carolina, production credit associations organized under the act of Congress known as the Farm Credit Act of 1933, pawnbrokers lending or advancing money on specific articles of personal property, industrial banks, the business of negotiating loans on real estate as defined in G.S. 105-41, nor to installment paper dealers as defined in G.S. 105-83 other than persons, firms and corporations engaged in the business of accepting fees for endorsing or otherwise securing loans or contracts for repayment of loans. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, s. 26.)

Editor's Note. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 16.

Sale of Checks Act.

§ 53-192. Citation of Article. — This Article shall be known and may be cited as the "Sale of Checks Act." (1963, c. 1251, s. 1.)

§ 53-193. Definitions. — For the purpose of this Article:

(1) "Person" means any individual, partnership, association, joint stock association, trust or corporation;

(2) "Licensee" means any person duly licensed by the Commissioner pursuant to this Article;

(3) "Check" means any check, draft, money order or other instrument for the transmission or payment of money;

(4) "Commissioner" means the Commissioner of Banks of the State of North Carolina. (1963, c. 1251, s. 2.)

§ 53-194. License required to sell or issue checks; exception. — No person shall sell or issue checks in this State as a service or for a fee or other consideration without first obtaining a license from the Commissioner pursuant to the provisions of this Article, provided, however, that this Article shall not apply to the receipt of money by an incorporated telegraph company at any office or agency of such company for immediate transmission by telegraph. (1963, c. 1251, s. 3.)

§ 53-195. Exemptions. — Nothing in this Article shall apply to the sale or issuance of checks by:

(1) Corporations organized under the general banking laws of this State or of the United States.

(2) The government of the United States or any department or agency thereof.

(3) Savings and loan associations organized under the laws of this State or of the United States. (1963, c. 1251, s. 4.)

§ 53-196. Form and contents of license applications. — Each application for a license to sell or issue checks in this State shall be made in writing and under oath to the Commissioner in such form as he may prescribe. The application shall state the full name and business address of

(1) The proprietor, if the applicant is an individual;

(2) Every member, if the applicant is a partnership or association, except that if the applicant is a joint stock association having 50 or more

members the name and business address need be given only of the association and each officer and director thereof;

(3) The corporation and each officer and director thereof, if the applicant is a corporation. (1963, c. 1251, s. 5.)

§ 53-197. Investigation fee. — Each application for a license shall be accompanied by an investigation fee of five hundred dollars ($500.00). If the license is granted, the investigation fee shall be applied to the license fee for the first year. No investigation fee shall be refunded. (1963, c. 1251, s. 6.)

Cited in Mathis v. Minnesota Mut. Life Ins. Co., 302 F. Supp. 998 (M.D.N.C. 1969).

§ 53-198. Approved applicants to furnish surety bonds; lists of locations; cancellation of bonds. — Each approved applicant shall furnish a corporate surety bond in the principal sum of one hundred and fifty thousand dollars ($150,000) and an additional principal sum of five thousand dollars ($5,000) for each location within this State at which checks of the licensee are issued or sold, but in no event shall the bond be required to be in excess of two hundred and fifty thousand dollars ($250,000). Each application for a license or for the renewal of a license shall be accompanied by a list of the locations, including agencies, at which the applicant engages in the business of selling checks in this State. The bond shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article and will honestly and faithfully apply all funds received and perform all obligations issued and sold under this Article and will pay to the State and to any person entitled thereto all money that becomes due and owing to the State or to such person under the provisions of this Article because of any checks issued or sold in this State by such licensee or his agent or employee. The bond shall remain in force and effect until canceled by the surety, which cancellation may be had only upon 30 days' written notice to the Commissioner. Such cancellation shall not affect any liability incurred or accrued prior to the termination of such 30-day period. (1963, c. 1251, s. 7.)

§ 53-199. Requiring additional bonds; deposits in lieu of bonds. — (a) If the Commissioner shall find at any time that any bond required under this Article is insecure, insufficient or exhausted, an additional bond to be approved by the Commissioner shall be filed by the licensee within 10 days after written demand therefor by the Commissioner.

(b) In lieu of any bond required under this Article, the licensee may deposit with the Commissioner securities with a par value equal to the amount of any such bond. Such securities shall consist of

(1) General obligations of or fully guaranteed by the United States or of any agency or instrumentality of or corporation wholly owned by the United States directly or indirectly; or

(2) Direct general obligations of the State of North Carolina, or of any county, city, town, or other political subdivision or municipal corporation of the State of North Carolina.

Such securities shall be held by the Commissioner to secure the same obligation as would any bond required by this Article. The securities so deposited may be exchanged from time to time for other securities receivable as aforesaid. All said securities shall be subject to sale and transfer and to the disposal of the proceeds by said Commissioner only on the order of a court of competent jurisdiction. So long as the licensee so depositing shall continue solvent, and is not in violation of any of the provisions of this Article, such licensee shall be permitted to receive the interest or dividends on said deposit. The Commissioner shall provide for custody of such securities by any qualified trust company or bank located in the State of North Carolina or by any federal reserve bank. The

compensation, if any, of the custodian for acting as such under this section shall be paid by the depositing licensee. (1963, c. 1251, s. 8.)

§ 53-200. Investigation of applicants; issuance of licenses. — Upon the filing of the application, the payment of the investigation fee and the approval by the Commissioner of the bond or securities delivered pursuant to G.S. 53-198 or 53-199, the Commissioner shall investigate the financial responsibility, financial and business experience, character and general fitness of the applicant and, if he deems it advisable, of its officers and directors, and, if he finds these factors and qualities meet the requirements of this Article and are such as to warrant the belief that the applicant's business will be conducted honestly, fairly, equitably, carefully and efficiently and in a manner commanding the confidence and trust of the community, he shall issue to the applicant a license to sell and issue checks subject to the provisions of this Article. (1963, c. 1251, s. 9.)

§ 53-201. Minimum net worth of licensees. — Each licensee under this Article shall at all times maintain a minimum net worth of at least one hundred thousand dollars ($100,000). (1963, c. 1251, s. 10.)

§ 53-202. License fees. — Each licensee shall pay to the Commissioner within five days after the issuance of the license, and annually thereafter on or before June 30 of each year, a license fee of five hundred dollars ($500.00). (1963, c. 1251, s. 11.)

§ 53-203. More than one location authorized; employees, agents and representatives. — Each licensee may conduct business at one or more locations within this State and through or by means of such employees, agents, subagents or representatives as such licensee may from time to time designate and appoint. No license under this Article shall be required of any such employee, agent, subagent or representative who is acting for or on behalf of a licensee hereunder in the sale of checks of which the licensee is the issuer. Each such agent, subagent or representative shall upon demand transfer and deliver to the licensee the proceeds of the sale of licensee's checks less the fees, if any, due such agent, subagent or representative. (1963, c. 1251, s. 12.)

§ 53-204. Annual lists of locations and agents; annual financial statements; audits. — Each licensee shall file with the Commissioner annually on or before June 30 of each year a statement listing the locations of the offices of the licensee and the names and locations of the agents or subagents authorized by the licensee to engage in the sale of checks of which the licensee is the issuer and shall also file a statement correctly reflecting its net worth as of the close of its most recent fiscal year, such statement to be certified to by a certified public accountant satisfactory to the Commissioner. The Commissioner may conduct or cause to be conducted an examination or audit of the books and records of any licensee at any time or times he shall deem proper, the cost of such examination or audit to be borne by the licensee. The refusal of access to such books and records shall be cause for the revocation of license. (1963, c. 1251, s. 13.)

§ 53-205. Exempt agents need not be listed. — Nothing in this Article shall be deemed to require a licensee to list agents which are exempted by the provisions of G.S. 53-195 of this Article. (1963, c. 1251, s. 14.)

§ 53-206. Notice of denial or revocation of license; hearing; appeal. — No license shall be denied or revoked except on 10 days' notice to the applicant or licensee. Upon receipt of such notice the applicant or licensee may, within five days of such receipt, make written demand for a hearing. The Commissioner shall thereafter, with reasonable promptness, hear and determine the matter as

provided by law and his decision shall be subject to judicial review in the Superior Court of Wake County as provided by law. (1963, c. 1251, s. 15.)

§ 53-207. Grounds for revoking licenses. — The Commissioner may at any time revoke a license on any ground on which he might refuse to grant a license or for failure to pay an annual fee or for the violation of any provision of this Article. (1963, c. 1251, s. 16.)

§ 53-208. Violation a misdemeanor. — If any person to whom or to which this Article applies or any agent, subagent or representative of such person violates any of the provisions of this Article or attempts to sell or issue checks without having first obtained a license from the Commissioner pursuant to the provisions of this Article, or issues any check at a time when the bond or security required by this Article is not in full force and effect, such person or such agent, subagent or representative shall be deemed guilty [of] a misdemeanor, and upon conviction shall be fined or imprisoned within the discretion of the court and each violation shall constitute a separate offense. (1963, c. 1251, s. 17.)

Chapter 53A.

Business Development Corporations.

Sec.
53A-1. Definitions.
53A-2. Incorporation authorized; information to be set forth; purposes; powers generally.
53A-3. Capital stock; provisions of certificates of incorporation.
53A-4. Approval and filing of certificates; authority of incorporators.
53A-5. Acquisition, etc., of corporation's securities and stock; financial institutions becoming members; limitation on stock acquired by members.
53A-6. Applications for membership in corporation; acceptance; loans to corporation by members.
53A-7. Term of membership; withdrawal.
53A-8. Powers of stockholders and members; voting.
53A-9. Amendment of charter.
53A-10. Board of directors; officers and agents.
53A-11. Earned surplus requirements; determination of net earnings and surplus.
53A-12. Deposits by corporation in banking institutions; corporation not to receive deposits.
53A-13. Examinations and reports.
53A-14. First meeting.
53A-15. Tax exemptions and credits.
53A-16. Duration of corporation.
53A-17. Charter void unless business begun; Chapter void unless corporation organized.
53A-18. Credit of State not pledged.

§ 53A-1. Definitions. — As used in this Chapter, the following words and phrases, unless differently defined or described, shall have the meanings and references as follows:

(1) "Board of directors" : the board of directors of the corporation created under this Chapter.

(2) "Corporation" : a North Carolina business development corporation created under this Chapter.

(3) "Financial institution" : any banking corporation or trust company, building and loan association, insurance company or related corporation, partnership, foundation, or other institution engaged primarily in lending or investing funds.

(4) "Loan limit" : for any member, the maximum amount permitted to be outstanding at one time on loans made by such member to the corporation, as determined under the provisions of this Chapter.

(5) "Member" : any financial institution authorized to do business within this State which shall undertake to lend money to a corporation created under this Chapter, upon its call, and in accordance with the provisions of this Chapter. (1955, c. 1146, s. 1.)

§ 53A-2. Incorporation authorized; information to be set forth; purposes; powers generally. — (a) Incorporation; Information Required; Purposes. — Twenty-five or more persons, a majority of whom shall be residents of this State, who may desire to create a business development corporation under the provisions of this Chapter, for the purpose of promoting, developing and advancing the prosperity and economic welfare of the State and, to that end, to exercise the powers and privileges hereinafter provided, may be incorporated in the following manner; such persons shall, by certificate of incorporation filed with the Secretary of State, under their hands and seals, set forth:

(1) The name of the corporation, which shall include the words "Business Development Corporation of North Carolina" ;

(2) The location of the principal office of the corporation, but such corporation may have offices in such other places within the State as may be fixed by the board of directors;

(3) The purpose for which the corporation is founded, which shall include the following:

The purposes of the corporation shall be to promote, stimulate, develop and advance the business prosperity and economic welfare of the State of North Carolina and its citizens; to encourage and assist through loans, investments or other business transactions, in the location of new business and industry in this State and to rehabilitate and assist existing business and industry; and so to stimulate and assist in the expansion of all kinds of business activity which will tend to promote the business development and maintain the economic stability of this State, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of this State; similarly, to cooperate and act in conjunction with other organizations, public or private, in the promotion and advancement of industrial, commercial, agricultural and recreational developments in this State; and to provide financing for the promotion, development, and conduct of all kinds of business activity in this State.

(b) Powers Generally. — In furtherance of such purposes and in addition to the powers conferred on business corporations by the provisions of Chapter 55 of the General Statutes the corporation shall, subject to the restrictions and limitations herein contained, have the following powers:

(1) To elect, appoint and employ officers, agents and employees; to make contracts and incur liabilities for any of the purposes of the corporation; provided, that the corporation shall not incur any secondary liability by way of guaranty or endorsement of the obligations of any person, firm, corporation, joint-stock company, association or trust, or in any other manner.

(2) To borrow money from the members, from any financial institution, and from any agency established under the Small Business Investment Act of 1958, Public Law 85-699 — 85th Congress, or other similar federal legislation, for any of the purposes of the corporation; to issue therefor its bonds, debentures, notes or other evidences of indebtedness, whether secured or unsecured, and to secure the same by mortgage, pledge, deed of trust or other lien on its property, franchises, rights and privileges of every kind and nature or any part thereof or interest therein, without securing stockholder or member approval; provided, that no loan to the corporation shall be secured in any manner unless all outstanding loans to the corporation shall be secured equally and ratably in proportion to the unpaid balance of such loans and in the same manner.

(3) To make loans to any person, firm, corporation, joint-stock company, association or trust, and to establish and regulate the terms and conditions with respect to any such loans and the charges for interest and service connected therewith; provided, however, that the corporation shall not approve any application for a loan unless and until the person applying for said loan shall show that he has applied for the loan through ordinary banking channels and that the loan has been refused by at least one bank or other financial institution.

(4) To purchase, receive, hold, lease, or otherwise acquire, and to sell, convey, transfer, lease or otherwise dispose of real and personal property, together with such rights and privileges as may be incidental and appurtenant thereto and the use thereof, including, but not restricted to, any real or personal property acquired by the corporation from time to time in the satisfaction of debts or enforcement of obligations.

(5) To acquire the goodwill, business, rights, real and personal property, and other assets, or any part thereof, or interest therein, of any persons, firms, corporations, joint-stock companies, associations or

trusts, and to assume, undertake, or pay the obligations, debts and liabilities of any such person, firm, corporation, joint-stock company, association or trust; to acquire improved or unimproved real estate for the purpose of constructing industrial plants or other business establishments thereon or for the purpose of disposing of such real estate to others for the construction of industrial plants or other business establishments; and to transfer, lease, or otherwise dispose of industrial plants or business establishments.

(6) To acquire, subscribe for, own, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the stock, shares, bonds, debentures, notes or other securities and evidences of interest in, or indebtedness of, any person, firm, corporation, joint-stock company, association or trust, and while the owner or holder thereof to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

(7) To mortgage, pledge, or otherwise encumber any property, right or thing of value, acquired pursuant to the powers contained in subdivisions (4), (5) or (6) of this subsection, as security for the payment of any part of the purchase price thereof.

(8) To cooperate with and avail itself of the facilities of the Department of Natural and Economic Resources and any similar governmental agencies; and to cooperate with and assist, and otherwise encourage organizations in the various communities of the State in the promotion, assistance, and development of the business prosperity and economic welfare of such communities or of this State or of any part thereof.

(9) To do all acts and things necessary or convenient to carry out the powers expressly granted in this Chapter. (1955, c. 1146, s. 2; 1959, c. 613, s. 1; 1973, c. 1262, s. 86.)

Editor's Note. — The 1973 amendment substituted "Department of Natural and Economic Resources" for "Department of Conservation and Development" in subdivision (8) of subsection (b).

Session Laws 1959, c. 613, s. 2, provides that nothing contained therein shall change or affect in any way the provisions of the certificate of incorporation of any existing corporation organized under this Chapter unless and until such certificate of incorporation shall be amended as provided in § 53A-9.

§ 53A-3. Capital stock; provisions of certificates of incorporation. — The certificate shall set forth the amount of total authorized capital stock and the number of shares in which it is divided, the par value of each share, and the amount of capital stock with which it will commence business and, if there is more than one class of stock, a description of the different classes, and the names and post-office addresses of the subscribers of stock and the number of shares subscribed by each. The aggregate of the subscription shall be the amount of capital with which the corporation will commence business. The certificate of incorporation may also contain any provision consistent with the laws of this State for the regulation of the affairs of the corporation or creating, defining, limiting, and regulating its powers. The certificate of incorporation shall be in accordance with the provisions of G.S. 55-3. (1955, c. 1146, s. 3.)

Editor's Note. — Former § 55-3, referred to at the end of this section, set out the requirements for articles of incorporation. The present requirements are to be found in present § 55-7.

§ 53A-4. Approval and filing of certificates; authority of incorporators. — Before the said certificate of incorporation shall become effective, it must be approved by a resolution adopted by the Governor and Council of State and, from the date the said certificate of incorporation is filed in the office of the Secretary

of State, with such approval, the stock subscribers, their successors and assigns, shall become a body corporate, by the name specified in the certificate, subject to amendment and dissolution as provided in this Chapter. The incorporators shall have the authority and shall perform such acts and things as required by the provisions of this Chapter, as set forth in G.S. 53A-2. (1955, c. 1146, s. 4.)

§ 53A-5. Acquisition, etc., of corporation's securities and stock; financial institutions becoming members; limitation on stock acquired by members. — Notwithstanding any rule at common law or any provision of any general or special law or any provision in their respective charters, agreements of association, articles of organization, or trust indentures:

(1) All domestic corporations organized for the purpose of carrying on business within this State including without implied limitation any public utility companies and insurance and casualty companies and foreign corporations licensed to do business in this State, and all trusts, are hereby authorized to acquire, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds, securities or other evidences of indebtedness created by, or the shares of the capital stock of, the corporation, and while owners of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon, all without the approval of any regulatory authority of the State;

(2) All financial institutions are hereby authorized to become members of the corporation and to make loans to the corporation as provided herein;

(3) A financial institution which does not become a member of the corporation shall not be permitted to acquire any shares of the capital stock of the corporation; and

(4) Each financial institution which becomes a member of the corporation is hereby authorized to acquire, purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds, securities or other evidences of indebtedness created by, or the shares of the capital stock of the corporation, and while owners of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon, all without the approval of any regulatory authority of the State; provided, that the amount of the capital stock of the corporation which may be acquired by any member pursuant to the authority granted herein shall not exceed ten percent (10%) of the loan limit of such member. The amount of capital stock of the corporation which any member is authorized to acquire pursuant to the authority granted herein is in addition to the amount of capital stock in corporations which such member may otherwise be authorized to acquire. (1955, c. 1146, s. 5.)

§ 53A-6. Applications for membership in corporation; acceptance; loans to corporation by members. — Any financial institution may request membership in the corporation by making application to the board of directors on such form and in such manner as said board of directors may require, and membership shall become effective upon acceptance of such application by said board.

Each member of the corporation shall make loans to the corporation as and when called upon by it to do so on such terms and other conditions as shall be approved from time to time by the board of directors, subject to the following conditions:

(1) All loan limits shall be established at the thousand-dollar amount nearest to the amount computed in accordance with the provisions of this section.

(2) No loan to the corporation shall be made if immediately thereafter the total amount of the obligations of the corporation would exceed 10 times the capital of the corporation. For the purposes of this paragraph, the capital of the corporation shall include the amount of the outstanding capital stock of the corporation, whether common or preferred, the earned or paid-in surplus of the corporation, and the amount of any outstanding debentures of the corporation, the payment of which is subordinated to all obligations of the corporation other than the obligations of the corporation to the holders of its capital stock.

(3) The total amount outstanding on loans to the corporation made by any member at any one time, when added to the amount of the investment in the capital stock of the corporation then held by such member, shall not exceed:

a. Twenty percent (20%) of the total amount then outstanding on loans to the corporation by all members, including in said total amount outstanding, amounts validly called for loan but not yet loaned.

b. The following limit, to be determined as of the time such member becomes a member or at any time requested by a member on the basis of the audited balance sheet of such member at the close of its fiscal year immediately preceding its application for membership, or, in the case of an insurance company, its last annual statement to the Commissioner of Insurance: a minimum of two percent (2%) to a maximum of four percent (4%) of the capital and surplus of commercial banks and trust companies, the percentage within such limits to be determined by such member; a minimum of one half of one percent (.5 of 1%) to a maximum of one percent (1%) of the total outstanding loans made by a building and loan or savings and loan association, the percentage within such limits to be determined by such member; a minimum of one percent (1%) to a maximum of two percent (2%) of the capital and unassigned surplus of stock insurance companies, except fire insurance companies, the percentage within such limits to be determined by such member; a minimum of one percent (1%) to a maximum of two percent (2%) of the unassigned surplus of mutual insurance companies, except fire insurance companies, the percentage within such limits to be determined by such member; one tenth of one percent (.1 of 1%) of the assets of fire insurance companies; and such limits as may be approved by the board of directors of the corporation for other financial institutions.

(4) Subject to subdivision (3)a of this section, each call made by the corporation shall be prorated among the members of the corporation in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members. The adjusted loan limit of a member shall be the amount of such member's loan limit, reduced by the balance of outstanding loans made by such member to the corporation and the investment in capital stock of the corporation held by such member at the time of such call.

(5) All loans to the corporation by members shall be evidenced by bonds, debentures, notes or other evidences of indebtedness of the corporation, which shall be freely transferable at all times, and which shall bear interest at a rate of not less than one quarter of one percent (.25 of 1%) in excess of the rate of interest determined by the board of directors to be the prime rate prevailing at the date of issuance thereof on unsecured commercial loans. (1955, c. 1146, s. 6; 1957, c. 1041, s. 1; 1963, c. 393, ss. 1, 2.)

Cross Reference. — See note to § 53A-9.

Editor's Note. — Session Laws 1963, c. 393, s. 3, provides that nothing contained in the 1963 amendment to this section shall change or affect in any way the provisions of the certificate of incorporation of any existing corporation organized under this Chapter unless and until such certificate of incorporation shall be amended as provided in § 53A-9.

§ 53A-7. Term of membership; withdrawal. — Membership in the corporation shall be for the duration of the corporation; provided that —

Upon written notice given to the corporation three years in advance, a member may withdraw from membership in the corporation at the expiration date of such notice.

A member shall not be obligated to make any loans to the corporation pursuant to calls made subsequent to the withdrawal of said member. (1955, c. 1146, s. 7; 1957, c. 1041, s. 4.)

Cross Reference. — See note to § 53A-9.

§ 53A-8. Powers of stockholders and members; voting. — The stockholders and the members of the corporation shall have the following powers of the corporation:

(1) To determine the number of and elect directors as provided in G.S. 53A-10;
(2) To make, amend and repeal bylaws;
(3) To amend this charter as provided in G.S. 53A-9;
(4) To exercise such other of the powers of the corporation as may be conferred on the stockholders and the members by the bylaws.

As to all matters requiring action by the stockholders and the members of the corporation, said stockholders and said members shall vote separately thereon by classes, and, except as otherwise herein provided, such matters shall require the affirmative vote of a majority of the votes to which the stockholders present or represented at the meeting shall be entitled and the affirmative vote of a majority of the votes to which the members present or represented at the meeting shall be entitled.

Each stockholder shall have one vote, in person or by proxy, for each share of capital stock held by him, and each member shall have one vote, in person or by proxy, except that any member having a loan limit of more than one thousand dollars ($1,000) shall have one additional vote, in person or by proxy, for each additional one thousand dollars ($1,000) which such member is authorized to have outstanding on loans to the corporation at any one time as determined under subdivision (3)b of G.S. 53-6. (1955, c. 1146, s. 8.)

§ 53A-9. Amendment of charter. — This charter may be amended by the votes of the stockholders and the members of the corporation, voting separately by classes, and such amendments shall require approval by the affirmative vote of two thirds of the votes to which the stockholders shall be entitled and two thirds of the votes to which the members shall be entitled; provided, that no amendment of this charter which is inconsistent with the general purposes expressed herein or which authorizes any additional class of capital stock to be issued, or which eliminates or curtails the right of the Secretary of State to examine the corporation or the obligation of the corporation to make reports as provided in G.S. 53A-13, shall be made without amendment of this Chapter; and provided, further, that no amendment of this charter which increases the obligation of a member to make loans to the corporation, or makes any change in the principal amount, interest rate, maturity date, or in the security or credit position, of any outstanding loan of a member to the corporation, or affects a member's right to withdraw from membership as provided in G.S. 53A-7, or

affects a member's voting rights as provided in G.S. 53A-8, shall be made without the consent of each member affected by such amendment.

Within 120 days after any meeting at which amendment of this charter has been adopted, articles of amendment signed and sworn to by the president, treasurer and a majority of the directors, setting forth such amendment and the due adoption thereof, shall be submitted to the Secretary of State, who shall examine them and if he finds that they conform to the requirements of this Chapter, shall so certify and endorse his approval thereon. Thereupon, the articles of amendment shall be filed in the office of the Secretary of State and no such amendment shall take effect until such articles of amendment shall have been filed as aforesaid. (1955, c. 1146, s. 9; 1963, c. 393, s. 3½.)

Editor's Note. — Session Laws 1957, c. 1041, s. 5 provides that nothing contained in the 1957 amendments to §§ 53A-6, 53A-7, 53A-10 and 53A-15 shall be construed to change or affect in any way the provisions of the certificate of incorporation of any existing corporation organized under this Chapter with respect to requirements to amend its certificate of incorporation.

§ 53A-10. Board of directors; officers and agents. — The business and affairs of the corporation shall be managed and conducted by a board of directors, a president and treasurer, and such other officers and such agents as the corporation by its bylaws shall authorize. The board of directors shall consist of such number, not less than 15 nor more than 21, as shall be determined in the first instance by the incorporators and thereafter annually by the members and the stockholders of the corporation. The board of directors may exercise all the powers of the corporation except such as are conferred by law or by the bylaws of the corporation upon the stockholders or members and shall choose and appoint all the agents and officers of the corporation and fill all vacancies except vacancies in the office of director which shall be filled as hereinafter provided. The board of directors shall be elected as hereinafter provided. The board of directors shall be elected in the first instance by the incorporators and thereafter at each annual meeting of the corporation, or, if no annual meeting shall be held in any year at the time fixed by the bylaws, at a special meeting held in lieu of the annual meeting. At each annual meeting, or at each special meeting held in lieu of the annual meeting, the members of the corporation shall elect two thirds of the board of directors and the stockholders shall elect the remaining directors. The directors shall hold office until the next annual meeting of the corporation or special meeting held in lieu of the annual meeting after their election and until their successors are elected and qualified unless sooner removed in accordance with the provisions of the bylaws. Any vacancy in the office of a director elected by the members shall be filled by the directors elected by the members, and any vacancy in the office of a director elected by the stockholders shall be filled by the directors elected by the stockholders.

Directors and officers shall not be responsible for losses unless the same shall have been occasioned by the wilful misconduct of such directors and officers. (1955, c. 1146, s. 10; 1957, c. 1041, s. 2.)

Cross Reference. — See note to § 53A-9.

§ 53A-11. Earned surplus requirements; determination of net earnings and surplus. — Each year the corporation shall set apart as earned surplus not less than ten percent (10%) of its net earnings for the preceding fiscal year until such surplus shall be equal in value to one half of the amount paid in on the capital stock then outstanding. Whenever the amount of surplus established herein shall become impaired, it shall be built up again to the required amount in the

manner provided for its original accumulation. Net earnings and surplus shall be determined by the board of directors, after providing for such reserves as said directors deem desirable, and the directors' determination made in good faith shal be conclusive on all persons. (1955, c. 1146, s. 11.)

§ 53A-12. Deposits by corporation in banking institutions; corporation not to receive deposits. — The corporation shall not deposit any of its funds in any banking institution unless such institution has been designated as a depository by a vote of a majority of the directors present at an authorized meeting of the board of directors, exclusive of any director who is an officer or director of the depository so designated.

The corporation shall not receive money on deposit. (1955, c. 1146, s. 12.)

§ 53A-13. Examinations and reports. — The corporation shall be subject to the examination of the Commissioner of Banks, and shall make reports of its condition not less than annually to said Commissioner, who in turn shall make copies of such reports available to the Commissioner of Insurance and to the Governor, and the corporation shall also furnish such other information as may from time to time be required by the Secretary of State. (1955, c. 1146, s. 13.)

§ 53A-14. First meeting. — The first meeting of the corporation shall be called by a notice signed by three or more of the incorporators, stating the time, place and purpose of the meeting, a copy of which notice shall be mailed, or delivered, to each incorporator at least five days before the day appointed for the meeting. Said first meeting may be held without such notice upon agreement in writing to that effect signed by all the incorporators. There shall be recorded in the minutes of the meeting a copy of said notice or of such unanimous agreement of the incorporators.

At such first meeting the incorporators shall organize by the choice, by ballot, of a temporary clerk, by the adoption of bylaws, by the election by ballot of directors, and by action upon such other matters within the powers of the corporation as the incorporators may see fit. The temporary clerk shall be sworn and shall make and attest a record of the proceedings. Ten of the incorporators shall be a quorum for the transaction of business. (1955, c. 1146, s. 14.)

§ 53A-15. Tax exemptions and credits. — (a) An annual excise tax is hereby levied on every corporation organized under this Chapter for the privilege of transacting business in this State during the calendar year, according to or measured by its entire net income as defined herein received or accrued from all sources during the preceding calendar year hereinafter referred to as taxable year, at the rate of four and one-half percent (4½%) of such entire net income. The minimum tax assessable to any one such corporation shall be ten dollars ($10.00). The liability for the tax imposed by this section shall arise upon the first day of each calendar year, and shall be based upon and measured by the entire net income of each such corporation for the preceding calendar year, including all income received from government securities (whether or not taxable under Article 4 of the Revenue Act) in such year except for any interest that may be allowed as deductible from gross income under subsection (e) of this section. As used in this section the words "taxable year" shall mean the calendar year next preceding the calendar year for which and during which the excise tax is levied.

(b) The excise tax levied under subsection (a) of this section shall be in lieu of the intangible personal property taxes, the State franchise tax, and the State income tax levied by the Revenue Act.

It is the purpose and intent of the General Assembly to levy taxes on corporations organized pursuant to this Chapter so that all such corporations will be taxed uniformly in a just and equitable manner in accordance with the provisions of Article V, § 3, of the Constitution of North Carolina. The intent of this section is to exercise the powers of classification and of taxation on

property, franchises, and trades conferred by the above constitutional provisions cited in this section.

(c) The words "entire net income" shall mean the gross income of a taxpayer less the deductions allowed by this section.

(d) For purposes of this section the words "gross income" shall mean the income of a corporation received or accrued from whatever source during the taxable years as follows: interest and discount on loans; interest from bonds, notes, mortgages and other investments, including interest from all government bonds issued direct by any level of government or through any government agency, any exclusion provided in Article 4 of Chapter 105 of the General Statutes notwithstanding; dividends from securities owned; service charges; collection fees; rents; commissions; gains or profits from the sale or other disposition of property, either real or personal, tangible or intangible; recoveries from losses previously written off or deducted from income in prior taxable years; and all other recoveries, gains, profits, income, or receipts regardless of nature and from whatever source derived, except that gifts received shall be excluded from gross income.

(e) In computing entire net income there shall be allowed as deductions the following items:

(1) All ordinary and necessary expenses paid or accrued during the taxable year.

(2) Rental expense paid or accrued during the taxable year.

(3) All unearned discount and interest paid during the taxable year except interest paid in connection with income exempt from taxation under Article 4 of Chapter 105 of the General Statutes and except interest deemed excessive under G.S. 105-130.6.

(4) Taxes paid or accrued except taxes based on net income, taxes assessed for local benefit of a kind tending to increase the value of the property assessed and any other taxes not deductible for corporate income tax purposes under Division I of Article 4 of Chapter 105 of the General Statutes.

(5) Dividends received from stock issued by any corporation to the extent provided in G.S. 105-130.7.

(6) Net economic losses to the extent provided in G.S. 105-130.8 and other losses as provided in Division I of Article 4 of Chapter 105 of the General Statutes.

(7) Loans or debts ascertained to be worthless and actually charged off during the taxable year, if connected with business and if the amount has previously been included in gross income in a return under this section; or, in the discretion of the Secretary of Revenue, a reasonable addition to a reserve for bad debts. Provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable hereunder.

(8) A reasonable allowance for depreciation and obsolescence to the extent provided for corporation income tax purposes in Division I of Article 4 of Chapter 105 of the General Statutes.

(9) Contributions to religious, charitable, educational, literary and like organizations to the extent provided in subdivision (1) of G.S. 105-130.9.

(10) Contributions to the State of North Carolina, any of its institutions, instrumentalities, agencies, or political subdivisions, and contributions to educational institutions located within North Carolina as provided in subdivision (2) of G.S. 105-130.9.

(11) Reasonable contributions to qualified employees' pension trusts within the taxable year; provided, exemption of any such trust under the federal income tax laws shall constitute prima facie evidence that it is

a "qualified employees' pension trust" within the meaning of this subdivision.

(12) Premiums paid upon the purchase of bonds to the following extent:

a. Amortization of bond premiums on tax-exempt bonds shall be mandatory for all taxpayers. Amortization for the taxable year shall be accomplished by lowering the basis or adjusted basis of the bond with no deduction against gross income for the year.

b. For purposes of this subsection, the term "bond" means any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation and bearing interest and includes any like obligation issued by any government or political subdivision thereof.

(13) Interest upon the obligations of the State of North Carolina or a political subdivision thereof received or accrued during the taxable year. Provided, that the deduction of accrued interest shall be permitted only if the taxpayer has included accrued income in his gross income for the taxable year. Provided further that in the event that any court of competent jurisdiction shall rule that the deduction of the interest of the obligations of the State of North Carolina or a political subdivision thereof from the base of the tax levied by this article violates the Constitution of this State or the Constitution of the United States, such deduction shall be disallowed and such interest shall be included in the entire net income of the taxpayer.

(14) Reasonable payments made to the beneficiaries or to the estate of a deceased employee, paid by reason of the death of the employee to the extent provided for corporate income tax purposes in Division I of Article 4 of Chapter 105 of the General Statutes.

(15) Deduction of accrued expenses, contributions, taxes, rental expense, or interest expense shall be subject to the limitations imposed upon corporate income taxpayers by Article 4 of Chapter 105 of the General Statutes.

(f) On or before June 1 of each year, the executive officer or officers of each corporation shall file with the Secretary of Revenue a full and accurate report of all income as defined in subsection (d) of this section received or accrued during the taxable year, and also an accurate record of the legal deductions in the same calendar year as allowed by subsection (e) of this section to the end that the correct entire net income of the corporation may be determined. This report shall be in such form and contain such information as the Secretary of Revenue may specify. At the time of making such report by each corporation, the taxes levied by this section with respect to an excise tax on corporations organized pursuant to this Chapter shall be paid to the Secretary of Revenue.

(g) The initial report and payment for each corporation shall be made on June 1, 1957, and shall be based on the calendar year of 1956, and the provisions of this section shall be applicable with respect to the year 1956 and all subsequent years.

(h) All provisions of Subchapter I of Chapter 105 of the General Statutes, not inconsistent with this section, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds, penalties, and appeal and review, shall be applicable to the tax imposed by this section. The Secretary of Revenue, may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this section.

(i) The securities, evidences of indebtedness and shares of the capital stock issued by the corporation established under the provisions of this Chapter, their transfer, and income therefrom, and deposits of financial institutions invested therein, shall at all times be free from taxation within the State.

(j) Any stockholder, member, or other holder of any securities, evidences of indebtedness, or shares of the capital stock of the corporation who realizes a loss from the sale, redemption, or other disposition of any securities, evidences of indebtedness, or shares of the capital stock of the corporation, including any such loss realized on a partial or complete liquidation of the corporation, and who is not entitled to deduct such loss in computing any of such stockholder's, member's, or other holder's taxes to the State shall be entitled to credit against any taxes subsequently becoming due to the State from such stockholder, member, or other holder, a percentage of such loss equivalent to the highest rate of tax assessed for the year in which the loss occurs upon mercantile and business corporations. (1955, c. 1146, s. 15; 1957, c. 1041, s. 3; 1967, c. 1110, s. 11; 1973, c. 476, s. 193.)

Cross Reference. — See note to § 53A-9.

Editor's Note. — The 1973 amendment substituted "Secretary of Revenue" for "Commissioner of Revenue" in subsections (e)(7), (f) and (h).

§ 53A-16. Duration of corporation. — The period of duration of the corporation shall be 50 years. (1955, c. 1146, s. 16.)

§ 53A-17. Charter void unless business begun; Chapter void unless corporation organized. — If a corporation organized pursuant to this Chapter shall fail to begin business within three years from the effective date of its charter then said charter shall become null and void. If, within three years from May 20, 1955, no corporation is organized pursuant to this Chapter, then and in that event, this Chapter shall become null and void. (1955, c. 1146, s. 17.)

§ 53A-18. Credit of State not pledged. — Under no circumstances is the credit of the State pledged herein. (1955, c. 1146, s. 18.)

Chapter 54.

Cooperative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

Article 1.

Organization.

Sec.
54-1. Application of terms.
54-2. Method of incorporation; powers.
54-3. Amendments to certificate.
54-4. Prior amendments validated.
54-5. Form of certificate.
54-6. When to begin business.
54-7. Chapter on corporations applicable.
54-8. Charters validated.
54-9. May become members of and hold stock in federal home loan bank.
54-10. Annual meetings.
54-11. Conversion of building and loan associations into federal savings and loan associations.
54-12. Conversion of federal association into State association.
54-12.1. Merger of building and loan associations.

Article 2.

Shares and Shareholders.

54-13. Number of shares and entrance fee prescribed.
54-14. Different classes of shares; dividends; reserve fund.
54-15. Certificate issued and payment enforced.
54-16. New members admitted.
54-17. Shareholders equally liable.
54-18. Minors as shareholders.
54-18.1. Shares issued in two or more names.
54-18.2. Shares acceptable as deposit of securities.

Article 2A.

Savings Accounts.

54-18.3. Savings accounts authorized; terms of payment and withdrawal.
54-18.4. Reserve fund required.
54-18.5. Administrator of the Savings and Loan Division to adopt rules and regulations.

Article 3.

Loans.

54-19. Manner of making loans; security required.
54-20. Direct reduction of principal.
54-21. Insured and guaranteed loans.
54-21.1. Purchase of loans.
54-21.2. Investments.
54-21.3. County and municipal bonds as investments.
54-21.4. Loans for improvements to real property; mobile home financing.
54-22. Repayment at any time.
54-23. Power to borrow money.

Article 4.

Under Control of Administrator of the Savings and Loan Division.

54-24. Power of Administrator of the Savings and Loan Division.
54-24.1. Savings and Loan Commission.
54-25. Annual license fees.
54-26. Statement filed by association.
54-27. Statement examined, approved, and published; fees.
54-28. License revoked.
54-29. Examinations made; expense paid; test appraisals of collateral for loans.
54-30. Failing to exhibit books or making false statement a misdemeanor.
54-31. Agent must obtain certificate.
54-32. Penalties imposed and recovered.
54-33. Notice required before appointment of receivers.
54-33.1. Administrator of the Savings and Loan Division to prescribe books, records, etc.; retention, reproduction and disposition of records.
54-33.2. Power of Administrator of the Savings and Loan Division to issue rules and regulations.
54-33.3. Certain powers of federal savings and loan associations granted to State associations.

Article 5.

Foreign Associations.

54-34. Allowed to do business.
54-35. Copy of charter and list of officers filed.
54-36. License granted.
54-37. Securities deposited.
54-38. Annual certificate; service of process.
54-39. Agent must have certificate of license; fees.
54-40. Fees and expenses.
54-41. All contracts deemed made in this State.

Article 5A.

Reserves.

Sec.
54-41.1. Required reserves for losses; profits not otherwise apportioned.

Article 6.

Withdrawals.

54-42. Month's notice required for withdrawals.
54-43. Withdrawal or maturity fund.

Article 7.

Statements of Financial Condition of Associations.

54-44. Derogatory statements.

Article 7A.

Mutual Deposit Guaranty Associations.

54-44.1. Definitions.
54-44.2. Organization of a mutual deposit guaranty association.
54-44.3. Examination and certificate by Administrator.
54-44.4. Recording of articles of incorporation; certified copies.
54-44.5. Proposed amendments transmitted to Administrator.
54-44.6. Examination and certificate of amendments.
54-44.7. Recording of amendments; certified copies.
54-44.8. Powers of associations.
54-44.9. Filing of semiannual financial reports.
54-44.10. Annual examination of associations.
54-44.11. Special examinations.
54-44.12. Right to enter and conduct investigations.
54-44.13. Fees.

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

Article 8.

Organization and Powers.

54-45. Application of term.
54-46. Incorporation and powers.
54-47. Loans.
54-48. Reserve associations.
54-49. Land Conservation and Development Bureau; land mortgage associations.
54-50. Number of incorporators; capital stock.
54-51. Incorporation.
54-52. Organization.
54-53. Corporate powers.
54-54. Restrictions.
54-55. Mortgage forms; approval.
54-56. Repayment of loan and interest.
54-57. Terms of payment.
54-58. Transfer of mortgaged lands.

Sec.
54-59. Calling in loans before due.
54-60. Partial recall of debt.
54-61. Foreclosure.
54-62. Appraisal of lands.
54-63. Preference prohibited; association borrowing money.
54-64. Bond issues.
54-65. Deed of trust.
54-66. Collaterals deposited with State Treasurer.
54-67. Redemption of bonds.
54-68. Validity of bonds after maturity.
54-69. Bonds as payment.
54-70. Bonds as investments.
54-71. Application of earnings; reserve fund.
54-72. Restriction on holding real estate.
54-73. Banking laws applicable.

SUBCHAPTER III. CREDIT UNIONS.

Article 9.

Credit Union Division; Administrator of Credit Unions.

54-74. Creation and supervision of Division.
54-75. Duties of Administrator.
54-75.1. Preservation of books, accounts and records; retention of minute books of meetings; classification of records; reproduction shall be deemed to be an original record.

Article 10.

Incorporation of Credit Unions.

54-76. Applications filed.
54-77. Bylaws adopted.
54-78. Certificate of incorporation.
54-79. Amendment of bylaws.
54-80. Restriction of use of terms.
54-81. Change of place of business.

Article 11.

Powers of Credit Unions.

54-82. General nature of business.
54-83. Receiving deposits.
54-84. Borrowing money.
54-85. Authority to execute contracts of guaranty in certain cases.
54-85.1. Conversion from State to federal credit union and from federal to State credit union.
54-86. Investment of funds.
54-87. Loans.
54-87.1. Money orders; nonnegotiable sight drafts; travelers' checks.
54-88. Rate of interest; authority to deduct interest.
54-89. Ownership and leasing of real estate.
54-90. Reserve fund.
54-91. Dividends.
54-92. Voluntary dissolution.

Sec.
54-93. Savings institution; restriction of taxation.

Article 12.

Shares in the Corporation.

54-94. Ownership of shares.
54-95. Shares and deposits for minors and in trust.
54-96. Fines and penalties.
54-97. Liability of shareholders.

Article 13.

Members and Officers.

54-98. Who may become members.
54-99. Expulsion and withdrawal of members.
54-100. Meetings; right of voting.
54-101. Election of directors and committees.
54-102. Duties of board of directors.
54-103. Duties of credit committee; appointment and duties of loan officers; appointment of loan officers in lieu of credit committee.
54-104. Duties of supervisory committee.

Article 14.

Supervision and Control.

54-105. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations.
54-106. Reports; penalties; fees.
54-107. Annual examinations required; payment of cost.
54-108. Revocation of certificate; liquidation.
54-109. When Administrator of Credit Unions may take possession of credit union business and property.

Article 15.

Central Associations.

54-110. Central association.

SUBCHAPTER IV. COOPERATIVE ASSOCIATIONS.

Article 16.

Organization of Associations.

54-111. Nature of the association.
54-111.1. [Repealed.]
54-112. Use of term restricted.
54-113. Articles of agreement.
54-114. Certificate of incorporation.
54-115. Fees for incorporation.
54-116. Bylaws adopted.
54-117. General corporation law applied; dealing in products of, or renting to, nonmembers.
54-118. Other corporations admitted.
54-118.1. License taxes.
54-118.2. Franchise taxes.

Article 17.

Stockholders and Officers.

Sec.
54-119. Certificate for stock fully paid.
54-120. Ownership of shares limited.
54-121. Shares issued on purchase of business.
54-122. Absent members voting.
54-123. Directors and other officers.

Article 18.

Powers and Duties.

54-124. Nature of business authorized.
54-125. Amendment of articles.
54-126. Apportionment of earnings.
54-127. Time of distribution.
54-128. Annual reports.

SUBCHAPTER V. MARKETING ASSOCIATIONS.

Article 19.

Purpose and Organization.

54-129. Declaration of policy.
54-130. Definitions and nature.
54-131. Who may organize.
54-132. Purposes.
54-133. Preliminary investigation.
54-134. Articles of incorporation.
54-135. Amendments to articles of incorporation.
54-136. Bylaws.
54-137. General and special meetings; how called.
54-138. Conflicting laws not to apply.
54-139. Domestication of foreign cooperative corporations; limitation on use of word "cooperative."
54-140. Association heretofore organized may adopt the provisions of this Subchapter.
54-141. Associations not in restraint of trade.
54-142. Application of Business Corporation Act to cooperative associations with capital stock.
54-142.1. Application of Nonprofit Corporation Act to cooperative associations without capital stock.
54-143. License taxes.
54-143.1. Franchise taxes.
54-144. Filing fees.

Article 20.

Members and Officers.

54-145. Members.
54-146. Directors; election.
54-147. Election of officers.
54-148. Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership.
54-149. Removal of officer or director.
54-150. Referendum.

Article 21.
Powers, Duties, and Liabilities.

Sec.
54-151. Powers.
54-152. Marketing contract.
54-153. Purchasing business of other associations, persons, firms, or corporations; payment; stock issued.
54-154. Annual reports.
54-155. Interest in other corporations or associations.
54-156. Contracts and agreements with other associations.
54-157. Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.
54-158. Cooperative associations may form subsidiaries.

Article 22.
Merger, Consolidation and Other Fundamental Changes.

54-159. Procedure for merger.
54-160. Procedure for consolidation.
54-161. Approval of merger or consolidation; abandonment.
54-162. Articles of merger or consolidation.
54-163. Effect of merger or consolidation.
54-164. Merger or consolidation of domestic and foreign associations.
54-165. Sale, lease or exchange of assets; mortgage or pledge of assets.
54-166. Rights of objecting members.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

ARTICLE 1.

Organization.

§ 54-1. Application of terms. — The terms "building and loan association" and "savings and loan association," as used in this Subchapter, shall apply to and include all corporations, companies, societies, or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes. It shall be unlawful for any corporation, company, society, or association doing business in this State not so conducted to use in its corporate name the terms "building and loan association," "building association" or "savings and loan association" or in any manner or device to hold itself out to the public as a building and loan association or savings and loan association. The terms "building and loan association" and "savings and loan association" in the General Statutes shall be interchangeable and the use of either shall be construed to include the other unless a different intention is expressly provided. (1905, c. 435, s. 16: Rev., s. 3881; C. S., s. 5169, c. 178.)

Editor's Note. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Stated in Mutual Sav. & Loan Ass'n v. Lanier, 279 N.C. 299, 182 S.E.2d 368 (1971).

§ 54-2. Method of incorporation; powers. — (a) It shall be unlawful for any persons in any city, town or county of this State, under any name by them to be assumed, to associate for the purpose of organizing and establishing a homestead and building and loan association, and, being so associated, they shall, on complying with this Subchapter, be a body politic and corporate, and as such be capable in law to hold and dispose of property, both real and personal; may have and use a common seal; may choose a presiding and other officers; may enact bylaws for the regulation of the affairs of such corporation, and compel the due observance of the same by fines and penalties; may sue and be sued, plead and be impleaded, answer and be answered in any court in this State, and do all acts necessary for the well ordering and good government of the

affairs of such corporation, and shall exercise all and singular the powers incident to bodies politic and corporate: Provided, that before any such corporation shall be entitled to the privileges of this Subchapter it shall file with the register of deeds of the county where such corporation is designed to act a copy of the certificate of incorporation of such corporation, signed by at least seven members, to be recorded in the office of such register of deeds, and shall pay a tax of twenty-five dollars ($25.00) to the register of deeds, which tax shall be paid over by the register of deeds to the treasurer of the county, to the use of the school fund of the county. The register of deeds shall certify a copy of the charter to the Administrator of the Savings and Loan Division. The register of deeds shall not issue or record the same until duly authorized to do so by the Administrator of the Savings and Loan Division as hereinafter provided.

(b) Upon receipt of a copy of the certificate of incorporation of the proposed association, the Administrator of the Savings and Loan Division shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business for which it is organized, the Administrator of the Savings and Loan Division shall so certify to the register of deeds in the county in which organized, who shall thereupon issue and record such certificate of incorporation. But the Administrator of the Savings and Loan Division may refuse to so certify, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any purpose other than a mutual building and loan business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said building and loan association is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment; or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted or appropriated by an existing association in the same county, or so similar thereto as to be likely to mislead the public.

(c) Upon receipt of such certificate from the Administrator of the Savings and Loan Division, the register of deeds shall, if said certificate of incorporation be in accordance with law, issue and cause same to be recorded in the records of his office as hereinabove provided. (1905, c. 435, s. 1; Rev., s. 3877; C. S., s. 5170; 1931, c. 73; 1967, c. 823, s. 4; 1971, c. 864, s. 17.)

Cross References. — As to annual license tax, see § 54-25. As to power to merge, see § 54-12.1. See Editor's note to § 53-5.

Editor's Note. — For brief comment on the 1931 amendment, see 9 N.C.L. Rev. 351.

§ 54-3. Amendments to certificate. — Any addition, alteration or amendment of the certificate of incorporation of any building and loan association shall be made at any annual or special meeting of such association, held in pursuance of the provisions of G.S. 54-10, by a majority of the shareholders present in person or represented by proxy at any such meeting, and any such addition, alteration or amendment shall be signed, certified, and recorded as is provided in G.S. 54-2. (1905, c. 435, s. 2; Rev., s. 3878; C. S., s. 5171; 1939, c. 128, s. 1.)

§ 54-4. Prior amendments validated. — All additions, alterations, or amendments of the certificate of any building and loan association made prior to March 17, 1939, and which failed to comply with all of the provisions of the statutes of North Carolina applicable thereto, be, and the same are hereby declared to be sufficient and valid to the same extent as if the provisions of said statutes had been fully complied with. (1939, c. 128, s. 2.)

§ 54-5. Form of certificate. — Substantially the following form shall be used by associations to be formed under this Chapter:

CERTIFICATE OF INCORPORATION

This is to certify that we, the undersigned citizens of the State of North Carolina, hereby associate ourselves into a building and loan association under and by virtue of the provisions of Subchapter I, entitled Building and Loan Associations, of Chapter 54 of the North Carolina General Statutes, and by this certificate do set forth:

First. The name of said association is to be .....

Second. The location where its business is to be transacted is in the ..... of ..... in the county of ..... and State of North Carolina, and the principal office of said corporation is to be at No. ....., ... Street, in the ..... of ..... aforesaid.

Third. The object for which said association is formed is to enable the subscribers hereto to assist each other, and all who may become associated with them, in making loans to its members only, and to enable them to acquire real estate, making improvements thereon and removing encumbrances therefrom by the payment of periodical installments, and to accumulate a fund, to be paid by its members who do not obtain loans for the purposes aforesaid when the funds of said association shall amount to the sum of ..... dollars per share of the first and subsequent classes or series.

Fourth. The amount fixed as the value of each share, when matured or full paid, is to be ..... dollars. The number of shares to be subscribed before said association shall begin business shall be ..... The maximum number of shares in this association at any one time to be in force shall be ..... The number of shares subscribed for by the incorporators is ....., and the number of shares subscribed for by each of them is as follows:

NAME	NUMBER OF SHARES
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

In witness whereof, we have hereto set our hands and seals, the ..... day of ....., A. D. 19.....

..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)

Signed, sealed, and delivered in the presence of .....

(1905, c. 435, s. 27; Rev., s. 3879; C. S., s. 5172.)

Applied in White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

§ 54-6. When to begin business. — Upon filing the certificate of incorporation with the register of deeds of the county where the principal office of the corporation is located, and with the Administrator of the Savings and Loan Division, the company shall become a body politic and corporate, and shall be authorized to begin business, when licensed by the Administrator of the Savings

and Loan Division. (Code, s. 2297; Rev., s. 3880; 1907, c. 959, s. 1; C. S., s. 5173; 1967, c. 823, s. 5; 1971, c. 864, s. 17.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-7. Chapter on corporations applicable. — All of the provisions of law relating to private corporations, and particularly those enumerated in the Chapter entitled Corporations, not inconsistent with this Subchapter, or with the business of building and loan associations, shall be applicable to building and loan associations. (Rev., s. 3882; C. S., s. 5174.)

Applied in White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

§ 54-8. Charters validated. — The charters of all building and loan associations heretofore organized are hereby in all respects validated and confirmed, and all such associations shall have the powers and privileges of associations formed under this Subchapter. (1905, c. 435, s. 27; Rev., s. 3883; C. S., s. 5175.)

§ 54-9. May become members of and hold stock in federal home loan bank. — Any building and loan association heretofore or hereafter organized under the laws of this State may subscribe to, purchase, hold, own and dispose of stock in any federal home loan bank, and may become members of any such bank authorized by or organized under an act of Congress entitled "The Federal Home Loan Bank Act," approved July 22, 1932. (1933, c. 20.)

§ 54-10. Annual meetings. — The annual meeting of any such association shall be held at such time and place as shall be fixed in the notice of said meeting. There shall be published once a week for two weeks preceding such meeting, in a newspaper published in the county or town where the association has its principal office, a notice, signed by the secretary, of such meeting, and the time and place where the same is to be held; and such further notice shall be given as the charter or bylaws of the association may require. Notice of special meetings of shareholders shall be given in a like manner. Unless otherwise provided, 25 shareholders, present in person or represented by proxy, shall constitute a quorum at any regular or special shareholders' meeting. If no newspaper be published in the county or town in which any association has its principal office, then the notice above provided may be published by posting same at a conspicuous place in the office of the association, and a like notice at the door of the county courthouse. (1933, c. 19.)

§ 54-11. Conversion of building and loan associations into federal savings and loan associations. — Any corporation organized and existing under the laws of this State and operating as a building and loan association may convert itself into a federal savings and loan association pursuant to an act of Congress, approved June 13, 1933, entitled "Home Owners' Loan Act of Nineteen Hundred and Thirty-three," and any amendments thereto, with the same force and effect as though originally incorporated under such act of Congress, and the procedure to effect such conversion shall be as follows:

(1) The directors shall submit a plan of conversion to the Administrator of the Savings and Loan Division, and he may approve the same, with or without amendment, or disapprove the plan. If he approve the plan, then same shall be submitted to the shareholders as provided in the next subdivision.

(2) A meeting of the shareholders shall be held upon not less than 10 days' written notice to each shareholder, served personally or sent by mail to the last known address of such shareholder, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this corporation into a federal savings and loan association, pursuant to act of Congress approved June 13, 1933." The secretary or other officer of the corporation shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.

(3) At the meeting of the shareholders of such corporation, called and held as above provided, such shareholders may, by affirmative vote of a majority of shareholders present, in person or by proxy, declare by resolution the determination to convert said corporation into a federal savings and loan association. A copy of the minutes of the proceedings of such meeting of the shareholders certified by the president or vice-president and secretary or assistant secretary of the corporation shall be filed in the office of the Administrator of the Savings and Loan Division of this State within five days after such meeting, and a like copy shall also be filed in the office of the register of deeds of the county in which such corporation has its principal office. Each of said certified copies when so filed shall be presumptive evidence of the holding and the action of such meeting.

(4) Within a reasonable time after the receipt of a certified copy of the minutes of said meeting the Administrator of the Savings and Loan Division shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the conversion and proceedings and send the same to the corporation. Such certificate shall be recorded in the office of the register of deeds of the county in which the corporation has its principal office, and the original shall be held by the corporation. If the Administrator disapproves such proceedings he shall mark the certified copy of minutes in his office disapproved and notify the corporation to that effect.

(5) Within 60 days after approval of the proposed proceedings by the Administrator of the Savings and Loan Division, the officers of said corporation shall take such action, in the manner prescribed or authorized by the laws of the United States, as shall make it a federal savings and loan association, and there shall thereupon be filed in the office of the Administrator of the Savings and Loan Division a copy of the charter or authorization issued to such corporation by the Federal Home Loan Bank Board, or a certificate showing the organization or conversion of such corporation into a federal savings and loan association, and upon such filing with the Administrator of the Savings and Loan Division the corporation shall cease to be a State corporation and shall be deemed to be converted into a federal savings and loan association.

(6) Whenever any such corporation shall so convert itself into a federal savings and loan association it shall thereupon cease to be a corporation under the laws of this State, except that its corporate existence shall be deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its concerns as a State corporation, and to dispose of and convey its property. At the time when such conversion becomes effective all the property of the State

corporation, including all its right, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal savings and loan association, which shall have, hold and enjoy the same in its right as fully and to the same extent as the same was possessed, held and enjoyed by the State corporation; and the federal savings and loan association as of the time of the taking effect of such conversion shall succeed to all the rights, obligations and relations of the State corporation.

(7) Any such corporation may, instead of effecting the conversion above provided, at a meeting called and held as above outlined, authorize the sale of all or any portion of its assets, subject to the approval of the Administrator of the Savings and Loan Division, to a federal savings and loan association or to a building and loan association of this State, and subject to the approval of the Administrator of the Savings and Loan Division, may authorize the taking of stock in the association so buying the assets in payment thereof; and upon liquidation of the selling corporation the stock so received shall be distributed to its shareholders. In the event such sale shall be authorized, and approved by the Administrator of the Savings and Loan Division, the directors and officers shall have full power and authority to do any and everything necessary to carrying same into effect. (1935, c. 104; 1967, c. 823, s. 6; 1971, c. 864, s. 17.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-12. Conversion of federal association into State association. — Any federal savings and loan association organized and existing under the Home Owners' Loan Act of 1933, as amended, may convert into a building and loan association, pursuant to the provisions of this Chapter, with the same force and effect as though originally incorporated under the provisions of this Subchapter, by complying with the acts of Congress and the requirements of federal regulatory authority, and also by following the procedure as set out below:

(1) The directors of such federal savings and loan association shall submit a plan of conversion to the Federal Home Loan Bank Board (hereinafter referred to as "Board") or other federal regulatory authority, and also to the Administrator of the Savings and Loan Division of the State of North Carolina. When such plan has been approved, either with or without amendment by both of said authorities, then said plan shall be submitted to the members of such association as provided in the next subdivision.

(2) A meeting of the members shall be held upon not less than 10 days' written notice to each member, served personally or sent by mail to the last known address of such member, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this association into a building and loan association, pursuant to the provisions of the laws of the State of North Carolina." The secretary

or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

(3) At the meeting of the members of such association, called and held as above provided, such members may, by affirmative vote of fifty-one percent (51%) or more of members present, in person or by proxy, declare by resolution the determination to convert said association into a building and loan association operating under the laws of this State. A copy of the minutes of the proceedings of such meeting of the members, certified by the president or vice-president and secretary or assistant secretary of the association, shall be filed with the Federal Home Loan Bank Board within five days after such meeting. Such certified copy, when so filed, shall be presumptive evidence of the holding and the action of such meeting.

(4) Within 30 days after the approval of said proceedings by the Board, the officers of said association shall file with the register of deeds of the county where such association is designed to act a copy of the certificate of incorporation of such association, signed by at least seven members, to be recorded in the office of such register of deeds. Such certificate of incorporation shall conform to the provisions of the laws of this State. The register of deeds shall certify a copy of the certificate to the Administrator of the Savings and Loan Division, and shall not issue or record the same until duly authorized to do so by the Administrator of the Savings and Loan Division. Upon receipt of a copy of the certificate of incorporation the Administrator of the Savings and Loan Division shall at once examine into the facts connected with the conversion of such association, and, if it appears that such association if converted will be lawfully entitled to commence business as a building and loan association pursuant to the laws of this State, the Administrator of the Savings and Loan Division shall so certify to the register of deeds in the county in which the association will be located, who shall thereupon issue and record such certificate of incorporation. Upon the issuance and recordation of such certificate of incorporation the association shall file with the Board a certified copy of same. Thereupon the association shall cease to be a federal savings and loan association and shall be deemed to be converted into a building and loan association under the laws of this State, whose corporate existence shall be deemed then to begin.

(5) At the time when the corporate existence of said State association begins all the property of the said federal association, including all its rights, title and interest in and to all property of whatsoever kind whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such State association, which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same was possessed, held or enojoyed by said federal association; and such State association shall be deemed to be a continuation of the entity and the identity of said federal association, operating under and pursuant to the laws of this State, and all the rights, obligations and relations of said federal association to or in respect to any person, estate, or creditor, depositor, trustee or beneficiary of any trust, and in or in respect to any executorship or trusteeship or other trust or fiduciary function, shall remain unimpaired, and such State association, as of said beginning of its corporate existence, shall by operation of this section

succeed to all such rights, obligations, relations and trusts, and the duties and liabilities connected therewith, and shall execute and perform each and every such trust and relation in the same manner as if such State association had itself assumed the trust or relation, including the obligations and liabilities connected therewith. (1937, c. 12; 1967, c. 823, s. 7; 1971, c. 864, s. 17.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-12.1. Merger of building and loan associations. — Any two or more building and loan associations organized or to be organized, or existing under the laws of this State and operating under the provisions of this Subchapter, may merge into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

merge, may, at separate meetings, enter into a written agreement of merger signed by them, and under the corporate seals of the respective associations, specifying each association to be merged and the association which is to receive into itself the merging association or associations, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. Such merger agreement may provide the manner and basis of converting or exchanging the shares in the association or associations so merged for shares of the same or a different class of the receiving association.

(2) Such merger agreement together with the copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective meetings shall be submitted to the Administrator of the Savings and Loan Division, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the shareholders of each of the associations proposing to merge will be benefited thereby, shall, in writing, approve same, or shall, if he deems that the proposed merger will not be in the interest of all members of the association so merging, disapprove, in writing, the same. If he approve the merger agreement, then same shall be submitted, within 30 days after notice to such associations of such approval, to the shareholders of each of such associations, as provided in the next subdivision.

(3) A special meeting of the shareholders of each of said associations shall be held separately upon written notice to each shareholder of not less than 20 days, specifying the time, place, and purpose for which such meeting is called and such notice shall be served personally or sent by mail, postage prepaid, to each shareholder at the last known address of such shareholder appearing upon the books of the association; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such association has its prinicpal office or conducts its business (and if there be no newspaper published in such county then in a newspaper published in an adjoining county). The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

(4) At separate meetings of the shareholders of each of such associations, called and held as above provided, such shareholders representing a majority of the outstanding shares of stock entitled to vote, by affirmative vote of at least two thirds of the shareholders present, in person or by proxy, may declare by resolution the determination to merge into a single association upon terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the Administrator of the Savings and Loan Division. Members of the associations who do not attend the meetings or who do not vote thereat, shall, if the merger is so approved by the members, be deemed to consent to the merger. Upon the adoption of such resolution, a copy of the minutes of the proceedings of such meetings of the shareholders of the respective associations, certified by the president or vice-president and secretary or assistant secretary of the merging associations, shall be filed in the office of the Administrator of the Savings and Loan Division of this State, within 10 days after such meetings, and within 15 days after the receipt of a certified copy of the minutes of said meetings the Administrator of the Savings and Loan Division shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the merger and send same to each of said associations. Such certificate shall be filed and recorded in the office of the register of deeds of the county or counties in this State in which the respective associations so merged shall have their original certificates of incorporation recorded; provided, that the only fees that shall be collected in connection with the merger of said associations shall be filing and recording fees. When such certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members of the associations so merging, and the same shall thence be taken and deemed to be the act of merger of such constituent building and loan associations under the laws of this State, and such record or certified copy thereof shall be evidence of the agreement and act of merger of said building and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. If the Administrator shall disapprove the proceedings he shall mark the certified copies of the meetings in his office disapproved and notify the associations to that effect.

(5) Upon the merger of any association, as above provided, into another:

a. Its corporate existence shall be merged into that of the receiving association; and all and singular its rights, powers, privileges and franchises, and all of its property, including all right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such receiving association which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held or enjoyed by the association or associations so merged; and such receiving association shall absorb fully and completely the association or associations so merged;

b. Its rights, liabilities, obligations and relations to any person shall remain unchanged, and the association into which it has been merged shall, by the merger, succeed to all the relations, obligations and liabilities, as though it had itself assumed or incurred the same, and no obligation or liability of a member in an association a party to the merger shall be affected by the merger, but the obligations and liabilities shall continue as they existed before the merger, unless other otherwise provided in the merger agreement;

c. A pending action or other judicial proceeding to which any association that shall be so merged is a party, shall not be deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order or decree in the same manner as if the merger had not been made; or the receiving association may be substituted as a party to such action or proceeding, and any judgment, order or decree may be rendered for or against it that might have been rendered for or against such other association if the merger had not occurred. (1943, c. 450, s. 1; 1967, c. 823, s. 8; 1971, c. 864, s. 17.)

Cross Reference. — See Editor's note to § 53-5.

ARTICLE 2.

Shares and Shareholders.

§ 54-13. Number of shares and entrance fee prescribed. — Any corporation created under and by virtue of this Subchapter shall have power to declare in its certificate of incorporation the maximum number of shares of which the corporation shall consist to be in force at any one time, the par value of the same, to prescribe the entrance fee per share to be paid by each shareholder at the time of subscribing, to regulate the amount of the installments to be paid on each share, and the time at which the same shall be paid and payable: Provided, that not more than one percent (1%) of the par value of each share of stock subscribed may be paid as commissions or other remuneration for the soliciting and sale of stock. (1905, c. 435, s. 3; Rev., s. 3887; C. S., s. 5176; 1931, c. 75.)

Editor's Note. — No penalty is attached for violation of the proviso, but the license of the association might be revoked under the provisions of § 54-28 if any prohibited payments were discovered through the annual report (see § 54-26) or otherwise, 9 N.C.L. Rev. 351.

Applied in Dorrity v. Greater Durham Bldg. & Loan Ass'n, 204 N.C. 698, 169 S.E. 640 (1933).

§ 54-14. Different classes of shares; dividends; reserve fund. — Every building and loan association doing business in this State shall be authorized to issue as many series or classes and kinds of shares and at such stated periods as may be provided for in its charter or bylaws, or by the federal home loan bank and Federal Savings and Loan Insurance Corporation for federal savings and loan associations, subject to such regulations and limitations as the Administrator of the Savings and Loan Division may prescribe: Provided, the dividends on paid-up stock shall be less than the association is earning, and such stock may have the right to share in the dividends between the rate paid and the earned per centum. Every association shall at all times have on hand and unpledged, investments in obligations of the United States government or the government of the State of North Carolina, or stock in the federal home loan bank, or bonds issued by the federal home loan bank, or on deposit in such bank

or banks as may have been approved by a majority of the entire board of directors, an amount equal to at least five per centum (5%) of the aggregate amount of paid-up stock outstanding, as shown by the books of the association. When the aggregate of investment or funds in hand or on deposit as herein provided falls below the amount required under this section, the association shall make no new real estate loans until the required amount has been accumulated: Provided, that the refinancing, recasting or renewal of loans previously made, and/or loans made as a result of foreclosure sales under instruments held by the interested building and loan association, shall not be considered as new loans within the meaning of this section. (1905, c. 435, s. 6; Rev., s. 3889; 1907, c. 959, s. 3; 1919, c. 179, s. 3; C. S., s. 5177; 1931, c. 107; 1933, c. 26; 1941, c. 67; 1967, c. 556; 1971, c. 864, s. 17.)

Editor's Note. — For comment on the 1933 amendment, see 11 N.C.L. Rev. 207.

Optional payment stock may be issued under this section. Lumpkin v. Durham Bldg. & Inv. Co., 204 N.C. 563, 169 S.E. 156 (1933).

§ 54-15. Certificate issued and payment enforced. — Any such corporation shall have power to issue to each member a certificate of the shares held by him, and to enforce the payment of all installments and other dues due to the corporation from the members or shareholders by such fines and forfeitures as the corporation may from time to time provide in the bylaws of its certificate of incorporation. (1905, c. 435, s. 4; Rev., s. 3888; C. S., s. 5178.)

§ 54-16. New members admitted. — Any person applying for membership or shares in any corporation after the end of a month from the date of its incorporation may be required to pay, on subscribing, such sums or assessments as may from time to time be fixed and assessed in the manner provided by the corporation, in order to place such new member or shareholder on like footing with the original members and others holding shares at the time of such application. (1905, c. 435, s. 5; Rev., s. 3886; C. S., s. 5179.)

§ 54-17. Shareholders equally liable. — All shareholders shall occupy the same relative position as to debts, losses, and profits of the association: Provided, that this shall not prevent the payment of a lesser rate of dividend on paid-up stock as provided in G.S. 54-14, but this provision shall not prevent any association from receiving dues in advance, allowing such a rate of interest for the anticipated payments of dues as may be agreed upon by the directors. No series or class of stock shall be paid off until fully matured: Provided, that this section shall not prevent the cashing in of any stock before maturity. (1905, c. 435, s. 7; Rev., s. 3884; 1907, c. 959, s. 2; 1919, c. 179, s. 2; C. S., s. 5180; 1931, c. 109.)

Editor's Note. — For comment on the 1931 amendment, see 9 N.C.L. Rev. 352.

Liability upon Insolvency. — In case of the insolvency of a building and loan association, every person having stock therein, whether as creditor or debtor, must be considered a corporator, and every member indebted to it must be treated as a debtor. Strauss v. Carolina Interstate Bldg. & Loan Ass'n, 117 N.C. 308, 23 S.E. 450 (1895); Strauss v. Carolina Interstate Bldg. & Loan Ass'n, 118 N.C. 556, 24 S.E. 116 (1896).

Such debtors upon insolvency are liable for authorized assessments to cover losses. New Bern Bldg. & Loan Ass'n v. Blalock, 160 N.C. 490, 76 S.E. 532 (1912).

Where a corporation becomes the holder of stock in a building and loan association, which becomes insolvent, it may be held liable on the same, as an incorporator, in the association issuing the stock. Meares v. Fairley, 126 N.C. 662, 36 S.E. 130 (1900).

Stockholder and Debtor. — Where the borrower from a building and loan association takes out stock, to pay at maturity the debt secured by a mortgage on his building he occupies, upon the bankruptcy of the association in the hands of a receiver in bankruptcy, two independent relations to the association, that of stockholder, and that of debtor to the association, and he is not entitled to have his payments made on his

shares of stock credited to his debt, as against the claims of the other creditors. Rendleman v. Stoessel, 195 N.C. 640, 143 S.E. 219 (1928).

§ 54-18. Minors as shareholders. — Minors of the age of 12 years and upwards are authorized and empowered to become shareholders in and buy, sell, hold, pay dues on, withdraw, transfer, and otherwise deal in the shares in any such association in the same manner and with the same powers, rights, and liabilities, force and effect as though such minors were of full age. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this State. (1903, c. 728; 1905, c. 435, s. 1; Rev., s. 3885; C. S., s. 5181; 1939, c. 179.)

This section is a statutory exception to the general rule that contracts of infants are voidable at the option of the infant, and when so avoided are void ab initio. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N.C. 41, 178 S.E. 863 (1935).

Stated in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 54-18.1. Shares issued in two or more names. — A single membership in an association may be held by two or more persons and the share or share account certificates may be issued in their names, and in the absence of written instructions to the contrary, consented to by the association, the value of such share or share account certificates and any dividends thereon may be paid by such association to any one or more of such persons whether the others be living or not, and the receipt or acquittance of the person so paid shall fully exonerate and discharge the association from all liability to any person having any interest in such account, and the last survivor of such persons may transfer such membership and the share or share account certificates to himself or to any other person. Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-24 relating to the administration of the inheritance tax laws, or provisions of laws relating to inheritance tax, nor shall the provisions herein contained regulate the rights and liabilities of the parties having interest in such share or share account certificates as among themselves but shall regulate, govern and protect the associations in their dealings with members holding share or share account certificates as herein provided, and further provided that the provisions herein shall also apply to members of federal savings and loan associations having their principal offices in this State. (1947, c. 718.)

§ 54-18.2. Shares acceptable as deposit of securities. — Notwithstanding any restrictions or limitations contained in any law of this State, shares of any building and loan association organized under the laws of this State or of any federal savings and loan association having its principal office in this State may be accepted by any agency, department, or official of the State of North Carolina in any case wherein such agency, department or official acting in its or his official capacity requires that securities be deposited with such agency, department or official. (1959, c. 363.)

ARTICLE 2A.

Savings Accounts.

§ 54-18.3. Savings accounts authorized; terms of payment and withdrawal. — Notwithstanding any other provisions of law, any building and loan association or savings and loan association incorporated under the laws of this State or any federal savings and loan association having its principal office in

North Carolina is authorized to raise capital in the form of such savings deposits or savings accounts as are authorized by its charter or by regulation of the Administrator of the Savings and Loan Division and may issue such passbooks, time certificates of deposit, or other evidence of savings accounts as are so authorized. Holders of savings accounts and obligors of an association shall to such extent as may be provided by its charter or by regulations of the Administrator of the Savings and Loan Division, be members of the association, and shall have such voting rights and such other rights as are thereby provided. Except as may be otherwise authorized by the association's charter or regulation of the Administrator of the Savings and Loan Division in the case of savings accounts for fixed or minimum terms of not less than 30 days, the payment of any savings account shall be subject to the right of the association to require such advance notice, not less than 30 days, as shall be provided for by the charter of the association or the regulations of the Administrator of the Savings and Loan Division. The payment of withdrawals from savings accounts in the event an association does not pay all withdrawals in full (subject to the right of the association to require notice) shall be subject to such rules and procedures as may be prescribed by the association's charter or by regulation of the Administrator of the Savings and Loan Division. Savings accounts shall not be subject to check or to withdrawal or transfer on negotiable or transferable order or authorization to the association, but the Administrator of the Savings and Loan Division may by regulation provide for withdrawal or transfer of savings accounts upon nontransferable order or authorization. To such extent as the Administrator of the Savings and Loan Division may authorize by regulation or advice in writing, an association may borrow, may give security, and may issue such notes, bonds, debentures, or other obligations, or other securities as the Administrator of the Savings and Loan Division may so authorize. (1969, c. 449, s. 1; 1971, c. 864, s. 17.)

§ 54-18.4. Reserve fund required. — Any capital raised pursuant to the provisions of G.S. 54-18.3 shall be added to the amount of capital raised by the issuance of stock of the association for the purposes of determining the amount of the reserve fund required by G.S. 54-14. (1969, c. 449, s. 2.)

§ 54-18.5. Administrator of the Savings and Loan Division to adopt rules and regulations. — The Administrator of the Savings and Loan Division shall adopt rules and regulations for the implementation of the authority herein vested in savings and loan associations. (1969, c. 449, s. 3; 1971, c. 864, s. 17.)

ARTICLE 3.

Loans.

§ 54-19. Manner of making loans; security required. — At such times as the bylaws shall designate, not less frequently than once a month, the board of directors shall hold meetings at which the funds in the treasury applicable for loans may be loaned: Provided, that between meetings of the board of directors any three members of said board may act as an executive committee and may, by unanimous vote, make such loans. Any loans so made or approved by the executive committee shall be reported to the board of directors at its next meeting. No loans shall be made by such association to anyone not a member thereof. Borrowers shall be required to give real estate security, either by way of mortgage or deed or trust, subject only to mortgages or deeds of trust to secure loans made by the association and undue taxes and special assessments: Provided, that the shares of any such association may be received as security for a loan on such shares of an amount not to exceed the withdrawable value thereof: Provided, further, that bonds issued as general obligations of the United

States government and bonds issued as general obligations of the State of North Carolina may be received as security to an amount not exceeding ninety per centum (90%) of the face value of such bonds. (1905, c. 435, s. 8; Rev., s. 3890; 1907, c. 959, s. 4; 1919, c. 249; C. S., s. 5182; 1937, c. 11; 1941, c. 65; 1959, c. 158.)

Cross References. — As to investment in bonds guaranteed by United States, see § 53-44. As to loans on mortgages, etc., issued under the Federal Housing Act, see § 53-45.

§ 54-20. Direct reduction of principal. — The board of directors of any building and loan association, heretofore or hereafter organized under the laws of this State, may, unless specifically prohibited by the certificate of incorporation, constitution or bylaws of the association, by resolution or bylaw, permit borrowing members to repay their indebtedness by a direct monthly or periodical reduction of principal method. In every such case the borrower shall in writing make such agreement with the association relative to the repayment of his indebtedness as the directors may require. The agreement shall stipulate that the borrower or debtor shall make periodical payments, not less frequently than once a month, until such mortgage indebtedness and advances, if any, made by the association for payment of taxes, assessments, insurance premiums and other purposes, as may be owing from the borrower to the association, with interest thereon, shall have been fully paid. The balance of any loan account under such direct reduction of principal method shall be determined monthly, quarterly or semiannually, in order to ascertain the amount then necessary to satisfy in full the mortgage obligation, and when so ascertained such amount shall be the amount due upon said loan at said time to said association or any representative or successor thereof. Any association permitting such method of repayment may adopt a plan by which the interest shall be computed periodically on the preceding balance, and such interest shall be added to that preceding balance, together with any and all advances and other charges above enumerated made for the benefit of the borrower during the said interest period, and then there shall be deducted from the total any and all payments made by the borrower to the association during said period, or since the preceding balance was set up.

All payments made on a loan under such plan of direct periodical reduction shall be applied first to interest, and then to the principal of advances made for the account of the borrower and charged thereto, and to the principal of the loan. The board of directors may adopt any other direct periodic reduction of principal plan that will require complete repayment of such loans: Provided, no plan of payment shall be adopted that will not mature and pay off the loan within a term to be fixed by the Commissioner of Insurance of North Carolina, which term shall not exceed 40 years from the date of the making thereof: Provided further, the board of directors may authorize the renewal or extension of the time of repayment of any loan theretofore made. Every person who has obtained or shall obtain a loan upon this or any other plan, or who has assumed or shall assume payment of a loan theretofore made upon this or any other plan or who shall be obligated upon any loan held by an association, shall be by reason thereof a member of the association making or holding such loan and shall be deemed a member until such loan is fully paid or assumed by another person or persons acceptable to the association. Such association may issue certificates of stock or membership to such member, but certificates shall not be necessary or required. (1937, c. 18; 1945, c. 189, s. 1; 1959, c. 367; 1971, c. 466.)

§ 54-21. Insured and guaranteed loans. — (a) Notwithstanding any other provisions of law, any such association, incorporated under the laws of this State, is authorized to make any real estate mortgage loan, which is insured or guaranteed, in any manner, in whole or in part, by the United States or any

instrumentality thereof, or for which there is a commitment to insure or guarantee; provided, the association making any insured or guaranteed second lien shall also hold the first lien on the property.

(b) And, further, notwithstanding any other provision of law, any such association, incorporated under the laws of this State, is authorized to make any real estate repair or improvement loan under Title I of an act of Congress of the United States entitled "National Housing Act," as amended, when such loan is insured in whole or in part by the government of the United States or any instrumentality thereof; provided, however, no such loans may be made by any association when the total outstanding balance of principal and interest due the association on such loans shall equal or exceed the sum of its unencumbered contingent reserve and the insurance reserve accumulated to the credit of the association by reason of such loans. (1941, c. 64; 1945, c. 189, s. 2; 1947, c. 694.)

§ 54-21.1. Purchase of loans. — Any such association, incorporated under the laws of this State, is authorized to invest any funds on hand, in excess of the demands of its shareholders, in the purchase of loans of a type which the association would be permitted to make under this Article; provided, that such purchase shall not be made until the purchaser has received the approval of two thirds of the entire membership of the board of directors, in a regular or called session, and provided, that separate appraisals be made on each property involved and a certificate of title be furnished by an approved attorney for the association. (1945, c. 189, s. 3.)

§ 54-21.2. Investments. — (a) Any building and loan association or savings and loan association incorporated under the laws of this State is authorized to invest any funds on hand, in excess of the demands of its shareholders, in bonds or evidences of indebtedness of the United States government, or guaranteed by it; in bonds or other evidences of indebtedness of the State of North Carolina; in demand or time deposits with such bank or banks as may be approved by a majority of the board of directors; in stock of a federal home loan bank of which it is a member and in any obligations or consolidated obligations of any federal home loan bank or banks; in stock or obligations of the Federal Savings and Loan Insurance Corporation; in stock or obligations of the National Mortgage Association or any successor or successors thereto; in savings accounts of any association operating under the provisions of this section, or in savings accounts of any federal savings and loan association having its principal office within the State, subject to the maximum amounts insured by any federal agency; in stock and obligations of any corporation doing business in North Carolina or of any agency of the State of North Carolina or of the United States where the principal business of such corporation or agency is to make loans for the financing of a college education and other educational loans, provided that each savings and loan association shall determine and be limited to an investment in such stock and obligations which shall not exceed a maximum of one percent (1%) of the total outstanding loans made by each such savings and loan association.

(b) Subject to such regulations and limitations as the Administrator of the Savings and Loan Division may prescribe, any such association is authorized and permitted to make any loan or investment now or hereafter permitted to be made by any federal savings and loan association by the Congress of the United States, Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation.

(c) The rights and powers granted to associations by this section shall be deemed supplementary to and not in substitution for any rights and powers heretofore or hereafter granted such associations in their charters or by the laws of this State.

(d) Any savings and loan association incorporated under the laws of this State or any federal savings and loan association whose principal office is in the State

of North Carolina, may invest in the capital stock, obligations, or other securities of any corporation organized under the laws of the State of North Carolina when the entire capital stock of such corporation is owned or is to be owned by such savings and loan association. Provided, however, that the original capital stock of such corporation shall aggregate at least three hundred thousand dollars ($300,000) from subscriptions and payments by at least 10 of the aforementioned associations; and provided further that no association may own capital stock obligations or other securities of such corporation which in their aggregate exceeds one percent (1%) of the assets of each such savings and loan association, and provided further that not less than one hundred percent (100%) of all the activities of such service corporation shall consist of originating, purchasing, selling and servicing loans or participating interest in loans upon real estate or other investments authorized to be made by savings and loan associations doing business in the State of North Carolina, and performing such clerical, bookkeeping, accounting, statistical, and other such activities, as may be permitted by the Administrator of the Savings and Loan Division. (1945, c. 189, s. 4; 1959, c. 366; 1967, cc. 580, 653; 1971, c. 864, s. 17.)

§ 54-21.3. County and municipal bonds as investments. — Bonds or other evidences of indebtedness of counties and municipalities of the State of North Carolina are authorized as investments for any savings and loan association incorporated under the laws of this State; provided, that said bonds or other evidences of indebtedness of such counties and municipalities shall have a rating by Moody's Investors Services, Inc., of not less than AA, and a rating by the North Carolina Municipal Council, Inc., of not less than 90 points out of 100 points, and, provided further that the investment by any savings and loan association in such bonds or other evidences of indebtedness shall not exceed three percent (3%) of the total value of the outstanding shares of such association. (1963, c. 352.)

§ 54-21.4. Loans for improvements to real property; mobile home financing. — (a) Notwithstanding any other provisions of law, any building and loan association or savings and loan association incorporated under the laws of this State or any federal savings and loan association having its principal office in North Carolina is authorized, without being required to take or receive any security, to make:

(1) Any loan not exceeding seven thousand five hundred dollars ($7,500) which is made for the improvement, alteration, repairing and equipping real property, subject to the rules and regulations governing such loans as adopted by the Administrator of the Savings and Loan Division; provided, however, that the combined total amount of the outstanding loans made under this section and the amount of the outstanding loans made on nonresidential real property as the term "nonresidential real property loan" is defined in the United States Code section 7701 (a) (19) shall not exceed nineteen percent (19%) of the total amount of the assets of any savings and loan association making loans under the provisions of this section.

(2) Any loan for the purpose of purchasing or refinancing a mobile home, subject to the rules and regulations governing such loans as adopted by the Administrator of the Savings and Loan Division.

(b) The loans authorized to be made by savings and loan associations under the provisions of this section shall be subject to such regulations and limitations as the Administrator of the Savings and Loan Division shall prescribe. (1969, c. 737; 1971, c. 864, s. 17; 1973, c. 529.)

Editor's Note. — The 1973 amendment, in subdivision (1) of subsection (a), substituted "seven thousand five hundred dollars ($7,500)" for "five thousand dollars ($5,000.00)" near the beginning

of the subdivision and "United States Code section 7701 (a) (19)" for "United States Income Tax Regulations section 301.7701-13" and "assets" for "outstanding loans" near the end of the subdivision.

§ 54-22. Repayment at any time. — Any member of such association who shall borrow from it shall have the right at any time prior to the maturing of the shares pledged as collateral for such loan to pay off and discharge his loan by paying the amount received by him, including the cost and expenses of making the loan, if the same has been deducted therefrom, with interest at the rate agreed upon in the note to date of settlement, and all fines and dues then assessed and remaining unpaid. Upon such settlement he shall be credited with only the withdrawal value of his shares as fixed by the charter or bylaws, or by the directors of such association. In case of default by a shareholder who has borrowed from the association and a foreclosure of his mortgage or deed of trust, the amount of his indebtedness to such association shall be ascertained in the manner provided by this section. (1905, c. 435, s. 9; Rev., s. 3891; C. S., s. 5183; 1971, c. 487.)

Cross Reference. — As to interest and usury laws in general, see § 24-1 et seq.

Stockholder Cannot Escape Payment of Losses. — Before availing himself of the privileges provided by this section the stockholder must have paid any assessments to meet losses of the corporation. New Bern Bldg. & Loan Ass'n v. Blalock, 160 N.C. 490, 76 S.E. 532 (1912). See also Mears v. Davis, 121 N.C. 126, 28 S.E. 188 (1897).

Usury. — An illegal transaction cannot be settled. Dickerson v. Raleigh Co-op. Land & Bldg. Ass'n, 89 N.C. 37 (1883). And the usury laws apply to the same extent as to natural persons. Commissioners of Craven v. Atlantic & N.C.R.R., 77 N.C. 289 (1877). These laws will be found as § 24-1 et seq. of the General Statutes, and they cannot be changed by special legislation. Rowland v. Old Dominion Bldg. & Loan Ass'n, 116 N.C. 877, 22 S.E. 8 (1895). No subterfuge such as calling the charges "fines," "dues," etc., or calling the borrower a partner will prevent the transaction from being usurious. Mills v. Salisbury Bldg. & Loan Ass'n, 75 N.C. 292 (1876); Hollowell v. Southern Bldg. & Loan Ass'n, 120 N.C. 286, 26 S.E. 781 (1897). A full exposition of usury will be found in the notes to § 24-2, and the principles there stated are applicable when usury is charged by a building and loan association.

Same—Effect. — As stated in the notes to § 24-2 the effect of usury is the forfeiture of the entire interest, and when already paid the recovery back of twice the amount of interest. Cases applying this principle to building and loan associations are: Smith v. Old Dominion Bldg. & Loan Ass'n, 119 N.C. 249, 26 S.E. 41 (1896); Hollowell v. Southern Bldg. & Loan Ass'n, 120 N.C. 286, 26 S.E. 781 (1897); Cheek v. Iron Belt Bldg. & Loan Ass'n, 126 N.C. 242, 35 S.E. 463 (1900).

This rule is qualified, however, by the equitable doctrine that where the borrower seeks an affirmative relief, such as to prevent the foreclosure of his mortgage, equity will make payment of a legal rate of interest a prerequisite to the grant of relief. This principle is fully explained in the note to § 24-2. Building and loan association cases applying the same are: Rowland v. Old Dominion Bldg. & Loan Ass'n, 118 N.C. 173, 24 S.E. 266 (1896); Williams v. Maxwell, 123 N.C. 586, 31 S.E. 821 (1898).

Forfeiture of Mortgage on Default. — A contract, by which the stock, taken out by a borrower and assigned to the association, when the mortgage is executed, is forfeited to the association on default, without allowance of credit on the mortgage for the payments made on the stock, is unconscionable, and, though upheld by the laws of the association's own state, will not be enforced in North Carolina. Rowland v. Old Dominion Bldg. & Loan Ass'n, 116 N.C. 877, 22 S.E. 8 (1895).

Refusal to Make Loan. — On the association's refusal to make a loan to a subscriber, he is entitled to recover back money paid for shares of stock in the association. Fagg v. Southern Bldg. & Loan Ass'n, 113 N.C. 364, 18 S.E. 655 (1893).

§ 54-23. Power to borrow money. — Any such association may in its certificate of incorporation, constitution or bylaws authorize the board of directors from time to time to borrow money, and the board of directors may from time to time, by resolution adopted by a vote of at least two thirds of all the directors and duly recorded in the minutes, borrow money for the association

on such terms and conditions as they may deem proper; but the total amount of money so borrowed shall at no time exceed fifty per centum (50%) of the gross assets of such association; provided, however, any such association may borrow without limit from any agency or instrumentality of the United States upon such terms and conditions as such agency or instrumentality may impose. (1905, c. 435, s. 10; Rev., s. 3892; 1909, c. 898; 1911, c. 61; 1913, c. 21; C. S., s. 5184; 1933, c. 18; 1941, c. 66; 1959, c. 159.)

Editor's Note. — For comment on 1931 amendment, see 11 N.C.L. Rev. 208.

ARTICLE 4.

Under Control of Administrator of the Savings and Loan Division.

§ 54-24. Power of Administrator of the Savings and Loan Division. — The Administrator of the Savings and Loan Division of the State is hereby empowered and directed to perform all the duties and exercise all the powers as to building and loan associations, unless herein otherwise provided. (1905, c. 435, s. 24; Rev., s. 3893; C. S., s. 5185; 1971, c. 864, s. 17.)

§ 54-24.1. Savings and Loan Commission. — (a) There shall be in the Department of Commerce a Savings and Loan Commission which shall consist of seven members. The Secretary of the Department of Commerce shall be ex officio a member of the Commission and serve as chairman of the Commission. The five members of the Savings and Loan Advisory Board, heretofore appointed by the Governor, shall continue as members of this Commission and shall serve their full terms and their successors shall be appointed in the same manner and for the same terms as was heretofore provided for members of the Savings and Loan Advisory Board. Upon July 14, 1971, and quadrennially thereafter, the Governor shall appoint a sixth member of the Commission whose term shall be for four years. At least three members of the Commission shall be persons who have had experience in management of savings and loan associations.

Meetings shall be held regularly as fixed by the bylaws but special meetings may be had at any time upon call of the chairman, or any three members of the Commission. Members of the Commission shall be reimbursed for expenses incurred in the performance of their duties under this section as prescribed in G.S. 138-5.

(b) The relationship between the Secretary of Commerce and the Savings and Loan Commission shall be as defined for a type II transfer under G.S. 143A-1 to 143A-11.

(c) The Savings and Loan Commission is hereby vested with full power and authority to review, approve, or modify any action taken by the Administrator of the Savings and Loan Division in the exercise of all powers, duties, and functions vested in or exercised by the Administrator of the Savings and Loan Division under the savings and loan association laws of this State. (1967, c. 557; 1971, c. 864, s. 17.)

State Government Reorganization. — The Savings and Loan Advisory Board [now Commission] was transferred to the Department of Commerce by § 143A-179, enacted by Session Laws 1971, c. 864.

The Savings and Loan Association Division was transferred to the Department of Commerce by § 143A-178, enacted by Session Laws 1971, c. 864.

§ 54-25. Annual license fees. — All domestic building and loan associations shall pay an annual license fee of twenty-five dollars ($25.00) and may be licensed upon filing with the Administrator of the Savings and Loan Division an application in such form as he may prescribe. Such license fee shall be used to defray the expenses incurred by the Administrator of the Savings and Loan Division in supervising building and loan associations. (1919, c. 179, s. 1; C. S., s. 5186; 1971, c. 864, s. 17.)

§ 54-26. Statement filed by association. — Every association doing business under this Subchapter shall file in the office of the Administrator of the Savings and Loan Division, on or before the first day of February in each year, in such form as he shall prescribe, a statement of the business standing and financial condition of the applicant on the preceding thirty-first day of December, signed and sworn to by the principal, or chief managing agent, attorney, or officer thereof, before the Administrator of the Savings and Loan Division, or before a commissioner of affidavits for North Carolina, or before some notary public. (1905, c. 435, s. 11; Rev., s. 3894; 1907, c. 959, s. 5; C. S., s. 5187; 1971, c. 864, s. 17.)

§ 54-27. Statement examined, approved, and published; fees. — It shall be the duty of the Administrator of the Savings and Loan Division to receive and thoroughly examine each annual statement required by the Subchapter, and if made in compliance with the requirements thereof, to publish an abstract of the same in one of the newspapers of the State, to be selected by the general agent or attorney making such statement, and at the expense of his principal. The Administrator of the Savings and Loan Division shall collect a fee of five dollars ($5.00) from each association filing such statement, and the fees shall be paid into the State treasury to be credited to the general fund. (1905, c. 435, s. 12; Rev., s. 3895; C. S., s. 5188; 1945, c. 635; 1971, c. 864, s. 17.)

§ 54-28. License revoked. — If the Administrator of the Savings and Loan Division shall become satisfied at any time that any statements made by any association licensed under this Subchapter are untrue, or in case a general agent shall fail or refuse to obey the provisions of this Subchapter, or if upon examination the Administrator of the Savings and Loan Division is of opinion that such association or company is insolvent, or has exceeded its powers, or has failed to comply with any provisions of law, or its mode of business is not feasible for the purposes of carrying out successfully its plan, or that its condition is such as to render its further proceedings hazardous to the stockholders, he shall thereupon have power to revoke and cancel such license. (1905, c. 435, s. 13; Rev., s. 3896; 1907, c. 959, s. 6; C. S., s. 5189; 1971, c. 864, s. 17.)

§ 54-29. Examinations made; expense paid; test appraisals of collateral for loans. — If at any time the Administrator of the Savings and Loan Division has good reason to think that the standing and responsibility of any building and loan association or company doing business in this State, or its mode of business, is of a doubtful character, or in his discretion whenever he deems it prudent to do so, it shall be his duty to examine and investigate everything relating to the business of such company, and to that end he is hereby authorized, if he deem it advisable, to appoint a suitable and competent person to make such investigation, who shall file with the Administrator of the Savings and Loan Division a full report of his finding in such case. The expenses and cost of such examination shall be defrayed by the company or association subjected to investigation, and each company or association doing business in this State shall stipulate in writing, to be filed with the Administrator of the Savings and Loan Division, that it will pay all reasonable cost and expenses of such examination when it shall become necessary. The Administrator of the Savings and Loan

Division whenever he deems it advisable, may direct the making of test appraisals of real estate and other collateral securing loans made by savings and loan associations doing business in this State, and where he deems advisable, employ competent appraisers, or prescribe a list from which competent appraisers may be selected, for the making of such appraisals by the Administrator of the Savings and Loan Division, or in a manner prescribed by the Administrator of the Savings and Loan Division, and do any and all other acts incident to the making of such test appraisals. The expense and cost of such test appraisals shall be defrayed by the company or association subjected to the test appraisals, and each company or association doing business in this State shall pay all reasonable costs and expenses of such test appraisals when it shall be directed. (1905, c. 435, ss. 14, 15; Rev., s. 3897; 1919, c. 179, s. 4; C. S., s. 5190; 1963, c. 353; 1971, c. 864, s. 17.)

§ 54-30. Failing to exhibit books or making false statement a misdemeanor. — If any person, having in his possession or control any books, accounts, or papers of any building and loan association licensed by law, shall refuse to exhibit the same to the Administrator of the Savings and Loan Division, or his agents on demand, or shall knowingly or willfully make any false statement in regard to the same, he shall be guilty of a misdemeanor, and fined and imprisoned, at the discretion of the court. (1893, c. 434; 1899, c. 164; Rev., s. 3329; C. S., s. 5191; 1971, c. 864, s. 17.)

§ 54-31. Agent must obtain certificate. — It shall be unlawful for any person to solicit business or act as agent for any building and loan association or company without having procured from the Administrator of the Savings and Loan Division a certificate that such association or company for which he offers to act is duly licensed by the State to do business for the current year in which such person solicits business or offers to act as agent. The fee for such license shall be two dollars and fifty cents ($2.50), to be paid to the Administrator of the Savings and Loan Division at the time the certificate is issued; and no other license or fee shall be required for said business of an agent or solicitor so licensed. (1895, c. 444, s. 3; 1899, c. 154, s. 2, subsec. 20; Rev., s. 3898; 1907, c. 959, s. 7; C. S., s. 5192; 1933, c. 17; 1971, c. 864, s. 17.)

§ 54-32. Penalties imposed and recovered. — Every general agent or attorney of any building and loan company or association who shall fail or refuse to perform any duty required of him by this Subchapter shall forfeit and pay to the Administrator of the Savings and Loan Division fifty dollars ($50.00) for the State for every such refusal, to be recovered in the district court at the suit of the Administrator of the Savings and Loan Division. (1893, c. 434, s. 2300g; 1899, c. 154, s. 2, subsec. 20; Rev., s. 3899; C. S., s. 5193; 1971, c. 864, s. 17; 1973, c. 108, s. 18.)

Editor's Note. — The 1973 amendment substituted "in the district court" for "before any justice of the peace."

§ 54-33. Notice required before appointment of receivers. — No judge or court shall appoint a receiver for any building and loan association organized and incorporated under the laws of this State unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the Administrator of the Savings and Loan Division of the State. (1933, c. 38; 1971, c. 864, s. 17.)

Editor's Note. — See 11 N.C.L. Rev. 208.

§ 54-33.1. Administrator of the Savings and Loan Division to prescribe books, records, etc.; retention, reproduction and disposition of records. — (a) Whenever in his judgment it may appear to be advisable, the Administrator of the Savings and Loan Division may issue such rules, instructions, and regulations prescribing the manner of preserving books, accounts, and records of associations as will tend to produce uniformity in the books, accounts, and records of associations of the same class.

(b) The following provisions shall be applicable to all building and loan associations and savings and loan associations operating under the provisions of this Subchapter:

(1) Each association shall retain permanently the minute books of meetings of its stockholders and directors and all records which the Administrator of the Savings and Loan Division shall in accordance with the terms of this section require to be retained permanently.

(2) All other association records shall be retained for such periods as the Administrator of the Savings and Loan Division shall in accordance with the terms of this section prescribe.

(3) The Administrator of the Savings and Loan Division shall from time to time issue regulations classifying all records kept by associations and prescribing the period for which records of each class shall be retained. Such periods may be permanent or for a lesser term of years. Such regulations may from time to time be amended or repealed, but any amendment or repeal shall not affect any action taken prior to such amendment or repeal. Prior to issuing any such regulations the Administrator of the Savings and Loan Division shall consider:

a. Actions at law and administrative proceedings in which the production of association records might be necessary or desirable;

b. State and federal statutes of limitation applicable to such actions or proceedings;

c. The availability of information contained in association records from other sources;

d. Such other matters as the Administrator of the Savings and Loan Division shall deem pertinent in order that his regulations will require associations to retain their records for as short a period as is commensurate with the interest of association customers and stockholders and of the people of this State in having association records available.

(4) Any association may cause any or all records kept by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.

(5) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.

(6) Any association may dispose of any record which has been retained for the period prescribed by the Administrator of the Savings and Loan Division or in accordance with the terms of this section for retention of records for its class.

(c) The provisions of this section with reference to the retention and disposition of records shall apply to any federal savings and loan association

operating in North Carolina unless in conflict with regulations prescribed by its supervisory authority. (1957, c. 1106; 1971, c. 864, s. 17.)

§ 54-33.2. Power of Administrator of the Savings and Loan Division to issue rules and regulations. — Whenever in his judgment it may appear to be advisable, the Administrator of the Savings and Loan Division of this State is empowered to issue such rules, instructions and regulations as may be necessary or incident to the proper discharge of his duties and powers as to savings and loan associations for the supervision and regulation of said associations and for the protection of the public investing in said savings and loan associations. (1963, c. 1121; 1971, c. 864, s. 17.)

Cited in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

§ 54-33.3. Certain powers of federal savings and loan associations granted to State associations. — In addition to all the powers granted under this Subchapter, any savings and loan association incorporated under the laws of this State and operating under the provisions of this Subchapter is herein authorized to:

(1) Invest in the capital stock, obligations or other securities of any service corporation organized under the laws of the State of North Carolina when the entire capital stock of such corporation is owned or is to be owned by one or more, but less than five, associations; but no association may make any investment in such corporation if its aggregate investment as determined by the Administrator of the Savings and Loan Division of North Carolina would exceed one percent (1%) of its assets. Such service corporations shall be subject to audit by the Administrator of the Savings and Loan Division of North Carolina, and the cost of such audit shall be borne by such corporation, and such corporation may engage in such activities which are approved as of the date of enactment of this section [June 21, 1971], by the Federal Home Loan Bank Board for service corporations for federal savings and loan associations whose principal office is in the State of North Carolina, provided that such activities are also approved by the Administrator of the Savings and Loan Division of North Carolina.

(2) Act as trustee of any trust created or organized in the United States and forming part of a stock bonus, pension or profit-sharing plan which qualifies or qualified for specific tax treatment under section 401 (d) of the Internal Revenue Code of 1954, as amended, if the funds of such trusts are invested only in savings accounts or deposits in such association or of obligations or securities issued by such association. All funds held in such fiduciary capacity by any such association may be commingled for appropriate purposes of investment, but individual records shall be kept by the fiduciary of each participant and shall show in proper detail all transactions engaged in under the authority of this section.

(3) Negotiate dividend rates on an individual basis with members of such association. (1971, c. 632; c. 864, s. 17.)

ARTICLE 5.

Foreign Associations.

§ 54-34. Allowed to do business. — A building and loan association of another state may be admitted to transact business in this State in the manner

hereinafter provided, and no association not so admitted shall transact business in this State. (1905, c. 435, s. 17; Rev., s. 3900; C. S., s. 5194.)

§ 54-35. Copy of charter and list of officers filed. — Application for authority to transact business in this State shall be made to the Administrator of the Savings and Loan Division, and on making such application every such association shall file with the Administrator of the Savings and Loan Division a duly authenticated copy of its charter or certificate of incorporation, its constitution and bylaws, and thereafter certified copies of all amendments thereto, the names and addresses of its officers and directors, the compensation paid each officer, and a report of its condition, in such form as may be prescribed by the Administrator of the Savings and Loan Division, which shall be verified by oath of such officers and other persons as the Administrator of the Savings and Loan Division shall designate, and the Administrator of the Savings and Loan Division shall furnish blank forms for the report required, and may call for additional reports at such other times as may seem to him expedient. (1905, c. 435, s. 19; Rev., s. 3902; C. S., s. 5195; 1971, c. 864, s. 17.)

§ 54-36. License granted. — If it shall appear to the Administrator of the Savings and Loan Division by the report aforesaid and by an examination of the affairs of such association that it has good assets of sufficient value to cover all liabilities, and that its methods of doing business are safe and not contrary to the laws governing building and loan associations of this State, it may be admitted to transact business in this State upon a certificate of authority to be issued by the Administrator of the Savings and Loan Division, which shall only be issued when such association shall have complied with the further requirements of this Article. (1905, c. 435, s. 20; Rev., s. 3903; C. S., c. 5196; 1971, c. 864, s. 17.)

§ 54-37. Securities deposited. — The Administrator of the Savings and Loan Division before issuing the certificate of authority aforesaid shall require every such association to deposit with the Administrator of the Savings and Loan Division such securities as he may approve, amounting to at least thirty thousand dollars ($30,000), which securities shall be held by him in trust for the exclusive benefit and security of the creditors and shareholders of such association resident in this State, and he shall have authority to require it to deposit additional securities and to order a change in any of the securities so deposited at any time, and no change or transfer of the same shall be made or be effectual without his consent. Such deposit shall be maintained intact in the full sum required at all times, but the association making such deposit, so long as it shall continue solvent and comply with all the provisions of this Subchapter applicable to it, may receive the dividends or interest on the securities deposited, and may from time to time, with the assent of the Administrator of the Savings and Loan Division, withdraw any of such securities on depositing with the Administrator of the Savings and Loan Division other like securities the par value of which shall be equal to such as may be withdrawn. (1905, c. 435, s. 21; Rev., s. 3904; C. S., s. 5197; 1971, c. 864, s. 17.)

§ 54-38. Annual certificate; service of process. — Such certificate of authority shall be for the current year only, and shall not be issued until such association shall, by a duly executed instrument filed with the Administrator of the Savings and Loan Division of the State, constitute the Administrator of the Savings and Loan Division and his successors in office its true and lawful attorney, upon whom all original process in any action or legal proceedings against it may be served, and therein shall agree that any original process against it which may be served upon the Administrator of the Savings and Loan Division shall be of the same force and validity as if served on the association, and that the authority thereof shall continue in force irrevocable so long as any

liability of the association remains outstanding in this State. The service of such process shall be made by leaving a copy of the same in the office of the Administrator of the Savings and Loan Division, with a fee of two dollars ($2.00), to be taxed in the plaintiff's costs. When any original process is thus served, the Administrator of the Savings and Loan Division, by letter directed to the secretary, shall within two days after such service forward to the secretary a copy of the process served upon him, and such service shall be deemed sufficient service upon the association. The Administrator of the Savings and Loan Division shall keep a record of all such process, showing the day and hour of service. (1905, c. 435, s. 23; Rev., s. 396; C. S., s. 5198; 1971, c. 864, s. 17.)

§ 54-39. Agent must have certificate of license; fees. — It shall be unlawful for any person to solicit business or act as agent for any foreign building and loan association or company doing business in this State without having first procured from the Administrator of the Savings and Loan Division a certificate that such association or company for which he offers to act is duly licensed by the State to do business for the current year in which such person solicits business or offers to act as agent. The Administrator of the Savings and Loan Division shall be entitled to a fee of one dollar ($1.00) for issuing each such certificate, to be paid by the company for which the same was issued. Any person violating the provisions of this section shall be guilty of a misdemeanor. (1895, c. 444, s. 3; 1905, c. 435, s. 18; Rev., ss. 3327, 3901; C. S., s. 5199; 1971, c. 864, s. 17.)

§ 54-40. Fees and expenses. — Every such association shall pay for filing a certified copy of its charter or certificate of incorporation twenty dollars ($20.00); for filing original annual reports, twenty dollars ($20.00); for certificate of authority, annually, two hundred and fifty dollars ($250.00); for certificate for each agency, five dollars ($5.00); and shall defray all expenses incurred in making any examination of its affairs as herein provided for; and the Administrator of the Savings and Loan Division may maintain an action in the name of the State against such association for the recovery of such expenses in any court of competent jurisdiction. (1905, c. 435, s. 22; Rev., s. 3905; C. S., s. 5200; 1971, c. 864, s. 17.)

§ 54-41. All contracts deemed made in this State. — Any contract made by any foreign association with any citizen of this State shall be deemed and considered a North Carolina contract, and shall be so construed by all the courts of this State according to the laws thereof. (1905, c. 435, s. 26; C. S., s. 5203.)

Foreign building and loan associations are subject to the State usury laws where loans are made at the home office. Rowland v. Old Dominion Bldg. & Loan Ass'n, 115 N.C. 825, 18 S.E. 965 (1894); Meroney v. Atlanta Bldg. & Loan Ass'n, 116 N.C. 882, 21 S.E. 924 (1895).

ARTICLE 5A.

Reserves.

§ 54-41.1. Required reserves for losses; profits not otherwise apportioned. — The gross earnings of every building and loan association or savings and loan association shall be ascertained at least semiannually. Before any such association shall apportion profits or declare dividends, the board of directors shall first deduct from the earnings a sufficient sum of money to meet the operating expenses of such association, all of which expenses shall be paid from earnings. The directors, after providing for the operating expenses, shall then transfer to a reserve fund which shall at all times be available to meet losses arising from any source whatsoever not less than five percent (5%) of the net earnings since the last apportionment of profits or declaration of dividends until

such reserve for losses is at least five percent (5%) of the outstanding shares of the association; and thereafter, if at any time such reserve for losses shall become less than five percent (5%) of the outstanding shares of the association, then at least five percent (5%) of the net earnings shall be transferred thereto before the apportionment of any profits or the declaration of any dividends until said reserve fund is restored to five percent (5%) of the outstanding shares of the association. The reserve fund herein provided is to be considered identical with, and not supplemental to the reserves required to be set up by an association insured by the Federal Savings and Loan Insurance Corporation.

Any profits not otherwise apportioned or set apart by the directors of the association shall be paid to or credited to the accounts of the shareholders semiannually in conformity with the bylaws of the association. (1959, c. 1126; 1971, c. 886, ss. 1, 2.)

ARTICLE 6.

Withdrawals.

§ 54-42. Month's notice required for withdrawals. — Any shareholder in a building and loan association may withdraw all or any part of his or her holdings of unpledged or unhypothecated stock in such association by giving to the secretary of such association one month's written notice of his or her intention so to do, and the right of such shareholder to make such withdrawal shall accrue one month after the giving of such notice, subject to the conditions set out in G.S. 54-43. (1933, c. 122, s. 1.)

Editor's Note. — See 11 N.C.L. Rev. 207, for review of this section and § 54-43.

§ 54-43. Withdrawal or maturity fund. — Whenever any shareholder whose stock has matured or whose right to withdraw his or her stock has accrued, as set out in G.S. 54-42, has not been paid because of insufficiency of funds in the treasury of the association, the secretary of said association shall, under instruction from the directors, create a separate fund to be known as the "withdrawal or maturity fund" and into such fund shall be paid one half of the net receipts of the association monthly. Net receipts shall mean the receipts of the association from interest, installments, rent and other revenue-producing sources, diminished by the expenses of the association, and by any sums directed by the board of directors to be set apart and held separately for the purpose of meeting bills payable or notes payable at the maturity thereof. From time to time as the board of directors may direct, the secretary shall make an equitable and ratable distribution of the funds in said "withdrawal or maturity fund" to the stockholders whose right to receive payment from said fund has accrued, as hereinbefore provided, at the date of such distribution. One half of the net receipts of the association shall be added monthly to such fund so long as there remains any shareholder of the association entitled to receive a portion thereof as aforesaid. No shareholder whose stock has matured or whose right to withdraw his stock has accrued as hereinbefore set out, shall have the right to demand or receive any funds in excess of the amount equitably and ratably distributed as hereinbefore set out except on approval of the board of directors of such association and/or the Administrator of the Savings and Loan Division. (1933, c. 122, s. 2; 1971, c. 864, s. 17.)

ARTICLE 7.

Statements of Financial Condition of Associations.

§ 54-44. Derogatory statements. — Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any building and loan association, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1915, c. 273; C.S., s. 4231; 1921, c. 4, s. 82; 1931, c. 12.)

ARTICLE 7A.

Mutual Deposit Guaranty Associations.

§ 54-44.1. Definitions. — As used in this Article,

(1) "Administrator" means the Administrator of the Savings and Loan Division of the State.

(2) "Guaranty association" means a mutual deposit guaranty association organized pursuant to this Article.

(3) "Institution" means a building and loan association, a savings and loan association or a credit union organized pursuant to Article 1 of Subchapter I and Article 10, Subchapter III of this Chapter. (1967, c. 1091; 1973, c. 967, s. 1.)

Editor's Note. — The 1973 amendment rewrote subdivision (1), which formerly provided: " 'Commissioner' means Commissioner of Insurance of North Carolina."

§ 54-44.2. Organization of a mutual deposit guaranty association. — Any number of institutions, not less than 10, may become incorporated as a mutual deposit guaranty association without capital stock subject to the limitations prescribed in this Article.

Articles of incorporation of a guaranty association shall be filed in the office of the Secretary of State. The Secretary of State shall, upon receipt of such articles, transmit a copy of them to the Administrator and shall not record them until authorized to do so by the Administrator. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.3. Examination and certificate by Administrator. — Upon receipt from the Secretary of State of a copy of the articles of incorporation of a proposed guaranty association, the Administrator shall at once examine into all the facts connected with the formation of such proposed corporation. In the event such articles of incorporation are correct in form and substance and the examination shows that such corporation, if formed, would be entitled to commence the business of a guaranty association, the Administrator shall so certify to the Secretary of State.

The Administrator may refuse to make such certification if upon examination he has reason to believe the proposed corporation is to be formed for any business other than assuring the liquidity of member institutions and guaranteeing deposits therein, if he has reason to believe that the character and general fitness of the incorporators are not such as to command the confidence

of the general public or if the best interests of the public will not be promoted by its establishment. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.4. Recording of articles of incorporation; certified copies. — Upon receipt of the certificate provided for in G.S. 54-44.3, the Secretary of State shall record the articles of incorporation of such guaranty association and furnish a certified copy thereof to the incorporators and to the Administrator. Upon such recordation, such association shall be deemed a corporation. All papers thereafter filed in the office of the Secretary of State relating to such corporation shall be recorded as provided by law and a certified copy forwarded to the Administrator. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.5. Proposed amendments transmitted to Administrator. — When any proposed amendments to the articles of incorporation of a guaranty association are filed in the office of the Secretary of State, the Secretary of State shall transmit a copy thereof to the Administrator and shall not record such amendments until authorized to do so by the Administrator. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.6. Examination and certificate of amendments. — Upon receipt from the Secretary of State of a copy of proposed amendments to the articles of incorporation of a guaranty association, the Administrator shall at once examine the proposed amendments to determine their effect on the operation of the guaranty association.

In the event such proposed amendments are correct in form and substance and the examination shows that if adopted they would not change the character or principal business of the guaranty association, the Administrator shall so certify to the Secretary of State.

The Administrator may refuse to make such certification if upon examination he has reason to believe the proposed amendments would change the character of the business of the guaranty association or the best interests of the public will not be promoted by their adoption. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.7. Recording of amendments; certified copies. — Upon receipt of the certificate provided for in G.S. 54-44.6, the Secretary of State shall record the amendments to the articles of incorporation and furnish a certified copy thereof to the corporation and to the Administrator. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.8. Powers of associations. — A guaranty association incorporated in accordance with the provisions of this Article may:

(1) Assure the liquidity of a member institution;
(2) Guarantee the free shares or deposits in a member institution;
(3) Loan money to a member institution for the purpose of assuring its liquidity and deposits therein;
(4) Buy any assets owned by a member institution for the purpose of assuring its liquidity and deposits therein;
(5) Invest any of its funds in:
    a. Bonds or interest-bearing obligations of the United States or for which the faith and credit of the United States are pledged for the payment of principal and interest;
    b. Bonds or interest-bearing obligations of this State;
    c. Farm loan bonds issued under the "Federal Farm Loan Act" and amendments thereto;
    d. Notes, debentures, and bonds of the federal home loan bank issued under the "Federal Home Loan Bank Act" and any amendments thereto;
    e. Bonds or other securities issued under the "Home Owners' Loan Act of 1933" and any amendments thereto;
    f. Securities acceptable to the United States to secure government deposits in national banks;
    g. Certificates of deposit of any financial institution that is subject to examination and supervision by the United States or by this State;
    h. Bonds or other evidences of indebtedness of counties and municipalities of the State of North Carolina; provided, that said bonds or other evidences of indebtedness of such counties and municipalities shall have a rating by Moody's Investors Services, Inc., of not less than AA, and a rating by the North Carolina Municipal Council, Inc., of not less than 90 points out of 100 points.
(6) Issue its capital notes or debentures to member institutions, provided the holders of such capital notes or debentures shall not be individually responsible as such holders for any debts, contracts, or engagements of the guaranty association issuing such notes or debentures;
(7) Borrow money;
(8) Exercise any corporate power or powers not inconsistent with, and which may be necessary or convenient to, the accomplishment of its purposes of assuring liquidity of member institutions and guaranteeing deposits therein. (1967, c. 1091; 1969, c. 816.)

§ 54-44.9. Filing of semiannual financial reports. — Each guaranty association shall on the thirtieth day of June and the thirty-first day of December of each year, or within 40 days thereafter, file with the Administrator a report for the preceding half year, showing its financial condition at the end thereof. Such reports shall be in such form and contain such information as may be prescribed by the Administrator. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.10. Annual examination of associations. — At least once each year the Administrator shall make or cause to be made an examination into the affairs of each guaranty association doing business in this State. The expenses of such yearly examination shall be paid by the association so examined. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.11. Special examinations. — Whenever the Administrator deems it necessary he may make or cause to be made a special examination of any guaranty association doing business in this State in addition to the regular examination provided for by this Article. The expense of a special examination shall be paid by the guaranty association so examined. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.12. Right to enter and conduct investigations. — The Administrator or any examiner appointed by him shall have access to and may compel the production of all books, papers, securities, moneys, and other property of a guaranty association under examination by him. He may administer oaths to and examine the officers and agents of such association as to its affairs. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

§ 54-44.13. Fees. — Each guaranty association doing business in this State shall pay to the Administrator, at the time of filing each semiannual report required by this Article, the sum of five dollars ($5.00). All such fees shall be paid into the State treasury to the credit of the general fund. (1967, c. 1091; 1973, c. 967, s. 2.)

Editor's Note. — The 1973 amendment substituted "Administrator" for "Commissioner."

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

ARTICLE 8.

Organization and Powers.

§ 54-45. Application of term. — The term "land and loan associations" shall apply to and include all corporations, companies, societies or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, where the principles of building and loan associations and their work are adapted to the use of the farmers and the rural population.

It shall be unlawful for any corporation, company, society, or association doing business in this State not so conducted to use in its corporate name the term "land and loan association," or in any manner or device to hold itself out to the public as a land and loan association. (1915, c. 172, s. 1; C. S., s. 5204.)

§ 54-46. Incorporation and powers. — Land and loan associations shall be incorporated, supervised, and be subject to such regulations and have such privileges as are prescribed for building and loan associations under the laws

of this State as they now are or may be hereafter enacted, except as prescribed in this Article. (1915, c. 172, s. 2; C. S., s. 5205.)

Cross Reference. — As to powers of building and loan associations, see § 54-2.

§ 54-47. Loans. — The board of directors of land and loan associations may contract for loans to the amount of seventy-five percent (75%) of the securities used by them as collateral, where the loans are on long time (three or more years), and for at least one percent (1%) less than is charged by such associations on their loans to shareholders; and they may make short loans to their shareholders on their shares and personal endorsement or personal property. (1915, c. 172, s. 3; C. S., s. 5206.)

Cross Reference. — As to loans on mortgages, etc., issued under Federal Housing Act, see § 53-45.

§ 54-48. Reserve associations. — Associations to be known as "reserve land and loan associations" may be chartered and licensed as provided in this Article, when they are organized and the stock therein is held by local land and loan associations, and shall have such powers, rights, and privileges as are accorded to other domestic associations, and they may conform to such laws, rules, and regulations as may be prescribed by the laws of the United States, or of this State, to enable them to receive moneys, bonds, or securities to be used in loans and to secure the same. Such reserve associations shall be under the supervision of the Administrator of the Savings and Loan Division as are building and loan associations. (1915, c. 172, s. 4; C. S., s. 5207; 1971, c. 864, s. 17.)

§ 54-49. Land Conservation and Development Bureau; land mortgage associations. — Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly of North Carolina does hereby authorize and direct the State Department of Agriculture to establish as a major division of its organization a Land Conservation and Land Development Bureau. The function of this Bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1.)

§ 54-50. Number of incorporators; capital stock. — Any number of persons, resident freeholders of the State, not less than 15, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars ($20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State and known as a land mortgage association. (1925, c. 223, s. 2.)

§ 54-51. Incorporation. — The articles of incorporation shall be in writing, signed and acknowledged by the incorporators and shall contain the following:

(1) The declaration that they are associating for the purpose of forming a land mortgage association under the provisions of this Article.
(2) The name of such association, which shall be in no material respect similar to any other association in the same county.
(3) The name of the village, town or city, and the county where such association is to be located.

(4) The amount of capital stock, which shall be divided into shares of one hundred dollars ($100.00) each.
(5) The period for which such association is organized. (1925, c. 223, s. 3.)

§ 54-52. Organization. — The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of bylaws and a plan of organization approved by the Commissioner of Agriculture and the Commissioner of Banks. (1925, c. 223, s. 4; 1931, c. 243, s. 5.)

§ 54-53. Corporate powers. — Said land mortgage association shall have power:

(1) To make loans, the conditions of which shall be approved by the Commissioner of Banks if the security taken therefor is to be used as the basis for a bond issue under subdivision (3) hereof, and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands within this State. Such loan shall not exceed, however, sixty-five percent (65%) of the value of such real estate so conveyed, according to the appraisal made as herein provided.
(2) To purchase first mortgages, heretofore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said Commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than 20 years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the Commissioner of Agriculture. Upon completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.
(3) To issue bonds secured by the pledge of the mortgage so taken or purchased.
(4) To pledge the note and mortgages so taken or purchased under the provisions of subdivisions (1) and (2) hereof as security for the bonds of the land mortgage association referred to in subdivision (3) hereof. (1925, c. 223, s. 5; 1931, c. 243, s. 5.)

Cross References. — As to investment in bonds guaranteed by United States, see § 53-44. As to loan on mortgages, etc., issued under Federal Housing Act, see § 53-45.

§ 54-54. Restrictions. — All mortgage obligations acquired by the company shall be subject to the following restrictions:

(1) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;

(2) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

(3) Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen percent (15%) of the capital and surplus of the company;

(4) All such mortgages shall contain provisions for soil conservation;

(5) All such mortgages shall contain provisions for the time of commencing payments for annual or semiannual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;

(6) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two thirds of all the trustees;

(7) A sufficient amount of the proceeds of any loan made upon lands upon which are buildings in course of construction or upon which land clearing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouchers, countersigned by a duly authorized agent of the association. (1925, c. 223, s. 6.)

§ 54-55. Mortgage forms; approval. — The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the Commissioner of Banks and the Attorney General. (1925, c. 223, s. 7; 1931, c. 243, s. 5.)

§ 54-56. Repayment of loan and interest. — The prospective borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total amount shall include (i) the rate of interest agreed upon; and (ii) a payment. (1925, c. 223, s. 8.)

§ 54-57. Terms of payment. — A borrower may repay his loan by installments of such frequency and amounts as may be agreed upon: Provided, that not less than one percent (1%) of the original amount of the mortgage shall be paid upon the principal thereof annually, and commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the association. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the bylaws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal before it is due except as prescribed herein for partial repayment on account of depreciation and for foreclosure by the association. The borrower may on 60 days' notice repay the association his total indebtedness, or, without such notice, upon payment of 60 days' interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

Cross Reference. — As to satisfaction of mortgages, see § 45-37 et seq.

§ 54-58. Transfer of mortgaged lands. — The acquirer of any lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within 14 days after demand. (1925, c. 223, s. 10.)

§ 54-59. Calling in loans before due. — Every land mortgage association shall have the power to call in loans upon 60 days' notice:

(1) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of G.S. 54-58 and fulfill the obligations incumbent upon him;
(2) When the debtor does not meet the obligation imposed upon him by his contract and the bylaws of the land mortgage association;
(3) When the mortgaged premises become subject to forced sale;
(4) When the mortgaged premises are depreciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever necessary, shall provide for an inspection of the mortgaged premises by the State Department of Agriculture for an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 11.)

§ 54-60. Partial recall of debt. — The association may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

§ 54-61. Foreclosure. — Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past-due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

§ 54-62. Appraisal of lands. — Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished it by the State Department of Agriculture. (1925, c. 223, s. 14.)

§ 54-63. Preference prohibited; association borrowing money. — No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pledging any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloaning, the Commissioner of Banks may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15; 1931, c. 243, s. 5.)

§ 54-64. Bond issues. — (a) The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times and in such manner, as the land mortgage association may, subject to the approval of the Banking Commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of bonds issued by it in which it shall register, or cause to be registered, all bonds upon presentation thereof for such purpose; and such register shall contain the post-office address of all registered holders of bonds and shall, at all reasonable times, be open to the inspection of the Banking Commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

§ 54-65. Deed of trust. — (a) To secure the payment of such bonds, the land mortgage association shall issue a collateral deed of trust to the State Treasurer, pledging as security for such bonds the notes and mortgages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

(b) The total amount of bonds actually outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the State Treasurer under the provisions hereof.

(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed 20 times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

§ 54-66. Collaterals deposited with State Treasurer. — All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the State Treasurer. The land mortgage association may, with the approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substituting in place thereof other of its mortgages, or money or State of North Carolina bonds or certificates of deposit, endorsed in blank, issued by State or national banks located in North Carolina, farm mortgage bonds issued under the provisions of the Federal Farm Loan Act approved July 17, 1916, or obligations of the United States government, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

§ 54-67. Redemption of bonds. — (a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of affecting redemption in accordance with the conditions of the bonds and as provided by law and the bylaws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months' notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19.)

Editor's Note. — It would seem that the word "affecting" in subsection (a) should read "effecting," however it appears as "affecting" in the act from which this section was codified.

§ 54-68. Validity of bonds after maturity. — In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treasurer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitation running against such bonds shall have expired, a single

legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption. (1925, c. 223, s. 20.)

§ 54-69. Bonds as payment. — If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the association in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments. (1925, c. 223, s. 21.)

§ 54-70. Bonds as investments. — The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships or associations. (1925, c. 223, s. 22.)

§ 54-71. Application of earnings; reserve fund. — The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two percent (2%) of the capital stock outstanding, and until such reserve fund equals twenty percent (20%) of the capital stock of such association. (1925, c. 223, s. 23.)

§ 54-72. Restriction on holding real estate. — No land mortgage association shall acquire real estate (other than for the occupation of its offices) except to protect its interest in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

§ 54-73. Banking laws applicable. — The statutes relating to banks and banking in this State, that is, G.S. 53-1 to 53-158 [G.S. 53-1 to 53-208], insofar as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

SUBCHAPTER III. CREDIT UNIONS.

ARTICLE 9.

Credit Union Division; Administrator of Credit Unions.

§ 54-74. Creation and supervision of Division. — There shall be established in the North Carolina Department of Commerce a Credit Union Division, which shall be under the supervision of Administrator of Credit Unions appointed by the Secretary of Commerce. The Credit Union Division and the Administrator of Credit Unions shall be under the general direction and supervision of the Secretary of Commerce, and there shall be such assistants to the Administrator of Credit Unions as may be necessary and the salaries of the Administrator and assistants shall be fixed by the State Personnel Council. (1915, c. 115, s. 1; C. S., s. 5208; 1925, c. 73, s. 4; 1935, c. 87; 1965, c. 956, s. 1; 1971, c. 864, s. 17.)

State Government Reorganization. — The Credit Union Division was transferred to the Department of Commerce by § 143A-180, enacted by Session Laws 1971, c. 864.

§ 54-75. Duties of Administrator. — The duties of the Administrator of Credit Unions shall be as follows:

(1) To organize and conduct in the State Department of Commerce, a bureau of information in regard to cooperative associations and rural and industrial credits.

(2) Upon the application of three persons residing in the State of North Carolina, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the State.

(3) To maintain an educational campaign in the State looking to the promotion and organization of credit unions. Upon the written request of 12 bona fide residents of any particular locality in this State expressing a desire to form a local credit union at or in such locality, the Administrator of Credit Unions, or one of his assistants, shall proceed as promptly as may be convenient to such locality and make an investigation in order that the Administrator may determine whether or not a local credit union should be established according to the standards set forth and provided in this Subchapter. The Administrator shall notify the applicants of his decision within 30 days after receipt of the written request. Before refusing the establishment of a credit union the Administrator shall afford the applicants an opportunity to be heard therewith in person or by counsel and at least 60 days prior to the date set for a hearing on any such matter shall notify in writing the applicants of the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150[A] of the General Statutes of North Carolina, as amended.

(4) To examine at least once a year, and oftener if such examination be deemed necessary by the Administrator or his assistant, the credit unions formed under this Subchapter. A report of such examination shall be filed with the State Department of Commerce, and a copy mailed to the credit union at its proper address.

(5) The Administrator of Credit Unions is authorized, empowered, and directed to fix the amount of a blanket surety bond which shall be required of each credit union official, committee member and employee, irrespective of whether such official, committee member and employee receives, pays or has custody of money or other personal property owned by a credit union or in the custody or control of the credit union as collateral or otherwise. The surety on the bond shall be a surety company authorized to do business in North Carolina. Any such bond or bonds shall be in a form approved by the Administrator of Credit Unions with a view to providing surety coverage to the credit union with reference to loss by reason of acts of fraud or dishonesty including forgery, theft, embezzlement, wrongful abstraction or misapplication on the part of the person, directly or through connivance with others, and such other surety coverages as the Administrator of Credit Unions may determine to be reasonably appropriate or as elsewhere required by the Chapter. Any such bond or bonds shall be in an amount in relation to the money or other personal property involved or in relation to the assets of the credit union as the Administrator may from time to time prescribe by regulation for the purpose of requiring reasonable coverage. The Administrator may also approve the use of a form of excess coverage bond whereby a credit union may obtain an amount of coverage in excess of the basic surety coverage. No agreement, compromise or settlement of any claim or claims filed by a credit union with any surety or any surety company, for less than the full amount of said claim or claims, shall be entered into or made by the board of

directors of any credit union unless and until the said claim or claims shall have been submitted to the Administrator of Credit Unions and his advice thereon given or transmitted to the board of directors of said credit union.

The following schedule shall be deemed as the minimum fidelity and faithful performance bond requirements only:

Assets	*Minimum Coverage*
$ 0,000 to $ 5,000	$ 1,000
5,001 to 10,000	2,000
10,001 to 20,000	4,000
20,001 to 30,000	6,000
30,001 to 40,000	8,000
40,001 to 50,000	10,000
50,001 to 75,000	15,000
75,001 to 100,000	20,000
100,001 to 200,000	30,000
200,001 to 300,000	40,000
300,001 to 400,000	50,000
400,001 to 500,000	70,000
500,001 to 750,000	85,000
750,001 to 1,000,000	100,000

Over $1,000,000 minimum amount, $100,000 plus $50,000 for each additional million or fraction thereof of assets.

It shall be the duty of the board of directors of each credit union to provide proper protection to meet any circumstances by obtaining adequate bond (an insurance) coverage in excess of the above minimum schedule. The treasurer and all other persons handling credit union funds or records before entering upon his or their duties shall give a proper bond with good and sufficient surety, in an amount and character to be determined by the board in compliance with regulations conditioned upon the faithful performance of his or their trust.

The Administrator may require additional coverage for any credit union when, in his opinion, the surety bonds in force are insufficient to provide adequate surety coverage, and it shall be the duty of the board of directors of any credit union to obtain such additional coverage within 60 days after the date of written notice by the Administrator to such board of directors. For good cause shown the Administrator may extend the time to obtain additional coverage. (1915, c. 115, s. 1; C. S., s. 5209; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87; 1957, c. 989, s. 1; 1965, c. 956, ss. 1-3; 1971, c. 864, s. 17; 1973, c. 199, ss. 1-3; c. 1331, s. 3.)

Editor's Note. — The 1973 amendment, in subdivision (5), rewrote the former first sentence as the present first and second sentences of the first paragraph, eliminated a former fourth sentence in the first paragraph, relating to blanket bonds covering all boards, committee members and employees of a credit union, and substituted "200,000" for "150,000" under "Assets" in the schedule in the second paragraph.

Pursuant to Session Laws 1973, c. 1331, s. 3, effective July 1, 1975, the reference to Chapter 150[A] has been substituted for a reference to Article 33 of Chapter 143 near the end of subdivision (3).

§ 54-75.1. Preservation of books, accounts and records; retention of minute books of meetings; classification of records; reproduction shall be deemed to be an original record. — (a) Whenever in his judgment it may appear to be advisable, the Administrator of the Credit Union Division may issue such rules, instructions, and regulations prescribing the manner of preserving books,

accounts, and records of associations as will tend to produce uniformity in the books, accounts, and records of associations of the same class.

(b) The following provisions shall be applicable to all credit unions operating under the provisions of this Subchapter:

(1) Each credit union shall retain permanently the minute books of meetings of its members and directors and all records which the Administrator of the Credit Union Division shall in accordance with the terms of this section require to be retained permanently.

(2) All other credit union records shall be retained for such periods as the Administrator of the Credit Union Division shall in accordance with the terms of this section prescribe.

(3) The Administrator of the Credit Union Division shall from time to time issue regulations classifying all records kept by credit unions and prescribing the period for which records of each class shall be retained. Such periods may be permanent or for a lesser term of years. Such regulations may from time to time be amended or repealed, but any amendment or repeal shall not affect any action taken prior to such amendment or repeal. Prior to issuing any such regulations the Administrator of the Credit Union Division shall consider:

a. Actions at law and administrative proceedings in which the production of credit union records might be necessary or desirable;

b. State and federal statutes of limitation applicable to such actions or proceedings;

c. The availability of information contained in credit union records from other sources;

d. Such other matters as the Administrator of the Credit Union Division shall deem pertinent in order that his regulations will require credit unions to retain their records for as short a period as is commensurate with the interest of credit union members and of the people of this State in having credit union records available.

(4) Any credit union may cause any or all records kept by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.

(5) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.

(6) Any credit union may dispose of any record which has been retained for the period prescribed by the Administrator of the Credit Union Division or in accordance with the terms of this section for retention of records for its class. (1973, c. 98, s. 1.)

ARTICLE 10.

Incorporation of Credit Unions.

§ 54-76. Applications filed. — Twelve or more persons employed or residing in the State may become a credit union by making, signing, and acknowledging a certificate which shall contain:

(1) The name of the proposed credit union which shall include the words "credit union."

(2) A statement that incorporation is desired under this Article.
(3) The conditions, whether of residence, of occupation, or otherwise, which shall qualify persons for membership.
(4) The par value of the shares, which shall not exceed twenty-five dollars ($25.00).
(5) The city, village, or town in which its principal business office is to be located. If it is to be located in an incorporated city, the street address of the city shall be given. If the condition of its membership is employment by a certain individual, copartnership, or corporation, a statement that its office shall be with such individual, copartnership, or corporation may be substituted for the street address.
(6) The number of its directors, not less than five, all of whom must be members of and shareholders in the corporation.
(7) The names and post-office addresses of the directors for the first year.
(8) The names and post-office addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation. (1915, c. 115, s. 2; C. S., s. 5210; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 4.)

§ 54-77. Bylaws adopted. — At the time of filing the certificate the incorporators shall adopt bylaws which shall provide:
(1) The name of corporation.
(2) The purposes for which it is formed.
(3) Qualifications for membership.
(4) The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which constitute a quorum at the meetings, and the regulations as to voting.
(5) The number of members of the board of directors, their powers and duties, and the compensation and duties of officers elected by the board of directors.
(6) The number of members of the credit committee, their powers and duties.
(7) The number of members of the supervisory committee, their powers and duties.
(8) The par value of shares of capital stock.
(9) The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
(10) The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.
(11) The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.
(12) The manner in which the funds of the corporation shall be invested.
(13) The conditions upon which loans may be made and repaid.
(14) The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.
(15) The method of receipting for money paid on account of shares, deposits, or loans.
(16) The manner in which the reserve fund shall be accumulated.
(17) The manner in which dividends shall be determined and paid to members.
(18) The manner in which a voluntary dissolution of the corporation shall be effected. (1915, c. 115, s. 2; C. S., s. 5211.)

§ 54-78. Certificate of incorporation. — The bylaws acknowledged to have been adopted by all of the incorporators, together with the certificate of

incorporation, shall be filed in the office of the Administrator of Credit Unions who shall approve the certificate of incorporation if he is satisfied that:

(1) The certificate of incorporation and bylaws are in conformity with this Subchapter;

(2) The general character and fitness of the subscribers or incorporators, and their ability to provide proper business and financial records and conduct sound financial operations is reasonably probable;

(3) The bylaws are reasonable and will tend to give assurance that the affairs of the prospective credit union will be administered in accord with this Subchapter;

(4) The economic advisability and that convenience and necessity require a credit union in the locality.

Thereupon, the Administrator of Credit Unions shall issue to the corporation a certificate of approval, annexed to a duplicate of the certificate of incorporation and of the bylaws, which certificate of approval, together with the attached duplicate certificate of incorporation, shall be recorded in the office of the register of deeds of the county in which the office of such credit union is situated, and upon recordation of the incorporators shall become and be a corporation for the purposes set forth in this Subchapter. The register of deeds of the county in which such recordation is made shall charge the same fee for such recordation as he is now allowed to charge for handling and recording a certificate of incorporation of a corporation organized under the business corporation laws of the State. (1915, c. 115, s. 2; C. S., s. 5212; 1925, c. 73, s. 3; 1935, s. 87; 1965, c. 956, s. 5; 1967, c. 823, s. 9.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-79. Amendment of bylaws. — The bylaws adopted by the incorporators and approved by the Administrator of Credit Unions shall be the bylaws of the corporation, and no amendment to the bylaws shall become operative until such amendment shall have been approved and filed by the Administrator of Credit Unions; and a copy thereof certified by him, with a certificate of his approval, shall be filed with the credit union. Such approval may be given or withheld by the Administrator of Credit Unions, at his discretion. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150[A] of the General Statutes of North Carolina as amended. (1915, c. 115, s. 3; C. S., s. 5213; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 6; 1973, c. 1331, s. 3.)

Editor's Note. — Pursuant to Session Laws 1973, c. 1331, s. 3, effective July 1, 1975, the reference to Chapter 150[A] has been substituted for a reference to Article 33 of Chapter 143.

§ 54-80. Restriction of use of terms. — The use by any person, copartnership, association, or corporation except corporations formed under the provisions of this Subchapter, of any name or title which contains the words "credit union" shall be a misdemeanor: Provided, that the provisions of this section shall not apply to associations or credit union leagues, the membership of which is composed entirely of corporations formed under the provisions of this Subchapter. (1915, c. 115, s. 4; C. S., s. 5214; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236.)

§ 54-81. Change of place of business. — A credit union may change its place of business on the written approval of the Administrator of Credit Unions upon

filing with the Administrator of Credit Unions a written application or request setting forth all details of such proposed change, and setting forth the location, building, office, and proper address of such proposed change or new location. If the Administrator of Credit Unions shall approve such change of place of business, then he shall record such approval in his office, and a duplicate of such approval shall be recorded in the office of the register of deeds where its office was located, and a second duplicate in the office of the register of deeds of the county in which the new office is to be located, if same is changed to another county. If the change is from one location to another in the same county, then the recordation shall be in said county. Before refusing any change in location the Administrator shall afford the credit union an opportunity to be heard in connection therewith in person or by counsel and at least 30 days prior to the date set for a hearing on any such matter shall notify in writing the credit union the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150[A] of the General Statutes of North Carolina, as amended. (1915, c. 115, s. 25; C. S., s. 5215; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 7; 1967, c. 823, s. 10; 1973, c. 1331, s. 3.)

Cross Reference. — See Editor's note to § 53-5.

Editor's Note. — Pursuant to Session Laws 1973, c. 1331, s. 3, effective July 1, 1975, the reference to Chapter 150[A] has been substituted for a reference to Article 33 of Chapter 143.

ARTICLE 11.

Powers of Credit Unions.

§ 54-82. General nature of business. — A credit union may receive the savings of its members in payment for shares or on deposit; may loan to its members at reasonable rates of interest not exceeding the legal rate, or may invest as hereinafter provided the funds so accumulated, and may undertake such other activities relating to the purpose of the corporation as its bylaws may authorize. (1915, c. 115, s. 5; C. S., s. 5216; 1925, c. 73, s. 3; 1935, c. 87.)

Editor's Note. — For act relating to withdrawal of deposits from the State Employees' Credit Union, see Session Laws 1943, c. 781.

§ 54-83. Receiving deposits. — A credit union may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the bylaws shall provide. (1915, c. 115, s. 16; C. S., s. 5217; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-84. Borrowing money. — If the bylaws so provide, a credit union shall have power to borrow money in addition to receiving deposits, but the aggregate amount of such indebtedness shall not at any one time exceed more than the total sum of its capital, surplus, and reserve fund. (1915, c. 115, s. 17; C. S., s. 5218; 1925, c. 73, s. 10; 1935, c. 87; 1965, c. 956, s. 8.)

§ 54-85. Authority to execute contracts of guaranty in certain cases. — A credit union may execute such contracts of guaranty as may be necessary to procure credit for its members: Provided, that the said contracts of guaranty shall not place on the said local credit union a liability arising in any one year in excess of ten percent (10%) of the total credit under the said contracts of guaranty handled through that association in a particular year; and provided

further, that all such contracts shall be approved by the Administrator of Credit Unions and each such contract must bear his approval in writing before becoming effective. In assuming such liability the said credit union may require of the individual members being served such security as the board of directors of each such credit union may determine upon. (1925, c. 73, s. 11; 1935, c. 87; 1965, c. 956, s. 1.)

§ 54-85.1. Conversion from State to federal credit union and from federal to State credit union. — (a) A State credit union may be converted into a federal credit union under the laws of the Federal Credit Union Act.

(1) The proposition for such conversion shall be approved, and a date set for a vote thereon by the members (either at a meeting to be held on such date or by written ballot to be filed on or before such date), by a majority of the directors of the State credit union. Written notice of the proposition and of the date set for the vote shall then be delivered in person to each member, or mailed to each member at the address for such person appearing on the records of the credit union, not more than 30 nor less than seven days prior to such date. Approval of the proposition for conversion shall be by the affirmative vote of a majority of the members, in person or in writing.

(2) A statement of the results of the vote, verified by the affidavits of the president or vice-president and the secretary, shall be filed with the State Credit Union Division within 10 days after the vote is taken.

(3) Promptly after the vote is taken and in no event later than 90 days thereafter, if the proposition for conversion was approved by such vote, the credit union shall take such action as may be necessary under the Federal Credit Union Act to make it a federal credit union, and within 10 days after receipt of the federal credit union charter there shall be filed with the State Credit Union Division a copy of the charter thus issued. Upon such filing the credit union shall cease to be a State credit union.

(4) Upon ceasing to be a State credit union such credit union shall no longer be subject to any of the provisions of the North Carolina Credit Union Act. The successor federal credit union shall be vested with all of the assets and shall continue responsible for all of the obligations of the State credit union to the same extent as though the conversion had not taken place.

(b) (1) A federal credit union organized under the laws of the United States may be converted into a State credit union (i) complying with all federal credit union requirements requisite to enabling it to convert to a State credit union or to cease being a federal credit union, (ii) filing with the State Credit Union Division proof of such compliance, satisfactory to the Administrator of Credit Unions and (iii) filing with the State Credit Union Division an organization certificate as required by the State Credit Union Act.

(2) When the Administrator of the State Credit Union Division has been satisfied that all of such requirements, and all other requirements of the State act, have been complied with, the Administrator of the Credit Union Division shall approve the organization certificate. Upon such approval, the federal credit union shall become a State credit union as of the date it ceases to be a federal credit union. The State credit union shall be vested with all of the assets and shall continue responsible for all of the obligations of the federal credit union to the same extent as though the conversion had not taken place. (1965, c. 956, s. 9.)

§ 54-86. Investment of funds. — The capital, deposits, undivided profits and reserve fund of the corporation may be invested in any of the following ways, and in such ways only:

(1) They may be lent to the members of the corporation in accordance with the provisions of this Chapter.

(2) In capital shares, obligations, or preferred stock issues of any agency or association organized either as a stock company, mutual association, or membership corporation, provided the membership or stockholdings, as the case may be, of such agency or association are confined or restricted to credit unions or organizations of credit unions, and provided the purposes for which such agency or association is organized or designed to service or otherwise assist credit union operations.

(3) In obligations of the State of North Carolina or any subdivision thereof.

(4) In obligations of the United States, including bonds and securities upon which payment of principal and interest is fully guaranteed by the United States.

(5) They may be deposited to the credit of the corporation in savings banks, credit unions, savings and loan associations, State banks or trust companies incorporated under the laws of the State, or in national banks located therein.

(6) In loans to other credit unions in an amount not to exceed twenty-five percent (25%) of the shares and unimpaired surplus of the lending credit union.

(7) In an aggregate amount not to exceed twenty-five percent (25%) of the allocations to the reserve fund in any agency or association of the type described in subdivision (2) hereof, provided the purposes of any such agency or association are designed to assist in establishing and maintaining liquidity, solvency, and security in credit union operations.

(8) In the North Carolina Mutual Deposit Guaranty Association.

(9) Guaranteed Debentures and Real Estate Investment Trusts. — A credit union shall keep on deposit at interest in any such depositories as are enumerated in subdivisions (2), (4), (5), and (10) of this section, so much of the reserve fund and capital stock as shall equal five percent (5%) of the total shares and deposits. The said five percent (5%) representing said deposit shall not be encumbered or in any manner pledged, hypothecated, used as collateral or in any manner used as security for a loan.

(10) They may be placed on time deposits in any banks insured by the Federal Deposit Insurance Corporation or may be deposited or may be invested in any savings or building and loan association insured by the Federal Savings and Loan Insurance Corporation. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; C. S., s. 5219; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; 1947, c. 781; 1965, c. 956, ss. 10, 11; 1969, c. 69, s. 1; 1973, c. 199, s. 4; c. 1255, s. 1.)

Cross Reference. — As to investment in bonds guaranteed by the United States, see § 53-44.

Editor's Note. — The first 1973 amendment rewrote this section.

The second 1973 amendment inserted the reference to subdivision (10) in the first sentence of subdivision (9). The amendatory act purported to rewrite the second sentence of subdivision (9), but the first sentence was plainly intended. Apparently the draftsman mistook the catchline of the subdivision for a first sentence.

Credit Unions May Invest in Government Securities Program. — See opinion of Attorney General to Mr. W.V. Didawick, Administrator, Credit Union Division, Department of Agriculture, 40 N.C.A.G. 50 (1970).

§ 54-87. Loans. — (a) To members. — A credit union may lend to its members for such purposes and upon such security and terms as the bylaws provide and

the credit committee or loan officer shall approve; provided, however, the maximum amount of any secured or unsecured loan shall be based on the amount of the unimpaired capital and surplus of the lending credit union according to the following table:

Unimpaired Capital and Surplus	Unsecured Limit	Secured Limit
$ 1,000	$ 200	$ 200
2,000	200	200
3,000	200	300
4,000	200	400
5,000	200	500
6,000	200	600
7,000	200	700
8,000	200	800
9,000	225	900
10,000	250	1,000
20,000	500	2,000
30,000	750	3,000
40,000	1,000	4,000
50,000	1,250	5,000
60,000	1,500	6,000
70,000	1,750	7,000
80,000	2,000	8,000
90,000	2,250	9,000
100,000	2,500	10,000
More than 100,000	2,500	10% of Unimpaired Capital and Surplus

An endorsed note shall be deemed to be security within the meaning of this section. Irrespective of the foregoing table, a member of a credit union may be permitted to borrow up to the full amount of his shares.

(b) Loans to Members of Committee. — The supervisory committee or board of directors shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from the credit union or becomes surety for any other member whose application for a loan is under consideration.

(c) Loans to Persons Not Members Forbidden. — All officers and members of any committees in any way knowingly permitting or participating in making a loan of funds of a credit union to persons not members shall be guilty of a misdemeanor and upon conviction or plea of guilty shall be imprisoned not more than two years or fined not in excess of ten thousand dollars ($10,000), or both such fine and imprisonment. The credit union shall have the right to recover the amount of such illegal loans from the borrower or from any officers or members of committees who knowingly permitted or participated in the making thereof, or from all of them jointly.

(d) Repayment of Loans. — A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business. (1915, c. 115, s. 19; 1917, c. 232, s. 4; C. S., s. 5220; 1925, c. 73, s. 3; 1935, c. 87; 1955, c. 1135, s. 2; 1961, c. 1187, s. 1; 1965, c. 956, ss. 1, 12, 13; 1969, c. 69, s. 9; 1973, c. 199, s. 5.)

Cross Reference. — As to loans on mortgages, etc., issued under Federal Housing Act, see § 53-45.

Editor's Note. — The 1973 amendment rewrote subsection (a) and inserted "or board of directors" in subsection (b).

§ 54-87.1. Money orders; nonnegotiable sight drafts; travelers' checks. — In addition to the powers now authorized by this Article, credit unions organized under this Subchapter are hereby authorized to make money orders, nonnegotiable sight drafts and travelers' checks available to their members as their bylaws may provide. (1973, c. 199, s. 13.)

§ 54-88. Rate of interest; authority to deduct interest. — No corporation organized pursuant to this Subchapter shall directly or indirectly charge or receive any interest or discount in excess of one percent (1%) per month on the unpaid principal of loans except a minimum charge not to exceed fifty cents (50¢) may be made for any loan. The terms "interest" and "discount" as used in this section shall not be deemed to include charges made by a credit union for appraisals of real or personal property; attorneys' fees for searching title to real property, preparing notes, deeds of trust, mortgages and closing loans; and recording fees. Rate of interest and terms of repayment shall appear on each note but the corporation may, for the purpose of making loans, discount and negotiate promissory notes and deduct in advance, from the proceeds of such loan, interest at a rate not to exceed the rate herein fixed, which shall be the legal rate for corporations organized under this Subchapter, and such deductions shall be made upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in such installments. (1915, c. 115, s. 20; C. S., s. 5221; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 2; 1973, c. 199, s. 6.)

Cross Reference. — As to interest and usury laws in general, see § 24-1 et seq.

Editor's Note. — The 1973 amendment substituted "or discount" for "discount or consideration, other than the entrance fee," near the beginning of the first sentence, added "except a minimum charge not to exceed fifty cents (50¢) may be made for any loan" at the end of the first sentence and added the second sentence.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Opinions of Attorney General. — Mr. W.V. Didawick, Administrator of Credit Unions, Department of Agriculture, 40 N.C.A.G. 49 (1969).

§ 54-89. Ownership and leasing of real estate. — Any credit union may purchase and hold a lot and building to be used principally for the transaction of credit union business, by first obtaining written approval from the Administrator of Credit Unions. Provisions may be made for future expansion; and any excess space which is not occupied by the credit union may be leased to the public. (1927, c. 101; 1929, c. 43, s. 1; 1931, c. 329; 1965, c. 956, s. 14.)

Editor's Note. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 54-90. Reserve fund. — All entrance fees, transfer fees, and fines shall, after the payment of organization expenses, be known as reserve income, and shall be added to the reserve fund of the corporation.

At the close of each fiscal year when the reserve fund does not equal five per centum (5%) of the corporation's outstanding loans, or five thousand dollars ($5,000) whichever is greater, there shall be set apart to the reserve fund twenty per centum (20%) of the net income of the credit union which has accumulated during the year. At the end of any fiscal year when the reserve fund equals or is in excess of five per centum (5%) of the corporation's outstanding loans or five thousand dollars ($5,000) whichever is greater, then the board of directors

may reduce the amount to be set apart to the reserve fund each year to an amount not less than ten per centum (10%) of the net income of the credit union. When the reserve fund is equal to seven per centum (7%) of the outstanding loans or ten thousand dollars ($10,000) whichever is the greater, the board of directors shall not be required to make an allocation to the reserve fund. The reserve fund shall not be distributed to the members except upon dissolution of the credit union. Nothing in this section shall be construed as limiting the amount that a credit union may set apart to its reserve fund. The reserve fund shall belong to the credit union and all loans which the board of directors decide are uncollectible may at the option of the board of directors be charged against the reserve fund, undivided profits, or income during the year. (1915, c. 115, s. 21; C. S., s. 5222; 1939, c. 400, s. 2; 1955, c. 1135, s. 1; 1969, c. 69, ss. 2, 10.)

§ 54-91. Dividends. — The board of directors of any credit union may declare dividends as its bylaws provide.

Dividends shall be paid on fully paid shares outstanding at the close of the accounting period, but shares which become fully paid by the tenth of any month of the period may be entitled to a proportional part of such dividend, calculated from the first day of the month. (1915, c. 115, s. 22; C. S., s. 5223; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 3; 1965, c. 956, s. 15; 1969, c. 69, ss. 3, 4; 1973, c. 199, s. 7.)

Editor's Note. — The 1973 amendment eliminated the former first sentence of the second paragraph, which provided that at the close of a fiscal year a credit union might declare a dividend not to exceed six percent from income, and, in the present second paragraph, deleted "all" preceding "fully paid," substituted "accounting" for "fiscal," deleted "day" following "tenth" and deleted a former proviso to the effect that in any one year not more than twenty-five percent of the undivided earnings could be used to pay a dividend and that the remainder of such dividend should be paid from the current year's earnings.

§ 54-92. Voluntary dissolution. — At any meeting specially called to consider the subject, three fourths of the members present and represented may vote to dissolve the corporation and upon such vote shall signify their consent to such dissolution in writing. Such corporation shall then file in the office of the Administrator of Credit Unions such consent, attested by its secretary or treasurer and its president or vice-president, with a statement of the names and residences of the existing board of directors of the corporation and the names and residences of its officers duly certified. The Administrator of Credit Unions, upon receipt of satisfactory proof of the solvency of the corporation, shall issue to such corporation, in duplicate, a certificate to the effect that such consent and statement have been filed and that it appears therefrom that such corporation has complied with this section. Such duplicate certificate shall be filed by the corporation in the office of the register of deeds of the county in which the corporation has its place of business, and thereupon such corporation shall continue in existence only for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs; and may sue and be sued for the purpose of enforcing such debts and obligations until its business and affairs are fully adjusted and wound up. The Administrator of Credit Unions, or an agent appointed by him, shall take possession of the property and business of such corporation and shall proceed to adjust and wind up the business and affairs of the corporation with the power to liquidate its assets and apply the same in discharge of debts, obligations and expenses of such corporation and after paying and adequately providing for the payment of such debts, obligations, and expenses shall pay to the shareholders the balance of the assets, in proportion to the number of shares held by each shareholder. The corporation shall then be dissolved and its certificate of incorporation

revoked. The liquidating agent's fee, if any, shall be set by the Administrator of Credit Unions. (1915, c. 115, s. 24; C. S., s. 5224; 1925, c. 73, ss. 3, 15; 1935, c. 87; 1957, c. 989, s. 4; 1965, c. 956, s. 1; 1967, c. 823, s. 11.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-93. Savings institution; restriction of taxation. — The corporation shall be deemed an institution for savings, and together with all accumulations therein shall not be taxable under any law which shall exempt building and loan associations or institutions for savings from taxation; nor shall any law passed taxing corporations in any form, or the shares thereof, or the accumulations therein, be deemed to include corporations doing business in pursuance of the provisions of this Subchapter, unless they are specifically named in such law. The shares of credit unions, being hereby regarded as a system for saving, shall not be subject to any stock-transfer tax either when issued by the corporation or transferred from one member to another. (1915, c. 115, s. 26; C. S., s. 5225; 1925, c. 73, ss. 3, 16; 1935, c. 87.)

ARTICLE 12.

Shares in the Corporation.

§ 54-94. Ownership of shares. — The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on the shares, undivided surplus, and reserves. Shares may be subscribed for and paid in such manner as the bylaws shall prescribe. The credit union shall have a lien on the shares of any member and upon any dividends payable thereon for and to the extent of any loan made to him and of any dues or fines payable by him. The credit union may, upon the resignation or expulsion of a member, cancel the shares of such member and apply the withdrawal value of such shares towards the liquidation of the member's indebtedness. (1915, c. 115, s. 13; C. S., s. 5226; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 16, 17.)

§ 54-95. Shares and deposits for minors and in trust. — Shares may be issued and deposits received in the name of a minor, and such shares and deposits may, in the discretion of the directors, be withdrawn by such minor or his parent or guardian, and in either case payments made on such withdrawals shall be valid. If shares are held or deposits made in trust, the name and residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. Such shares or deposits may, upon the death of the trustee, be withdrawn by the person for whom the shares were held or for whom such deposits were made, or by his legal representatives. (1915, c. 115, s. 14; C. S., s. 5227.)

§ 54-96. Fines and penalties. — For failure by any member of a credit union to meet his payments on obligations when due, such fines and other penalties may be imposed upon the delinquent member as the bylaws provide. Such fines shall not exceed two per centum (2%) per month or a fraction thereof on amounts due, except that a minimum fine of five cents (5¢) may be imposed. (1915, c. 115, s. 15; C. S., s. 5228; 1925, c. 73, s. 3; 1935, c. 87; 1939, c. 400, s. 3.)

§ 54-97. Liability of shareholders. — A shareholder of any such corporation, unless the bylaws so provide, shall not be individually liable for the payment of its debts for an amount in excess of the par value of the shares which he owns or for which he has subscribed. (1915, c. 115, s. 26; C. S., s. 5229.)

ARTICLE 13.

Members and Officers.

§ 54-98. Who may become members. — The membership of the corporation shall consist of those persons who have been duly elected to membership and who have subscribed for one or more shares and have paid for the same in whole or in part, together with the entrance fee as provided in the bylaws, and have complied with such other requirements as the bylaws may contain: Provided, that credit union membership shall be limited to groups having a common bond of occupation or association or residents within a well defined neighborhood community, or rural district, employees of a common employer, or members of a bona fide fraternal, religious, cooperative, labor, rural, educational or similar organization.

The provisions of this subsection [section] shall not prohibit a credit union from maintaining offices from locations other than its main office if the maintenance of such offices shall be reasonably necessary to furnish service to its membership. Provided, however, no such additional offices shall be established to serve persons who are not entitled to membership as defined in the preceding paragraph and would not be entitled to services of the credit union at its main office. Provided further that the establishment of additional offices shall be subject to the approval of the Administrator of Credit Unions.

No credit union shall ever pay any commission or offer compensation for the securing of members or on the sale of shares. (1915, c. 115, s. 6; C. S., s. 5230; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 18.)

§ 54-99. Expulsion and withdrawal of members. — The board of directors may expel from the corporation any member who has not carried out his engagement with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this Subchapter or of the bylaws, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt. The members at a regularly called meeting may expel from the corporation any member who has become intemperate or in any way financially irresponsible; no member shall be expelled until he has been informed in writing of the charges against him and an opportunity has been given him, after reasonable notice, to be heard thereon.

A member may withdraw from a credit union by filing a written notice of his intention to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to his shares and any interest accrued on his deposits to the date of expulsion or withdrawal, shall be paid to such member, but in the order of expulsion or withdrawal and only as funds therefor become available, after deducting any amounts due to the corporation by such member. The member shall have no other or further right in the credit union or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the corporation. (1915, c. 115, s. 23; C. S., s. 5231; 1925, c. 73, s. 3; 1935, c. 87.)

§ 54-100. Meetings; right of voting. — The fiscal year of every such corporation shall end at the close of business on the thirty-first day of December. The annual meeting of the corporation shall be held at such time and place as the bylaws prescribe. Special meetings may be held by order of the directors or of the supervisory committee, and shall be held upon request in writing of ten percent (10%) of the members. Notice of all meetings of the corporation shall be given in the manner prescribed in the bylaws. At all meetings of members or shareholders a member shall have one vote and but one vote, irrespective of the number of shares that may be held by him, and in case of sickness or other unavoidable absence of a member he shall be allowed to vote by proxy in writing,

but no member present shall vote more than one such proxy. At any meeting the members may decide upon any question of interest to the corporation, and overrule the board of directors, and by a three-fourths vote of those present and represented, provided the notice of the meeting shall have specified the question to be considered, may vote to amend the bylaws. (1915, c. 115, s. 8; C. S., s. 5232.)

§ 54-101. Election of directors and committees. — (a) Number Elected. — At the first annual meeting, the members shall elect a board of directors of not less than five members and a credit committee of not less than three members to serve staggered terms of one and two years and shall hold office for those terms and until successors qualify. At each subsequent annual meeting, the members shall elect directors and members of the credit committee for a term of two years. The bylaws may authorize the board of directors to appoint a credit committee, or in lieu thereof, appoint one or more loan officers to approve or disapprove loans assigned to him. Except as herein specified, no member of the board of directors shall be a member of the credit committee or of the supervisory committee, hereinafter provided, nor shall one person be a member of more than one such committee. All members of committees and all directors, as well as all officers whom they may elect, shall be sworn, and shall hold their several offices for such terms as may be determined by the bylaws. The board of directors may appoint a membership committee or membership officer from the members of the credit union, other than the treasurer, and assistant treasurers, or a loan officer, and authorize such membership committee or membership officer to approve applications for membership under such conditions as the board may prescribe, except that such membership committee or membership officer so authorized shall submit to the board at each monthly meeting a list of approved or pending applications for membership received since the previous monthly meeting, together with such other related information as the bylaws or board may require.

(b) Oath of Office. — The oath required of each director, officer, and member of committee shall be the oath of the individual taking the same that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right on the books of the corporation of at least one share therein. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall immediately be transmitted to the Administrator of Credit Unions and filed and preserved in his office. (1915, c. 115, s. 9; C. S., s. 5233; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 19; 1973, c. 199, s. 8.)

Editor's Note. — The 1973 amendment rewrote the former first and second sentences of subsection (a) as the present first, second and third sentences.

§ 54-102. Duties of board of directors. — (a) Elect Executive Officers. — At their first meeting and at each first meeting in the fiscal year, the board of directors shall elect from their number a president, vice-president, a secretary, and a treasurer, who shall be the executive officers of the corporation. The offices of secretary and treasurer may, if the bylaws so provide, be held by one person.

(b) General Management. — The board of directors shall have the general management of the affairs, funds, and records of the corporation, shall meet as often as may be necessary, and, unless the bylaws shall specifically reserve all or any of these duties to the members, it shall be the special duty of the directors:

(1) To act upon all applications for membership and the expulsion of members.
(2) To fix the amount of the surety bond which shall be required of every person employed, appointed or elected by the credit union to any position requiring the receipt, payment or custody of money or personal property owned by the credit union or in its custody or control as collateral or otherwise, in accordance with the provisions of subdivision (5) of G.S. 54-75.
(3) To determine from time to time the rate of interest which shall be allowed on deposits and charged on loans.
(4) To fix the maximum number of shares which may be held by and the maximum amount which may be lent to any one member; to declare dividends; and to recommend amendments to the bylaws.
(5) To fill vacancies in the board of directors or in the credit committees until the election and qualification of successors.
(6) To have charge of the investment of the funds of the corporation except loans to members, and to perform such other duties as the members may from time to time authorize.
(7) The board of directors at its first meeting after its election shall appoint a supervisory committee, (no more than one of whom may be a member of the board of directors and none a member of the credit committee) of not less than three members who shall serve for such terms as may be fixed by the bylaws; or in lieu thereof, the bylaws may authorize the board of directors to employ and use such clerical and auditing assistants as may be required to perform the duties required by G.S. 54-104. The board of directors may remove or suspend any member of the supervisory committee for neglect of duty, misfeasance, malfeasance, official misconduct, or for other good cause shown.

(c) Compensation. — No member of the board of directors or of the credit or supervisory committees shall receive any compensation for his services as a member of the board or committees. But the officers elected by the board of directors may receive such compensation as the members may authorize. (1915, c. 115, s. 10; C. S., s. 5234; 1957, c. 989, s. 5; 1965, c. 956, s. 20; 1973, c. 199, s. 9.)

Editor's Note. — The 1973 amendment added to the first sentence of subdivision (7) of subsection (b) the language beginning "or in lieu thereof."

§ 54-103. Duties of credit committee; appointment and duties of loan officers; appointment of loan officers in lieu of credit committee. — The credit committee shall have the general supervision of all loans to members. It shall be the duty of the credit committee to review all applications for loans, to ascertain whether the loan sought is for provident or productive purpose, and to determine whether or not the security offered, in its judgment, is sufficient and the terms proper. The credit committee shall meet as often as may be required after due notice has been given to each member thereof, but not less than once a month, shall keep a record of all meetings, and shall make a report to the members at the annual meetings.

The credit committee may appoint one or more loan officers to act under the supervision of the credit committee and such loan officers, when so appointed, may make loans without necessity for a meeting of or approval by any members of the credit committee, as provided by the bylaws.

The membership through appropriate bylaws, may authorize the board of directors to appoint one or more loan officers in lieu of a credit committee and in such instances, duties and responsibilities of the credit committee shall be

carried out by such loan officer or officers. (1915, c. 115, s. 11; C. S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10.)

Editor's Note. — The 1973 amendment rewrote this section.

§ 54-104. Duties of supervisory committee. — The supervisory committee shall make or cause to be made, an annual audit, in accordance with rules and regulations promulgated by the Administrator of Credit Unions, and shall submit a report of that audit to the board of directors and a summary of the report to the members at the next annual meeting of the credit union. The supervisory committee shall make or cause to be made such supplemental audits as deemed necessary by it or as may be ordered by the Administrator of Credit Unions. Any violation of this Subchapter or of the bylaws or of any practice of the corporation which in the opinion of the supervisory committee is unsafe, unsound, or unauthorized, shall be reported to the board of directors and the Administrator of Credit Unions within seven days after its discovery. (1915, c. 115, s. 12; C. S., s. 5236; 1965, c. 956, s. 21; 1973, c. 199, s. 11.)

Editor's Note. — The 1973 amendment rewrote this section.

ARTICLE 14.

Supervision and Control.

§ 54-105. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations. — In addition to any and all other powers, duties and functions vested in the Administrator of Credit Unions under the provisions of this Subchapter, the Administrator of Credit Unions shall have general control, management and supervision over all corporations organized under the provisions of this Subchapter. All corporations organized under the provisions of this Subchapter shall be subject to the management, control and supervision of the Administrator of Credit Unions as to their conduct, organization, management, business practices and their financial and fiscal matters. The Administrator of Credit Unions may prescribe rules and regulations for the administration of this Subchapter, as well as rules and regulations relating to financial records, business practices and the conduct and management of credit unions, and it shall be the duty of the board of directors and of the various officers of the credit union to put into effect and to carry out such regulations. (1915, c. 115, s. 7; C. S., s. 5237; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 6; 1965, c. 956, ss. 1, 22.)

§ 54-106. Reports; penalties; fees. — (a) Every corporation organized under this Subchapter shall, in January and in July of each year, make a report of condition to the Administrator of Credit Unions giving such information as he shall require, which reports shall be verified by oath of the treasurer and by oath of a majority of the supervisory committee, and shall make such other and further reports under like oath as the Administrator shall demand at any time.

(b) Each credit union applying on or after July 1, 1973, for a certificate to do business under the provisions of this Subchapter, shall, before receiving such certificate, pay into the office of the Administrator of Credit Unions, a charter fee of five dollars ($5.00) and an investigation fee of twenty dollars ($20.00).

(c) Fees to Be Paid to Office of Administrator of Credit Unions. — Each credit union subject to supervision and examination by the Administrator of Credit Unions, including credit unions in process of voluntary liquidation, shall pay into

the office of the Administrator of Credit Unions twice each year, in the months of January and July, supervision and examination fees.

The Secretary of Commerce, shall, on or before December 1 of each year, determine and fix the scale of supervisory and examination fees to be assessed during the next calendar year. However, when the costs of any examination exceed the annual fees assessed and paid by the credit union, the Administrator of Credit Unions may, in his discretion, invoke the provisions of G.S. 54-107, giving due consideration to the time and expense incident to such examination, and the ability of the credit union to pay such additional fees. The additional fees, if assessed by the Administrator, in his discretion, shall be paid by each credit union promptly after the completion of the examination; provided that such additional fees shall not exceed the estimated cost of such examination.

No credit union shall be required to pay any supervisory fee until the expiration of 12 months from the date of the issuance of a certificate of incorporation to such credit union.

(d) Any such corporation which neglects to make semiannual reports as provided in subsection (a) of this section, or any of the other reports required by the Administrator of Credit Unions at the time fixed by the Administrator, shall forfeit to the Administrator of Credit Unions five dollars ($5.00) for each day such neglect continues; and, furthermore, the Administrator of Credit Unions shall have authority, in his discretion, to revoke the certificate of incorporation and take possession of the assets and business of any corporation failing to pay the fees required in this section after serving notice of at least 15 days upon such corporation of his intention so to do.

(e) Moneys collected under this section shall be deposited with the State Treasurer of North Carolina and expended, under the terms of the Executive Budget Act, to defray expenses incurred by the office of the Administrator of Credit Unions in carrying out its supervisory and auditing functions.

(f) All revenue derived from fees will be placed into a special account to be administered solely for the operation of the Credit Union Division. (1915, c. 115, s. 7; C. S., s. 5238; 1925, c. 73, ss. 3, 7; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, s. 7; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12.)

Editor's Note. — The 1973 amendment substituted "July 1, 1973" for "July first, one thousand nine hundred forty-one," and added "and an investigation fee of twenty dollars ($20.00)" in subsection (b).

§ 54-107. Annual examinations required; payment of cost. — The Administrator of Credit Unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the Administrator shall have power and authority to subpoena and examine personally, or by one of his deputies or examiners, witnesses on oath and documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not.

Whenever the cost of making the annual examination exceeds the annual fees paid by the credit union to the State, the Administrator may charge the credit union fifty dollars ($50.00) per day, per man for each day required to complete the examination. The Administrator may designate an independent auditing firm to do the work under his direction and supervision, with the cost to be paid by the credit union involved. (1915, c. 115, s. 7; C. S., s. 5239; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 25; 1969, c. 69, ss. 7, 8.)

§ 54-108. Revocation of certificate; liquidation. — If any such corporation shall neglect to make its annual report, as provided in this Article, or any other report required by the Administrator of Credit Unions for more than 15 days, or shall fail to pay the charges required, including the fines for delay in filing reports, the Administrator of Credit Unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for 15 days after such notice, the said Administrator shall, at his discretion, personally or by an agent appointed by him, take possession of the property and business of the corporation and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided in G.S. 54-92 of this Subchapter. (1915, c. 115, s. 7; C. S., s. 5240; 1925, c. 73, ss. 3, 8; 1935, c. 87; 1957, c. 989, s. 8; 1965, c. 956, s. 1.)

§ 54-109. When Administrator of Credit Unions may take possession of credit union business and property. — The Administrator of Credit Unions may forthwith take possession and control of the business and property of any credit union to which this Subchapter is applicable whenever he shall find that such credit union:

(1) Is conducting its business contrary to law or the regulations of the Administrator promulgated hereunder;
(2) Has violated its charter or bylaws;
(3) Is conducting its business in an unauthorized or unsafe manner;
(4) Is in an unsound or unsafe condition to transact its business;
(5) Has an impairment of its capital;
(6) Cannot with safety and expediency continue business;
(7) Has neglected or refused to comply with the terms of a duly issued order of the Administrator;
(8) Has suspended the payment of its obligations;
(9) Has refused to submit its books, papers, records, or affairs for inspection to any examiner or agency of the Administrator; or
(10) Has refused to submit a sworn statement verified under oath by its treasurer and/or president or other responsible officers regarding its affairs and upon such inquiries as may be submitted to it by the Administrator.

The Administrator of Credit Unions upon taking possession of the property and business of any credit union for the reasons above set forth shall retain such possession until such time as he may permit it to resume business or he may order that its affairs be finally liquidated, as provided in G.S. 54-92 of this Subchapter. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150[A] of the General Statutes of North Carolina, as amended. (1915, c. 115, s. 7; C. S., s. 5241; 1925, c. 73, ss. 3, 9; 1935, c. 87; 1957, c. 989, s. 9; 1965, c. 956, s. 26; 1973, c. 1331, s. 3.)

Editor's Note. — Pursuant to Session Laws 1973, c. 1331, s. 3, effective July 1, 1975, the reference to Chapter 150[A] has been substituted for a reference to Article 33 of Chapter 143 in the second paragraph.

ARTICLE 15.

Central Associations.

§ 54-110. Central association. — (a) Upon application of seven or more credit unions for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearinghouse in the settlement of these accounts, the Administrator of Credit Unions shall, upon

receipt and investigation of charters and bylaws signed by the secretary-treasurers of the several credit unions, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this Article.

(b) Except as provided elsewhere in this section, the procedure and plan of organization, method of operation, officers and their duties, supervision, liquidation and dissolution shall be the same as with any local credit union; except that the membership of a central credit union shall be institutional and only local credit unions can become members, unless the bylaws otherwise prescribe.

(c) Any local credit union can become a member of a central association by subscribing to any number of shares and paying for same, in whole or in part, not to be in excess of twenty-five percent (25%) of their share capital and reserve fund.

(d) Deposits in the central association may be accepted from any source in such amounts and upon such terms as the board of directors may determine and the bylaws shall prescribe.

(e) The secretary-treasurer shall cast the one vote of local member credit unions in its annual election of officers and at all meetings of the member associations unless the bylaws otherwise prescribe.

(f) A central credit union shall not charge more than three fourths of one percent (¾ of 1%) for discounting paper, provided that no discount rate shall make the interest higher than the legal rate.

(g) Section 54-84 shall not apply to a central association, and such an association shall have power to borrow money from any source in amounts not in excess of 10 times the amount of its capital and reserve fund.

(h) A central credit union shall not be taxable under any law which shall exempt any local credit union.

(i) G.S. 54-86(6) shall not apply to a central association, and such association shall have the power to invest in loans to other credit unions in such amounts as approved by its loan officer and/or credit committee.

(j) The board of directors shall meet at least quarterly and shall have the general direction and control of the affairs of the corporation. (1925, c. 73, s. 17; 1935, c. 87; 1965, c. 956, s. 1; 1973, c. 1255, ss. 2, 3.)

Editor's Note. — The 1973 amendment added "Except as provided elsewhere in this section," at the beginning of subsection (b) and added subsections (i) and (j).

SUBCHAPTER IV. COOPERATIVE ASSOCIATIONS.

ARTICLE 16.

Organization of Associations.

§ 54-111. Nature of the association. — Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, housing (including apartment housing), horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, or purchase, maintain and use fire-fighting equipment, on the mutual plan. For the purposes of this Subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; provided that the membership of agricultural organizations incorporated under this Subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers. (1915, c. 144, s. 1; C. S.,

s. 5242; 1925, c. 179, ss. 1, 2; 1931, c. 447; 1949, c. 1042, ss. 1, 2(a); 1955, c. 746, s. 1; 1959, c. 991.)

§ 54-111.1: Repealed by Session Laws 1959, c. 991.

§ 54-112. Use of term restricted. — No corporation or association hereafter organized or doing business for profit in this State shall be entitled to use the term "mutual" as part of its corporate or other business name or title, unless it has complied with the provisions of this Subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this Subchapter. (1915, c. 144, s. 18; C. S., s. 5243; 1925, c. 179, s. 1; 1945, c. 635.)

§ 54-113. Articles of agreement. — The persons desiring to organize such association shall sign and acknowledge written articles which shall contain the name of the association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town, or village where its principal place of business shall be located. The articles shall also state the amount of authorized capital stock, the number of shares subscribed, and the par value of each. No shareholder in any corporation organized under this Subchapter shall be personally liable for any debt of the corporation. (1915, c. 144, s. 2; C. S., s. 5244.)

§ 54-114. Certificate of incorporation. — The original articles of incorporation of corporations organized under this Subchapter, or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the Secretary of State. A like verified copy of such articles and certificate of the Secretary of State, showing the date when such articles were filed with and accepted by the Secretary of State, within 30 days of such filing and acceptance, shall be filed with and recorded by the register of deeds of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The register of deeds shall forthwith transmit to the Secretary of State a certificate stating the time when such copy was recorded. Upon a receipt of such certificate, the Secretary of State shall issue a certificate of incorporation. (1915, c. 144, s. 3; C. S., s. 5245; 1967, c. 823, s. 12.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-115. Fees for incorporation. — For filing the articles of incorporation of corporations organized under this Subchapter, there shall be paid the Secretary of State ten dollars ($10.00) and his fees allowed by law, and for the filing of an amendment to such articles, five dollars ($5.00) and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars ($1,000), such fee for filing either the articles of incorporation or amendments thereto shall be two dollars ($2.00). (1915, c. 144, s. 4; C. S., s. 5246; 1967, c. 823, s. 13.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-116. Bylaws adopted. — At the time of making the articles of incorporation the incorporators shall make bylaws which shall provide:

(1) The name of the corporation.

(2) The purposes for which it is formed.
(3) Qualifications for membership.
(4) The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
(5) The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board of directors.
(6) In the case of selling agencies or productive societies, regulations for grading.
(7) In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.
(8) The par value of the shares of capital stock.
(9) The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
(10) The manner in which the reserve fund shall be accumulated.
(11) The manner in which the dividends shall be determined and paid to members.
(12) Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a bylaw limiting the patrons and subscribers to members of the association.
(13) In the case of apartment housing, regulations governing the rental of apartments. (1915, c. 144, s. 5; C. S., s. 5247; 1925, c. 179, s. 4; 1959, c. 991.)

§ 54-117. General corporation law applied; dealing in products of, or renting to, nonmembers. — All mutual associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this Subchapter. And no corporation or association hereafter organized under this Subchapter for doing business in this State shall be permitted to deal in the products of nonmembers to an amount greater in value than such as are handled by it for members: Provided, no housing corporation or association hereafter organized under this Subchapter shall be permitted to rent to nonmembers for a period longer than 90 days. (1915, c. 144, s. 17; C. S., s. 5248; 1925, c. 179, s. 1; 1931, c. 447, s. 2; 1949, c. 1042, s. 2(b).)

§ 54-118. Other corporations admitted. — All mutual corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all of the provisions of this Subchapter, and be bound thereby on filing with the Secretary of State a written declaration, signed and sworn to by the president and secretary, to the effect that the mutual company or association has by a majority vote of its shareholders decided to accept the benefits of and to be bound by the provisions of this Subchapter. No association organized under this Subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; C. S., s. 5249; 1925, c. 179, s. 1.)

§ 54-118.1. License taxes. — On and after June 1, 1955, the provisions of Article 2, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

§ 54-118.2. Franchise taxes. — On and after July 1, 1955, the provisions of Article 3, Subchapter I of Chapter 105 of the General Statutes of North Carolina

shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

ARTICLE 17.

Stockholders and Officers.

§ 54-119. Certificate for stock fully paid. — Certificates of stock shall not be issued to any subscriber until fully paid, but the bylaws of the association may allow subscribers to vote as shareholders: Provided, part of the stock subscribed for has been paid in cash. (1915, c. 144, s. 11; C. S., s. 5250.)

§ 54-120. Ownership of shares limited. — No shareholder in any such association shall own shares of a greater aggregate par value than twenty percent (20%) of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the bylaws. (1915, c. 144, s. 9; C. S., s. 5251; 1925, c. 179, s. 1.)

§ 54-121. Shares issued on purchase of business. — Whenever an association, created under this Subchapter, shall purchase the business of another association or person, it may pay for the same in whole or in part by issuing to the selling association or persons shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued. (1915, c. 144, s. 10; C. S., s. 5252.)

§ 54-122. Absent members voting. — At any regularly called general or special meeting of the shareholders a written vote received by mail from any absent shareholder, and signed by him, may be read in such meeting, and shall be equivalent to a vote of such of the shareholders so signing: Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. In case of sickness or other unavoidable absence of a member, he shall be allowed to vote by proxy in writing; but no member shall vote more than one such proxy. (1915, c. 144, s. 12; C. S., s. 5253.)

§ 54-123. Directors and other officers. — Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the bylaws may prescribe, and shall hold office for the time for which elected and until their successors are elected and shall enter upon the discharge of such duties as are prescribed in the bylaws; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director or officer so removed shall cease to be a director or officer of the association. The officers of every such association shall be a president, one or more vice-presidents, a secretary and treasurer, who shall be elected annually by the directors, and each of the officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer. (1915, c. 144, s. 6; C. S., s. 5254.)

ARTICLE 18.

Powers and Duties.

§ 54-124. Nature of business authorized. — An association created under this Subchapter shall have power to conduct any agricultural, housing, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, or purchase, maintain and use fire-fighting equipment, on the mutual plan. (1915, c. 144, s. 8; C. S., s. 5255; 1925, c. 179, ss. 1, 3; 1949, c. 1042, s. 2; 1955, c. 746, s. 2.)

§ 54-125. Amendment of articles. — The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders' meeting, or any special shareholders' meeting called for that purpose, on 10 days' notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid-up capital at the time the amendment is adopted. Within 30 days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the Secretary of State and of the register of deeds of the county where the principal place of business is located. (1915, c. 144, s. 7; C. S., s. 5256; 1967, c. 823, s. 14.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-126. Apportionment of earnings. — The directors, subject to revision by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock, not exceeding six percent (6%) per annum, then setting aside not less than ten percent (10%) of the net profits for a reserve fund, until an amount has been accumulated in the reserve fund equal to thirty percent (30%) of the paid-up capital stock, and not less than two percent (2%) thereof for an educational fund to be used in teaching cooperation, and the remainder of the net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employees, and one half of such uniform dividend to nonshareholders on the amount of their purchase, which may be credited to the account of such nonshareholders on account of capital stock of the association; but in selling agencies such as fruit, truck, peanuts, and cotton growers' associations, and in productive associations such as creameries, canneries, warehouses, factories, and the like, dividends shall be prorated on raw materials delivered instead of on goods purchased. In case the association is both a selling and productive concern, or a service and distributing association the dividends may be on both raw material delivered and on goods or service purchased by patrons. (1915, c. 144, s. 13; C. S., s. 5257; 1925, c. 179, s. 5.)

§ 54-127. Time of distribution. — The profits or net earnings of such association shall be distributed to those entitled thereto, at such times as the bylaws shall prescribe, which shall be as often as once in 12 months. (1915, c. 144, s. 14; C. S., s. 5258.)

§ 54-128. Annual reports. — Every association organized under the provisions of this Subchapter shall annually, on or before the first day of March of each year, make a report to the Secretary of State; such report shall contain the name of the company, its principal place of business in this State, and generally a statement as to its business, showing total amount of business

transacted, amount of capital stock subscribed for and paid in, number of shareholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses. A copy of such report shall also be filed with the division of markets in the Department of Agriculture. (1915, c. 144, s. 15; C. S., s. 5259.)

SUBCHAPTER V. MARKETING ASSOCIATIONS.

ARTICLE 19.

Purpose and Organization.

§ 54-129. Declaration of policy. — In order to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through cooperation, and to eliminate speculation and waste, and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer, and to stabilize the marketing problems of agricultural products, this Subchapter is enacted. (1921, c. 87, s. 1; C. S., s. 5259(a); 1935, c. 230, s. 1.)

Editor's Note. — For discussion of cooperative marketing, see 1 N.C.L. Rev. 216, and 2 N.C.L. Rev. 222.

Statute Is Valid. — The Cooperative Marketing Act, this Subchapter, was construed and its validity sustained in Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Tobacco Growers Co-op. Ass'n v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924); Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924); Tobacco Growers Co-op. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

Collateral Attack on Organization. — In Pittman v. Tobacco Growers Co-op. Ass'n, 187 N.C. 340, 121 S.E. 634 (1924), it was held that the validity of the association cannot be assailed by alleging an insufficient number of signers. This is a collateral attack and is not a direct attack by the State upon a quo warranto to vitiate the incorporation.

Withdrawal of Charter. — It was held in Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923), that since an association formed under this Subchapter had no capital, stock, surplus or credit except as given by the statute, the legislature may withdraw its charter at any time.

§ 54-130. Definitions and nature. — As used in this Subchapter—

(1) Agricultural Products. — The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products.

(2) Association. — The term "association" means

a. Any corporation organized under this Subchapter; or

b. Any foreign corporation which

1. Is organized under any general or special act of another State or the District of Columbia as a cooperative association for the mutual benefit of its members and other patrons,

2. Confines its operations in this State to the purposes specified in, and restricts the return on the stock or membership capital and the amount of its business with nonmembers to the limits placed thereon by, this Subchapter for corporations organized hereunder, and

3. Is authorized to transact business in this State pursuant to G.S. 54-139.

(3) Charter. — The term "charter" includes the original articles of incorporation, together with all amendments thereto and articles of merger or consolidation.

(4) Member. — The term "member" shall include actual members of associations without capital stock and holders of stock in associations organized with capital stock.

(5) Person. — The term "person" shall include individuals, firms, partnerships, corporations, and associations.

Associations organized or domesticated hereunder shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

This Subchapter shall be referred to as the "Cooperative Marketing Act." (1921, c. 87, s. 2; C. S., s. 5259(b); 1935, c. 436, s. 1; 1963, c. 1168, ss. 1-3.)

§ 54-131. Who may organize. — Five or more persons engaged in the production of agricultural products may form a nonprofit, cooperative association, with or without capital stock, under the provisions of this Subchapter. (1921, c. 87, s. 3; C. S., s. 5259(c).)

§ 54-132. Purposes. — An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above-enumerated activities; or in any one or more of the activities specified herein. (1921, c. 87, s. 4; C. S., s. 5259(d); 1933, c. 350, s. 2; 1935, c. 230, s. 2.)

§ 54-133. Preliminary investigation. — Every group of persons contemplating the organization of an association under this Subchapter is urged to communicate with the Chief of the Division of Markets, who will inform it whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. (1921, c. 87, s. 5; C. S., s. 5259(e).)

§ 54-134. Articles of incorporation. — Each association formed under this Subchapter must prepare and file articles of incorporation, setting forth:

(1) The name of the association.

(2) The purposes for which it is formed.

(3) The place where its principal business will be transacted.

(4) The period of duration, which may be perpetual. When the articles of incorporation fail to state the period of duration, it shall be considered perpetual. Any association heretofore or hereafter organized for a period less than perpetual, may by amendment to its articles of incorporation, extend the period of its duration for a specified period or perpetually.

(5) The names and addresses (not less than five) of those who are to serve as directors for the first term or until the election of their successors.

(6) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the article shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and this association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three fourths of the members.

(7) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The

capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and the privileges granted to each.

In addition to the foregoing, the petition for articles of incorporation may contain any provision consistent with law with respect to management, regulation, government, financing, indebtedness, membership, the establishment of voting districts and the election of delegates for representative purposes, the issuance, retirement and transfer of its stock, if formed with capital stock, or any provisions relative to the way or manner in which it shall operate with respect to its members, officers, or directors, and any other provisions relating to its affairs; provided that nothing set forth in this paragraph shall be construed as limiting any of the rights or powers otherwise given to such associations.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed as provided in G.S. 55A-4; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State, and other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Chief of the Division of Markets. (1921, c. 87, s. 8; C. S., s. 5259(f); 1935, c. 230, ss. 3, 4; 1963, c. 1168, ss. 4, 5.)

When Agreement Becomes Binding. — The agreement to form an association under this Subchapter becomes binding at once upon its being accepted by the association after incorporation. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-135. Amendments to articles of incorporation. — (a) An association may amend its charter from time to time in any and as many respects as may be desired, so long as its charter as amended contains only such provisions as are lawful under this Subchapter.

(b) Amendments to the charter shall be made as follows: The board of directors shall by a vote of not less than two thirds of all of the members of the board, adopt a resolution approving the proposed amendment or amendments and directing that the proposed amendment or amendments be submitted to a vote at a meeting of members, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed amendment or amendments, or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Subchapter for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least a majority of the votes entitled to be cast by members present or represented by proxy at such meeting.

(c) The articles of amendment shall set forth:

(1) The name of the association;

(2) The amendment or amendments so adopted;

(3) A statement setting forth the date of the meeting of the board of directors at which the amendment or amendments were approved by the board, that a quorum was present at such meeting, and that such approval received a vote of not less than two thirds of all the members of the board;

(4) A statement setting forth the date of the meeting of members at which the amendment was adopted, that a quorum was present at such meeting, and that such amendment received at least a majority of the

votes entitled to be cast by members present or represented by proxy at such meeting;

(5) The articles of amendment shall be executed by the association and shall be filed all as provided in G.S. 55A-4;

(6) A certified copy of the articles of amendment shall be filed with the Chief of the Division of Markets. (1921, c. 87, s. 9; C. S., s. 5259(g); 1935, c. 230, s. 5; 1963, c. 1168, s. 6.)

§ 54-136. Bylaws. — Each association incorporated under this Subchapter must, within 30 days after its incorporation, adopt for its government and management a code of bylaws, not inconsistent with the powers granted by this Subchapter. A majority vote of a quorum of the members or stockholders attending a meeting, of which notice of the proposed bylaw or bylaws shall have been given, is sufficient to adopt or amend the bylaws. Each association under its bylaws may also provide for any or all of the following matters:

(1) The time, place, and manner of calling and conducting its meetings.

(2) The number of stockholders or members constituting a quorum.

(3) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.

(4) The number of directors constituting a quorum.

(5) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.

(6) Penalties for violations of the bylaws.

(7) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.

(8) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any, to be paid by each member or stockholder for services rendered by the association to him, and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(9) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which, and the time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors.

In case of the withdrawal or expulsion of a member the board of directors shall equitably and conclusively appraise his property interests in the association, and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.

Notwithstanding the foregoing provisions of this section, any association may amend its articles of incorporation to provide that thereafter any bylaw or bylaws of the association may be amended or repealed, or any new bylaw may be adopted, either by the members or by the board of directors, but if the members amend any bylaw or bylaws or adopt any new bylaw or bylaws, such

bylaw or bylaws shall not thereafter be amended or repealed by the board of directors, and if the members repeal any bylaw or bylaws, such bylaw or bylaws shall not be readopted by the board of directors; provided, however, that no bylaw shall be adopted by the board of directors which shall require a higher number or percentage of members to be present or represented at a members' meeting for the purpose of constituting a quorum, or a higher number or percentage of such quorum to take action, than was the case before the power to alter, amend, or repeal the bylaws was conferred upon the board of directors. (1921, c. 87, s. 10; C. S., s. 5259(h); 1935, c. 230, s. 6; 1963, c. 1168, s. 7.)

§ 54-137. General and special meetings; how called. — In its bylaws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten percent (10%) of the members or stockholders may file a petition stating the specific business to be brought before the association, and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least 10 days prior to the meeting: Provided, however, that the bylaws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (1921, c. 87, s. 11; C. S., s. 5259(i).)

§ 54-138. Conflicting laws not to apply. — Any provisions of law which are in conflict with this Subchapter shall not be construed as applying to the associations herein provided for. (1921, c. 87, s. 20; C. S., s. 5259(j).)

§ 54-139. Domestication of foreign cooperative corporations; limitation on use of word "cooperative". — (a) A foreign corporation that can qualify as an association, as defined in G.S. 54-130(2)b1 and 2, may, under the provisions of Article 8, Chapter 55A, if it be a nonstock corporation, or under the provisions of Article 10, Chapter 55, if it be a stock corporation, be authorized to transact business in this State.

(b) No person other than an association organized under this Subchapter, or a foreign corporation domesticated pursuant to subsection (a) of this section, or an electric or telephone membership corporation domesticated pursuant to G.S. 117-28, shall be entitled to organize, domesticate, or transact business in this State if the corporate or other business name or title of such person contains the word "cooperative." (1921, c. 87, s. 21; C. S., s. 5259(k); 1963, c. 1168, s. 8.)

§ 54-140. Association heretofore organized may adopt the provisions of this Subchapter. — Any corporation or association organized under previously existing statutes may, by a majority vote of its stockholders or members, be brought under the provisions of this Subchapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the Secretary of State, to the effect that the corporation or association has by a majority vote of its stockholders or members decided to accept the benefits and be found by the provisions of this Subchapter. Articles of incorporation shall be filed as required in G.S. 54-134, except that they shall be signed by the members of the board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation. (1921, c. 87, s. 24; C. S., s. 5259(l).)

Cross Reference. — As to fee for filing amendment to articles of incorporation, see § 54-144.

§ 54-141. Associations not in restraint of trade. — No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal

monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this Subchapter be considered illegal or in restraint of trade. (1921, c. 87, s. 26; C. S., s. 5259(m).)

Purpose, Effect and Validity. — This Subchapter is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

The legal presumption is in favor of the validity of the marketing contract made by a member with a cooperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the anti-trust law, or in restraint of trade. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

Governmental Control as Affecting. — The governmental control to be exercised as herein prescribed renders the cooperative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-142. Application of Business Corporation Act to cooperative associations with capital stock. — The provisions of the Business Corporation Act (Chapter 55 of the General Statutes) shall apply, so far as appropriate, to every cooperative association with capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1921, c. 87, s. 28; C. S., s. 5259(o); 1963, c. 1168, s. 9.)

Effect of Period Limiting Existence. — A charter provision that a cooperative marketing association shall exist for five years does not contemplate that the association shall hold over the crops raised in one year for one or more successive years. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-142.1. Application of Nonprofit Corporation Act to cooperative associations without capital stock. — The provisions of the Nonprofit Corporation Act (Chapter 55A of the General Statutes) shall apply, so far as appropriate, to every cooperative association without capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1963, c. 1168, s. 9.)

§ 54-143. License taxes. — On and after June 1, 1955, the provisions of Article 2, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1921, c. 87, s. 29; C. S., s. 5259(p); 1955, c. 1313, s. 1.)

§ 54-143.1. Franchise taxes. — On and after July 1, 1955, the provisions of Article 3, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

§ 54-144. Filing fees. — For filing articles of incorporation, an association organized hereunder shall pay ten dollars ($10.00); and for filing an amendment to the articles, two and one-half dollars ($2.50). (1921, c. 87, s. 30; C. S., s. 5259(q).)

ARTICLE 20.

Members and Officers.

§ 54-145. Members. — (a) Under the terms and conditions prescribed in its bylaws, an association may admit as members, or issue common stock, only to persons engaged in the production of agricultural products, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations, organized hereunder. (1921, c. 87, s. 7; C. S., s. 5259(r); 1963, c. 1168, s. 10.)

§ 54-146. Directors; election. — (a) The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The bylaws may provide that the territory in which the association has members shall be divided into districts, and that the directors shall be elected according to such districts. In such case the bylaws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The bylaws may provide that primary elections should be held in each district to elect the directors apportioned to such districts, and the result of all such primary elections must be ratified by the next regular meeting of the association.

(b) The bylaws may provide that one or more directors may be appointed either by the Director of the Agricultural Extension Service or by such public official or public board or commission as may be designated by the bylaws. The directors so appointed need not be members or stockholders of the association, but shall have the same powers and rights as other directors.

(c) An association may provide a fair remuneration for the time actually spent by its officers and directors in its service. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

(d) When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the bylaws provide for an election of directors by districts. In such case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy: Provided, that this subsection shall not apply to the director or directors appointed under the provisions of subsection (b) of this section: Provided further, that any vacancy occurring in the office of a director appointed under subsection (b) of this section shall be filled in the same manner as the original appointment was made. (1921, c. 87, s. 12; C. S., s. 5259(s); 1963, c. 1168, s. 11.)

§ 54-147. Election of officers. — The directors shall elect a president, one or more vice-presidents, a secretary and treasurer who need not be directors, and they may combine the offices of secretary and treasurer designating the combined office as secretary-treasurer. They shall elect from their number a chairman and vice-chairman unless the president and vice-presidents are members of the board. The board may elect or appoint such additional officers as are necessary and appropriate. The treasurer may be a bank or any depository, and as such shall not be considered an officer, but as a function of the board of directors. In such a case the secretary shall perform the usual

accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13; C. S., s. 5259(t); 1971, c. 925.)

§ 54-148. Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership. — (a) When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

(b) No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

(c) Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

(d) A cooperative association, incorporated under this Subchapter, may fix or limit in its bylaws the amount of stock which one member might own in said association.

(e) No member or stockholder shall be entitled to more than one vote; provided, however, that any association organized hereunder, all of whose members are other associations organized hereunder shall have power to determine by its bylaws the number of votes to which each member association shall be entitled and to provide for the appointment or election of delegates to cast such votes and to represent the member associations at all members' meetings.

(f) Any association organized with stock under this Subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

(g) The bylaws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of agricultural products, and such restrictions must be printed upon every certificate of stock subject thereto.

(h) The association may at any time, except when the debts of the association exceed fifty percent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors, and pay for it in cash within one year thereafter. (1921, c. 87, s. 14; C. S., s. 5259(u); 1935, c. 436, s. 2; 1955, c. 596; 1963, c. 1168, s. 12.)

§ 54-149. Removal of officer or director. — Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten percent (10%) of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting, and shall have an opportunity at the meeting to be heard in person or by counsel, and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the bylaws provide for election of directors by districts, with primary elections in each district, then the petition for removal of a director must be signed by twenty percent (20%) of the members residing in the district from which he was elected. The board of directors must call a special meeting of the

members residing in that district to consider the removal of the director. By a vote of the majority of that district, the director in question shall be removed from office: Provided, that this section shall not apply to directors appointed under subsection (b) of G.S. 54-146. (1921, c. 87, s. 15; C. S., s. 5259(v).)

§ 54-150. Referendum. — Upon demand of one third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose. (1921, c. 87, s. 16; C. S., s. 5259(w).)

ARTICLE 21.

Powers, Duties, and Liabilities.

§ 54-151. Powers. — Each association incorporated under this Subchapter shall have the following powers:

(1) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of nonmembers to an amount greater in value than such as are dealt in, handled, and/or performed by it for and on behalf of members during the same period.

(2) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association.

(3) To act as the agent or representative of any member or members in any of the above-mentioned activities.

(4) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association, or engaged in the financing of the association.

(5) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the bylaws.

(6) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto.

(7) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this

Subchapter; and to do any such thing anywhere. (1921, c. 87, s. 6; C. S., s. 5259(x); 1933, c. 350, ss. 3, 4; 1935, c. 230, ss. 7-9.)

Cross Reference. — As to formation of subsidiary companies, see § 54-158 and note.

§ 54-152. Marketing contract. — (a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest on preferred stock, not exceeding eight percent (8%) per annum, and reserve for retiring the stock, if any; and other proper reserves; and interest not exceeding eight percent (8%) per annum upon common stock.

(b) The bylaws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State.

(c) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(d) In the event that a member of an association incorporated under this chapter shall have died; and that, at a time more than six months after his death, such cooperative corporation has in its hands moneys not in excess of one hundred dollars ($100.00) which would have been distributable and payable to such member except for his death; and that there has been appointed no administrator of his estate or that the administration of his estate has been closed at such time; then such corporation, without making any publication of notice, may disburse such moneys (not in excess of one hundred dollars ($100.00)) in the following order:

(1) To the widow of the deceased if there is a widow,

(2) To pay any unsatisfied claims for funeral expenses or reimburse any person for the payment thereof, and

(3) To any adult person of the class of those nearest of kin to the deceased, for the benefit of all members of such class.

In making such disbursements the said corporation shall be responsible and liable only for the exercise of good faith and reasonable care and shall have no further responsibility or liability with respect to such moneys or their application or disbursement. (1921, c. 87, s. 17; C. S., s. 5259(y); 1959, c. 1174.)

Validity of Standard Contract. — The provisions of the standard contract made by the Tobacco Growers Co-operative Association, formed under the provisions of this Subchapter, whereby a member agreed to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or lessor during certain years, was held valid and enforceable. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924); Tobacco Growers Co-op. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

Remedies for Breach of Contract by Member. — Upon the breach by a member of a cooperative association of a contract for the sole handling of his crop by the association, the recovery of liquidated damages and costs, and equitable relief by injunction to prevent the further breach of the contract, and a decree of spe-

cific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order may be had against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

Liquidated Damages. — The fact that a cooperative marketing contract provides for liquidated damages does not give the association an adequate remedy at law against the members selling their tobacco otherwise than as provided in the marketing contract. Tobacco Growers Co-op. Ass'n v. Pollock, 187 N.C. 409, 121 S.E. 763 (1924).

Same — Specific Performance. — Injuries from the breach of marketing contract by a member with the Tobacco Growers Co-operative Association, formed under the provisions of this Subchapter, cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by the statute will be upheld by the courts. Tobacco Growers Co-op. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

Injunctive Relief. — Upon an alleged breach of a cooperative marketing contract on the part of a member, the equitable remedy by injunction is available to the association. Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Where Restraining Order Not Continued. — The temporary restraining order obtained under the provisions of the statute will not be continued if the breach of the contract complained of was caused by the association's own default, or if the continuance of the temporary restraining order will work greater injury than its dissolution by the court. Tobacco Growers Co-op. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

The general denial by a cooperative marketing association of owing defendant member anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient against the defense that the defendant was forced to sell a small portion of crop to maintain his livelihood because of a failure of the association to pay for bulk of crop under contract; and an order of the superior court judge dissolving the restraining order upon defendant's giving a proper bond for plaintiff's protection was proper under the evidence in this case. Tobacco Growers Co-op. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

Same — Effect of Lien on Crop. — The fact that the member of a cooperative association gave a lien on his crop for advancements does not invade the rights of the association under the marketing contract so as to require that an injunction against selling the crops should be continued until the final hearing. Tobacco Growers Co-op. Ass'n v. Harvey & Son Co., 189 N.C. 494, 127 S.E. 545 (1925).

Continuation of Injunction to Final Hearing. — The right given to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. Tobacco Growers Co-op. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

Where defendant member has admitted breaking his contract with the association, and avows that he expects to continue doing so, a temporary injunction should be continued until the final hearing. Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Where the defendant resists injunctive relief upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, it was held that the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. Tobacco Growers Co-op. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924); Tobacco Growers Co-op. Ass'n v. Spikes, 187 N.C. 367, 121 S.E. 636 (1924).

Same — Safeguarding Rights of Mortgagee. — A preliminary order restraining a member of a cooperative association from disposing of the tobacco embraced in his contract in breach thereof will not be dissolved by reason of a defense set up by the member that the tobacco was the subject of a lien for supplies necessary for its cultivation. The restraining order should be continued to the hearing, safeguarding the rights of the mortgagee to be asserted by his appropriate action. Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Lack of Justification for Breach of Contract. — A penalty in a small sum erroneously attempted to be imposed on a member by the tobacco marketing association, under its contract for the failure to market the tobacco of his nonmember tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. Tobacco Growers Co-op. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924).

Justification for Breach Shown by Parol. — Where a member of a cooperative marketing association, formed under the statute, resists the performance of marketing his tobacco with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory. Tobacco Growers Co-op. Ass'n v. Moss, 187 N.C. 421, 121 S.E. 738 (1924).

Evasive Answer of Member Respecting Breach. — In proceedings for injunctive relief by a cooperative marketing association against a member wherein it definitely alleges that the defendant has breached his contract and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of injunctive relief. Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Right of Member to Place Lien on Crop. — In Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924), it was held that a member of the Tobacco Growers Co-operative Association may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same. The contract between the parties clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn.

Rights of Lienholder. — The mortgagee or lienholder for supplies furnished to an association member to produce his crop has a right to demand and receive of the member, or to enforce delivery by any appropriate procedure, a sufficient amount of the tobacco or other property included in his mortgage, to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of the association under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter. Tobacco Growers Co-op. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

Liability of Member for Act of Nonmember Tenant. — The member of a cooperative association is not liable for a penalty on account of the failure of his tenant to market tobacco through the association until and unless he receives the tenant's crop as payment for rent, etc. He is then liable for as much as is received. Tobacco Growers Co-op. Ass'n v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924).

Avoiding Contract for Fraud. — In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of this section, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. Tobacco Growers Co-op. Ass'n v. Chilton, 190 N.C. 602, 130 S.E. 312 (1925); Simpson v. Tobacco Growers Co-op. Ass'n, 190 N.C. 603, 130 S.E. 507 (1925).

In order to avoid a written contract, made under this section, for fraudulent misrepresentations of the association's agent, it must not only be shown that the statements complained of were false, but that the plaintiff was at the time ignorant of their falsity and relied thereon to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances. Simpson v. Tobacco Growers Co-op. Ass'n, 190 N.C. 603, 130 S.E. 507 (1925).

Where an agent of the Tobacco Growers Co-operative Association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract, the law will avoid the contract for the fraud. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply. Dunbar v. Tobacco Growers Co-op. Ass'n, 190 N.C. 680, 130 S.E. 505 (1925).

§ 54-153. Purchasing business of other associations, persons, firms, or corporations; payment; stock issued. — Whenever an association organized hereunder with preferred capital stock shall purchase the stock or any property, or any interest in any property of any person, firm, or corporation or association, it may by agreement with the other party or parties to the transaction discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest shares of its preferred capital stock to an amount which at par value would equal a fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for shares of stock issued. (1921, c. 87, s. 18; C. S., s. 5259(z).)

§ 54-154. Annual reports. — Each association formed under this Subchapter shall prepare and make out an annual report on forms furnished by the Division of Markets, containing the name of the association, its principal place of

business, and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up, and the number of stockholders of a stock association or the number of members and the amount of membership fees received, if a nonstock association; the total expenses of the operations; the amount of its indebtedness, or liability, and its balance sheets. (1921, c. 87, s. 19; C. S., s. 5259(aa).)

§ 54-155. Interest in other corporations or associations. — An association may organize, form, operate, own, control, have interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing, or selling of the agricultural products handled by the association, or the by-products thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association, or to any other person, and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association. (1921, c. 87, s. 22; C. S., s. 5259(bb).)

§ 54-156. Contracts and agreements with other associations. — Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements, and make all necessary and proper stipulations, agreements and contracts and arrangements with any other cooperative corporation, association, or associations, formed in this or in any other state, for the cooperative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses. (1921, c. 87, s. 23; C. S., s. 5259(cc).)

§ 54-157. Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor. — Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars ($100.00), and not more than one thousand dollars ($1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500.00) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness, or to any communication, written or oral, between a business company or concern and persons with whom it has an existing contractual relationship which communication relates to the performance of that contractual relationship and duties and responsibilities arising therefrom. (1921, c. 87, s. 25; C. S., s. 5259(dd); 1963, c. 1168, s. 14.)

Failure of Milk Processor to Deduct Dues from Payments to Producers. — Where a milk processor, purchasing directly from producers, deducts dues from its payments for milk so purchased and remits such dues to the producers' marketing association, but discontinues making such deductions pursuant to written instructions of the producers and thereafter pays the producers in full for the milk purchased, the processor may not be held to have violated this section. Carolina Milk Producers Co-op. v. Melville Dairy, Inc., 225 N.C. 1, 120 S.E.2d 548 (1961).

§ 54-158. Cooperative associations may form subsidiaries. — Nothing in this Subchapter shall prevent an association organizing, forming, operating, owning, controlling, having an interest in, owning stock of, or being a member of any other corporation (hereinafter referred to as a subsidiary corporation) from including or having included in the charter or bylaws of such subsidiary corporation provisions for the control or management of said subsidiary corporation by such association to such extent as shall by votes of the board of directors of such association, and the majority of the stockholders of such subsidiary corporation, be declared to be for the best interests of said association and said subsidiary corporation respectively. Such provisions may be so included in any such charter or bylaws and may by way of illustration, but not of limitation, include the following:

(1) Representation of said association on the board of directors or other governing body of said subsidiary corporation, upon such terms as may be deemed advisable.

(2) Ownership by an association of an interest or interests in a subsidiary corporation represented by stock of any class thereof, or otherwise, to such extent and upon such terms, and with such voting power, as may be deemed advisable.

(3) Participation by said association in the profits of such subsidiary corporation to such extent and upon such terms as shall be deemed advisable. (1933, c. 350, s. 1.)

Formation of Subsidiary Companies. — That an organization of tobacco growers had formed subsidiary companies to cure tobacco, redry it, etc., was held unobjectionable even prior to the enactment of this section. Tobacco Growers Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

ARTICLE 22.

Merger, Consolidation and Other Fundamental Changes.

§ 54-159. Procedure for merger. — (a) Any two or more domestic associations organized under this Subchapter, either with or without capital stock, may merge into any one of such associations pursuant to a plan of merger approved in the manner provided in this Article.

(b) The board of directors of each association shall, by resolution adopted by each such board, approve a plan of merger setting forth:

(1) The names of the association proposing to merge, and the name of the association into which they propose to merge, which is hereinafter designated as the surviving association.

(2) The name which the surviving association is to have, which name may be that of any of the associations involved in the merger or any other available name, subject, however, to the limitations of G.S. 54-139 and 55A-10.

(3) The terms and conditions of the proposed merger.

(4) A statement of any changes in the charter of the surviving association to be effected by such merger.

(5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1963, c. 1168, s. 13.)

§ 54-160. Procedure for consolidation. — (a) Any two or more domestic associations organized under this Subchapter, either with or without capital stock, may consolidate into a new association pursuant to a plan of consolidation approved in the manner provided in this Article.

(b) The board of directors of each association shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

(1) The names of the associations proposing to consolidate, and the name of the new association into which they proposed to consolidate, which is hereinafter designated as the new association. The name of the new association may be that of any of the associations involved in the consolidation or any other available name, subject, however, to the limitations of G.S. 54-139 and 55A-10.
(2) The terms and conditions of the proposed consolidation.
(3) With respect to the new association, all of the appropriate statements required to be set forth in articles of incorporation for associations organized under this Subchapter.
(4) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1963, c. 1168, s. 13.)

§ 54-161. Approval of merger or consolidation; abandonment. — (a) A plan of merger or consolidation shall be adopted in the following manner: The board of directors of each merging or consolidating association shall adopt a resolution approving the proposed plan, and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice of the meeting shall be given to each member entitled to vote at such meeting. The notice shall state that the proposed plan of merger or consolidation will be considered and acted upon at the meeting, and a copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice. Such notice shall contain a statement, displayed with reasonable prominence, to the effect that objecting members are entitled, upon compliance with G.S. 54-166, including the 20-day demand requirement, to be paid the fair market value of their stock or other property rights or interest in the association, but failure of the notice to contain such a statement shall not invalidate the merger or consolidation. Each such notice shall be mailed by first-class mail at such a time that not less than 10 full days shall elapse between the date of mailing the notice and the date of the meeting, and shall be mailed to the member at his last address as it appears on the records of the association. The proposed plan shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present at each such meeting where a quorum is present.

(b) After such approval, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (1963, c. 1168, s. 13.)

§ 54-162. Articles of merger or consolidation. — (a) Upon such approval, articles of merger or articles of consolidation shall be executed by each association and filed as provided in G.S. 55A-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent associations have their principal places of business or their registered offices.

(b) The articles of merger or consolidation shall set forth:
(1) The plan of merger or the plan of consolidation; and
(2) A statement setting forth the date of the meeting of the members of each association at which the plan was adopted, that a quorum was present at such meeting, and that such plan received at least two thirds of the votes entitled to be cast by members present at each such meeting where a quorum was present.

(c) The time when the merger or consolidation is effected is determined by the provisions of G.S. 55A-4. (1963, c. 1168, s. 13; 1967, c. 823, s. 15.)

Cross Reference. — See Editor's note to § 53-5.

§ 54-163. Effect of merger or consolidation. — When such merger or consolidation has been effected:

(1) The several associations, parties to the plan of merger or consolidation, shall be a single association which, in the case of a merger, shall be that association designated in the plan of merger as the surviving association, and, in the case of a consolidation, shall be the new association provided for in the plan of consolidation.

(2) The separate existence of all associations which are parties to the plan of merger or consolidation, except the surviving or new association, shall cease.

(3) Such surviving or new association shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of an association organized under this Subchapter.

(4) Such surviving or new association shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating associations; and all property, real and personal, and all debts due on any account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the associations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single association without further act or deed; and the title to any real estate, or any interest therein, vested in any of such associations shall not revert or be in any way impaired by reason of such merger or consolidation.

(5) Such surviving or new association shall thenceforth be responsible and liable for all the liabilities, contracts or other obligations, and penalties of each of the associations so merged or consolidated; and any claim existing or action or proceeding, civil or criminal, pending by or against any of such associations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new association may be substituted in its place; and any judgments rendered against any of the merged or consolidated associations may be enforced against the surviving or new association. Neither the rights of creditors nor any liens upon the property of any merged or consolidated association shall be impaired by such merger or consolidation.

(6) In the case of a merger, the charter of the surviving association shall be deemed to be amended to the extent, if any, that changes in its charter are stated in the plan of merger. In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new association. (1963, c. 1168, s. 13.)

§ 54-164. Merger or consolidation of domestic and foreign associations. — (a) One or more domestic associations organized under this Subchapter and one or more foreign corporations engaging in any activity such as is described in G.S. 54-132, and which is a nonprofit cooperative in the sense that the term "nonprofit" is used in G.S. 54-130, may be merged or consolidated into an association of this State or an association or corporation of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign association or corporation is organized.

(b) Each domestic association shall comply with the provisions of this Article with respect to the merger or consolidation, as the case may be, of domestic associations, and each foreign association or corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new association or corporation, as the case may be, is an association or corporation of any state other than this State, it shall comply with the provisions of this Subchapter with respect to foreign corporations if

it is to transact business in this State; and if after the merger or consolidation it transacts no business in this State, the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent association of this State and process therein may be served as provided in G.S. 55-145.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic associations, if the surviving or new corporation is to be an association of this State. If the surviving or new association or corporation is to be an association or corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic associations except insofar as the laws of such other state provide otherwise.

(e) If the new or surviving association or corporation is not an association of this State, then notwithstanding anything in the foregoing provisions of this section:

(1) The rights of any member of any constituent association that is an association of this State to receive notice of objectors' rights, to file his objection, upon such objection to demand and receive payment of the fair market value of his stock or other property rights or interests in the association, or to avail himself of any equitable relief to which he would be entitled if the surviving or new association or corporation were an association of this State, shall not be impaired; and

(2) The courts of this State shall have jurisdiction in actions to enforce the aforesaid rights against the surviving or new association or corporation regardless of whether or not said association or corporation is otherwise subject to the jurisdiction of the courts of this State and in any such action service of process may be made in the manner provided in G.S. 55-145 that would be applicable if said association or corporation were transacting business in this State. (1963, c. 1168, s. 13.)

§ 54-165. Sale, lease or exchange of assets; mortgage or pledge of assets. — (a) A sale, lease, or exchange of all, or substantially all, the property and assets of an association organized under the provisions of this Subchapter may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner: The board of directors shall adopt a resolution recommending such sale, lease, or exchange and directing that it be submitted to a vote at a meeting of members, which may be either an annual or a special meeting. Written or printed notice of the meeting shall be given to each member entitled to vote at such meeting. The notice shall state that the proposed sale, lease, or exchange will be considered and acted upon at such meeting, and a statement of the terms of the proposed sale, lease, or exchange, as the case may be, shall be included in or enclosed with such notice. Each such notice shall be mailed by first-class mail at such a time that not less than 10 full days shall elapse between the date of mailing the notice and the date of the meeting, and shall be mailed to the member at his last address as it appears on the records of the association. The proposed sale, lease, or exchange, as the case may be, shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present at the meeting, if a quorum is present.

(b) A mortgage or pledge of, or any other security interest in, all or any part or parts of the property of the association may be made by authority of the board of directors of the association without authorization of the members, unless otherwise provided in the charter or bylaws adopted by the members. (1963, c. 1168, s. 13.)

§ 54-166. Rights of objecting members. — (a) Any member of an association effecting a merger or consolidation may give to the association prior to or at

the meeting of the members to which the proposal of merger or consolidation is submitted to a vote, written notice that he objects to such proposal. Within 20 days after the date on which the vote was taken, such member may, unless he votes in favor of the proposal, make written demand on the association for payment of the fair market value of his stock or other property rights or interest in the association. Such demand shall state the number and class of shares of stock owned by him or the nature and amount of other property rights or interest owned by him in the association. In addition to any other right he may have in law or equity, a member giving such notice shall be entitled, if and when the merger or consolidation is effected, to be paid by the surviving or new association, the fair market value of such stock, or other property rights or interests, as of the day prior to the date on which the vote was taken, subject only to the surrender by him of the certificate or certificates or other evidence of ownership of such stock or other property rights or interests.

(b) If within 30 days after the date upon which the objecting member becomes entitled to payment for such stock or other property rights or interest, the fair market value of such stock or other property rights or interests is agreed upon between the member and the surviving or new association, as the case may be, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate or other evidence of such property rights or interests, whereupon the member shall cease to have any interest in such stock or other property rights or interests in the association.

(c) If within the 30-day period mentioned in subsection (b) of this section the member and the association do not agree as to the fair market value of such stock or other property rights or interests, the member may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county in which the association has its registered office or principal place of business asking for the appointment by the clerk of the superior court of that county of three qualified and disinterested appraisers to appraise the fair market value of such stock or other property rights or interests. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the association at least 10 days prior to the hearing of the petition by the court. The award of the appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the member, upon depositing with the court the proper stock certificates or other evidence of such property rights or interests, shall be entitled to judgment against the association for the appraised value thereof as of the day prior to the date on which the vote was taken, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 of the General Statutes for the trial of cases under the eminent domain law of this State, and with the same right of appeal to the appellate division as is permitted in that Chapter. The court shall assess the cost of the proceedings as it shall deem equitable. Upon payment of the judgment the owner of such stock or other property rights or interests shall cease to have any interest in the association and the association shall be entitled to have said stock certificates or other evidence of such property rights or interests surrendered to the association by the clerk of court. Unless the member shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder, but in that event nothing herein shall impair his status as a member.

(d) If in the notices sent to members in connection with the meeting to vote upon a proposed merger or consolidation no reference is made as required by

this Article to the provisions of this section, any member entitled to but who did not avail himself of the provisions of this section, unless he voted for the proposal, is entitled, if he so demands in writing within one year after the effective date of the merger or consolidation, to recover from the surviving or new association, as the case may be, any damage which he suffered from failure of the association of which he was a member to make the aforesaid reference.

(e) The liability to pay for shares or to pay damages imposed by this section on an association extends to the successor association which acquires the assets of the predecessor, whether by merger or consolidation.

(f) Shares of stock acquired by an association pursuant to payment of the agreed fair market value thereof or to payment of the judgment entered therefor as in this section provided, may be held and disposed of by the association as in the case of other treasury shares.

(g) The provisions of this section shall not apply to a merger if on the date of the filing of the articles of merger the surviving association is the owner of all the outstanding shares of the other association, domestic or foreign, participating in the merger and if such merger makes no changes in the relative rights of the members of the surviving association.

(h) Notwithstanding any of the foregoing provisions of this section, no member of an association effecting a merger or consolidation, who objects thereto and makes written demand for payment of the fair market value of his stock or other property rights or interests in the association, as hereinbefore provided in this section, shall be entitled to such payment at any time prior to the time that he would otherwise be entitled to payment pursuant to valid provisions of such stock, or valid provisions of the charter or the bylaws of the association, in effect on the date of the vote for such merger or consolidation. However, in any case where the owner of such stock or other property rights or interests in the association is not entitled, because of valid provisions of his stock, or because of valid provisions of the charter or bylaws of the association, to payment at the time hereinbefore provided in this section, the fair market value of such stock or other property rights or interests in the association, as of the day prior to the date on which the vote was taken, may be determined in any manner hereinbefore provided in this section, and the amount so determined, without interest, shall be an obligation of the surviving or new association, as the case may be, and shall be due and payable at the time that the owner thereof would be entitled to payment pursuant to valid provisions of such stock, or valid provisions of the charter or the bylaws of the association. (1963, c. 1168, s. 13; 1973, c. 108, s. 19.)

Editor's Note. — The 1973 amendment substituted "appellate division" for "Supreme Court" in the fourth sentence of subsection (c).

Chapter 55.

Business Corporation Act.

Article 1.

General Provisions.

Sec.
55-1. Title.
55-2. Definitions.
55-3. Applicability of Chapter.
55-3.1. Effect of acquisition of all shares by less than three persons.

Article 2.

Execution and Filing of Certain Corporate Documents.

55-4. Execution of corporate documents for filing; filing, recording and effectiveness.

Article 3.

Formation, Name and Registered Office.

55-5. Purposes.
55-6. Incorporators.
55-7. Articles of incorporation.
55-8. Corporate existence; filing of articles of incorporation; effect.
55-9. Requirement before commencing business.
55-10. Exercise of corporate franchises not granted.
55-11. Organization meeting of directors.
55-12. Corporate name.
55-13. Registered office and registered agent.
55-14. Change of registered office or registered agent.
55-15. Service of process on corporation.
55-16. Bylaws.

Article 4.

Powers and Management.

55-17. General powers.
55-18. Defense of ultra vires.
55-19. Indemnification of directors, officers, employees or agents; general provisions.
55-20. Indemnification in actions by outsiders.
55-21. Indemnity for litigation expenses in corporate action.
55-22. Loans and guaranties.
55-23. [Omitted.]
55-24. Board of directors.
55-25. Number, election and term of directors.
55-26. Staggered board of directors.
55-27. Vacancies and removal of directors.
55-28. Directors' meetings.
55-29. Informal or irregular action by directors or committees; attendance by telephone.
55-30. Director's adverse interest.
55-31. Executive and other committees.
55-32. Liability of directors in certain cases.
55-33. Jurisdiction over and service on nonresident director.
55-34. Officers.
55-35. Duty of directors and officers to corporation.
55-36. Execution of corporate instruments; authority and proof.
55-36.1. Declaring certain corporate conveyances prior to January 1, 1969, valid.
55-37. Books and records.
55-37.1. Form of records.
55-38. Examination and production of books, records and information.
55-39. Appointment of provisional director.

Article 5.

Corporate Finance.

55-40. Authorized shares and restrictions thereon.
55-40.1. Power of directors to issue shares.
55-41. Issuance of shares of preferred or special classes in series.
55-42. Determination by shareholders and directors of classification of shares.
55-43. Subscriptions for shares.
55-44. Conversion rights and option.
55-44.1. Rights of holders of debt securities.
55-45. Sale of shares and options to employees.
55-46. Consideration for shares.
55-47. Determination of stated capital.
55-48. Reduction of stated capital.
55-49. Surplus, net profits and valuation of assets.
55-50. Dividends in cash or property.
55-51. Share dividends.
55-52. Acquisition by a corporation of its own shares.

Article 6.

Shareholders.

55-53. Liability of shareholders arising from acquisition of shares.
55-54. Liability of shareholders for receiving unlawful payments.
55-55. Shareholders' derivative actions.
55-56. Preemptive rights.
55-57. Share certificates.
55-58. Issuance of fractional share certificates or script.
55-59. Recognition of acts of record owners of shares or other securities.
55-60. Closing of transfer books and fixing record date.
55-61. Meetings of shareholders.
55-62. Notice of shareholders' meetings.

Sec.
55-63. Irregular meetings; action without meetings.
55-64. Voting list.
55-65. Quorum of shareholders.
55-66. Votes required.
55-67. Voting of shares.
55-68. Proxies.
55-69. Voting by corporations, pledgees, life tenants, fiduciaries and coowners.
55-70. Voting inspectors.
55-71. Proceeding to determine validity of election or appointment of directors or officers.
55-72. Voting trust.
55-73. Shareholders' agreements.
55-74. [Omitted.]

Article 7.

Uniform Stock Transfer Act.

55-75 to 55-98. [Repealed.]

Article 8.

Fundamental Changes.

55-99. Right to amend charter.
55-100. Procedure to amend charter.
55-101. Class voting and objecting shareholders' rights on amendments.
55-102. Offer of exchange of securities for preferred shares; rights of objecting shareholders.
55-103. Articles of amendment.
55-104. Effect of amendment.
55-105. Restated charter.
55-106. Procedure for merger.
55-107. Procedure for consolidation.
55-108. Approval of merger or consolidation by shareholders.
55-108.1. Mergers without approval of the shareholders of the surviving corporation.
55-109. Articles of merger or of consolidation.
55-110. Effect of merger or consolidation.
55-111. Merger or consolidation of domestic and foreign corporations.
55-112. Sale, lease, exchange and mortgage of assets.
55-113. Rights of objecting shareholders upon fundamental changes and certain exchanges of shares.
55-113.1. Fundamental changes in reorganization proceedings.

Article 9.

Dissolution and Liquidation.

55-114. Dissolution and its effect.
55-115. Extension of duration after expiration.
55-116. Voluntary dissolution by directors.
55-117. Voluntary dissolution by written consent of shareholders.
55-118. Voluntary dissolution by action of directors and shareholders.
55-119. Procedure after filing articles of dissolution.
55-120. Revocation and cancellation of voluntary dissolution proceedings.
55-121. Completion of liquidation in voluntary dissolution proceedings.
55-122. Involuntary dissolution in action by Attorney General.
55-123. Duties of Attorney General with respect to actions for involuntary dissolution.
55-124. Venue and service of process.
55-125. Power of courts to liquidate and decree involuntary dissolution.
55-125.1. Discretion of court to grant relief other than dissolution.
55-126. Application for liquidation by court after dissolution.
55-127. Procedure in liquidation of corporation by court.
55-128. Discontinuance of liquidation action.
55-129. Duties of officials as to decrees and orders concerning dissolution or charter amendment.
55-130. Disposition of amounts due to unavailable shareholders and creditors.
55-130.1. Voluntary surrender of corporate rights and franchises by incorporators.

Article 10.

Foreign Corporations.

55-131. Right to transact business.
55-132. Powers of foreign corporation.
55-133. Dismissal of actions against foreign corporations.
55-134 to 55-136. [Omitted.]
55-137. Corporate name of foreign corporation.
55-138. Application for certificate of authority.
55-139. Filing of application for certificate of authority.
55-140. Effect of certificate of authority.
55-141. Registered office and registered agent of foreign corporation.
55-142. Change of registered office or registered agent of foreign corporation.
55-143. Suits against foreign corporations authorized to transact business in this State.
55-144. Suits against foreign corporations transacting business in the State without authorization.
55-145. Jurisdiction over foreign corporations not transacting business in this State.
55-146. Service on foreign corporations by service on Secretary of State.
55-146.1. Alternative jurisdiction over and service of process on foreign corporations.

Sec.
55-147. Amendment to charter of foreign corporation.
55-148. Merger of foreign corporation authorized to transact business in this State.
55-149. Amended certificate of authority.
55-150. Withdrawal of foreign corporation.
55-151. Revocation of certificate of authority.
55-152. Issuance of certificate of revocation.
55-153. Application of this Chapter to foreign corporations heretofore domesticated in this State.
55-154. Transacting business without certificate of authority.

Article 11.

Fees and Taxes.

55-155. Fees.
55-156. Taxes.

Article 12.

Curative Provisions.

55-157. Curative act; amendments prior to 1901.
55-158. Certain corporate conveyances validated.
55-159. Certain deeds executed by banks validated.
55-160. Certain conveyances of corporations now dissolved validated.
55-161. Conveyances by corporations owned by the United States government.
Sec.
55-162. Validation of amendments to corporate charters extending corporate existence.
55-163. Limitation of actions attacking validity of corporate action on grounds amendment not filed during corporate existence.
55-164. Clarification of intent of preceding section.
55-164.1. New corporations organized to succeed to rights in corporate charter forfeited.

Article 13.

Miscellaneous Provisions.

55-165. Interrogatories by Secretary of State.
55-166. Penalties imposed upon corporations, officers and directors for failure to answer interrogatories.
55-167. Information disclosed by interrogatories.
55-168. Powers of Secretary of State.
55-169. Certificates and certified copies to be received in evidence.
55-170. Forms of documents required to be filed in office of Secretary of State.
55-171. Photostatic copies of documents acceptable for filing or recording.
55-172. Waiver of notice.
55-173. Notice to director or shareholder outside the United States.
55-174. Reserve power.
55-175. Cross references.

Cross Reference. — As to jurisdiction of the superior court division over proceedings under this Chapter, see § 7A-249.

Article 1.

General Provisions.

§ 55-1. Title. — This Chapter shall be known and may be cited as the Business Corporation Act. (1955, c. 1371, s. 1.)

Cross References. — For constitutional provisions regarding corporations, see N.C. Const., Art. VIII. As to receivers of corporations, see § 1-507.1 et seq. As to executions, see § 1-324.1 et seq. As to provisions relating to nonprofit corporations, see §§ 55A-1 to 55A-89.1.

Editor's Note. — Session Laws 1955, c. 1371, inserted this new Chapter, numbered 55 and entitled "Business Corporation Act," to replace former Chapter 55 of the General Statutes, entitled "Corporations." By the same act certain sections of the former Chapter were transferred to §§ 1-324.1 through 1-324.7, and 1-507.1 through 1-507.11.

The citations in the historical references at the end of the sections in this Chapter denote the sections as they stood prior to the 1955 revision.

Some of the notes appearing under subsequent sections of this Chapter are based on the

comments of the corporation law drafting committee of the General Statutes Commission.

For case law survey on business associations, see 41 N.C.L. Rev. 415 (1963).

For article giving comments of draftsmen of the Business Corporation Act, see 33 N.C.L. Rev. 26 (1954).

For article reevaluating the Business Corporation Act, see 43 N.C.L. Rev. 768 (1965). For case law survey as to corporations, see 44 N.C.L. Rev. 950 (1966). For a note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967). For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

Cited in Adams v. Flora Macdonald College, 247 N.C. 648, 101 S.E.2d 809 (1958); Johns-Manville Sales Corp. v. Townsend, 248 N.C. 687, 104 S.E.2d 826 (1958); Raab & Co. v. Independence Corp., 9 N.C. App. 674, 177 S.E.2d 337 (1970).

§ 55-2. Definitions. — As used in this Chapter, unless the context otherwise requires, the term:

(1) "Accrued dividends" means, with reference to cumulative preferred shares, the amount by which the aggregate cumulative dividend preferences pertaining to a share of such class for the entire period during which the share was outstanding and cumulative, exceeds all the dividends actually paid thereon. For the purpose of this definition, a dividend is deemed paid if it has been declared and funds for its payment have been set aside.

(2) "Assets" means those properties and rights, other than treasury shares, which in accordance with generally accepted principles of sound accounting practice, are recognized as being properly entered upon the books and balance sheets of business enterprises in terms of a monetary value.

(3) "Charter" includes the original articles of incorporation, together with all amendments thereto and articles of merger or consolidation, and also includes what have heretofore been designated by law as certificates of incorporation, agreements of merger or of consolidation, or charters. When any provisions of this Chapter require a certified copy of a foreign corporation's "charter" to be filed, the corporation may file either certified copies of its articles and all amendments or a certified copy of its integrated articles or a certified copy of a restatement of its articles.

(4) "Corporation" means a corporation for profit or having a capital stock which may have been or may be created and organized under this Chapter or any other general or any special act of this State. "Foreign corporation" means any other corporation for profit. Nothing in this definition is intended to preclude the application of this Chapter to foreign corporations in those circumstances where the principles of conflicts of laws permit their application.

(5) "Dividend credit" means the aggregate of all yearly dividend credits. "Yearly dividend credit" means with respect to noncumulative preferred shares, the amount by which the full dividend preference of such a share, to the extent that such preference is earned by the corporation with respect to such a share in a particular fiscal year, exceeds the dividends paid on said share for that year; provided, that no dividend credit shall accrue unless, and only to the extent that, there exists an earned surplus at the end of such fiscal year. Computations of earnings allocable to classes of shares made in good faith by the board of directors in accordance with generally accepted principles of sound accounting practice or made or adopted by them on the bases represented by an independent public accountant or by a certified public accountant or by a firm of such accountants as being in accordance with generally accepted principles of sound accounting practice shall be

conclusive. For the purpose of this definition, a dividend is deemed paid if it has been declared and funds for its payment have been set aside.

(6) "Dominant shareholder" means a shareholder of a particular corporation, domestic or foreign, who by virtue of his shareholdings has legal power, either directly or indirectly or through another corporation or series of other corporations, domestic or foreign, to elect a majority of the directors of the said particular corporation.

(7) "Liabilities" means all those debts and claims which either are known to impose a fixed obligation of payment or, if contingent, have sufficient possibility of becoming fixed as to require in accordance with generally accepted principles of sound accounting practice an estimate of their probable amount. Unaccrued obligations under short or long term leases not in default are not, in absence of special circumstances, required to be included as liabilities. Liabilities do not include stated capital or the amount of accrued dividends and dividend credits with respect to shares entitled to preferential dividends except to the extent that dividends have been declared but are unpaid.

(8) "Net assets" means the amount of a corporation's assets in excess of its liabilities.

(9) "Parent corporation" and "subsidiary corporation." "Parent corporation" means a corporation which is a dominant shareholder, as herein defined. A corporation through which, by virtue of its shareholdings alone, a parent corporation has power to exercise the control which makes the latter a parent corporation is itself a parent corporation. A corporation with respect to which another corporation is a parent corporation is a "subsidiary corporation."

(10) "Preferred share" means a share of a class, whether or not designated by the term "preferred," entitling its holder to receive dividends before dividends are paid to shares of another class. (1955, c. 1371, s. 1; 1959, c. 1316, s. 1.)

Applied in Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Quoted in Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1960).

Cited in State v. Thompson, 6 N.C. App. 64, 169 S.E.2d 241 (1969).

§ 55-3. Applicability of Chapter. — (a) The provisions of this Chapter shall apply to every corporation for profit, and, so far as appropriate, to every corporation not for profit having a capital stock, now existing or hereafter formed, and to the outstanding and future securities thereof, unless the corporation is expressly excepted from the operation hereof or except to the extent that there is other specific statutory provision particularly applicable to the corporation or inconsistent with some provisions of this Chapter, in which case that other provision prevails.

(b) Notwithstanding the provisions of subsection (a) of this section, no corporation having a capital stock and formed for religious, charitable, nonprofit, social, or literary purposes shall hereafter be formed under this Chapter.

(c) The existence of corporations formed or existing on the date this Chapter takes effect shall not be impaired by the enactment of this Chapter nor by any change in the requirements for the formation of corporations nor by any amendment or repeal of the laws under which they were formed or created, and, except as otherwise expressly provided in this Chapter, the repeal of a prior act by this Chapter shall not affect any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof. (1955, c. 1371, s. 1; 1957, c. 550, s. 1; 1973, c. 469, s. 1.)

Editor's Note. — The 1973 amendment substituted "except to the extent that" for "unless" near the middle of subsection (a).

Application to Building and Loan Associations. — Building and loan associations have capital stock. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Under this section the right to know the names of their associates for the purpose of conducting an effective campaign in preparation for a stockholders' meeting, is extended to the shareholders of a building and loan association. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

The provisions of the Business Corporation Act are applicable to domestic banks operating in North Carolina. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Domestic banking corporations are not expressly excepted from the operation of the Business Corporation Act, and the Supreme Court knows of no "specific statutory provision particularly applicable" to domestic banks operating in North Carolina or inconsistent with some provisions of the Business Corporation Act, so as to make such provision prevail, nor has any such specific statutory provision been called to the Supreme Court's attention. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 55-3.1. Effect of acquisition of all shares by less than three persons. — (a) No provision in this Chapter, or in any prior act shall be construed as an indication of any legislative intention that the existence of a corporation, hereafter or heretofore formed, is in any respect impaired by the acquisition of all of the shares by one person or by two persons or that by such acquisition the corporation ceases to possess any managerial boards or bodies or any capacities, powers, or authority which it would have possessed with three or more shareholders, or that upon such acquisition the corporation becomes dormant, inactive or incapable of acting as a corporation.

(b) The acquisition, heretofore or hereafter, of all of the shares of a corporation by one person or by two persons is hereby declared to violate no policy or provision of the laws of this State.

(c) Any action heretofore taken by or on behalf of a corporation or a purported corporation and which might have been invalid, defective or ineffective solely in consequence of the ownership or beneficial ownership of all the shares of the corporation or purported corporation by one person or by two persons is hereby declared to be valid and effective.

(d) If any corporation or purported corporation might have been considered dormant or inactive solely in consequence of the acquisition heretofore of all its shares by one or by two persons, such corporation or purported corporation is hereby declared to have had uninterrupted existence and to have possessed uninterrupted capacity to act as a corporation. (1957, c. 550, s. 2.)

Editor's Note. — For comment on this section and the concentration of stock ownership in the one- or two-man corporation, see 36 N.C.L. Rev. 48 (1957).

When Corporation Regarded as an Association of Persons. — When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. Henderson v. Security Mtge. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968).

Corporation as Alter Ego of Dominant Shareholder. — The mere fact that one person owns all of the stock of a corporation does not make its acts the acts of the stockholder so as to impose liability therefor upon him. However, when the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation. Henderson v. Security Mtge. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968).

Chattel Mortgage Executed in Name of Corporation by Person Acquiring All Stock is Corporate Act. — Acquisition of the entire capital stock of a corporation by one person does not affect the corporate entity, and the execution in the name of the corporation by such person of a chattel mortgage is a corporate act and binding, provided the rights of its then existing creditors are not affected. Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559 (1966).

Personal liability of stockholder created before the effective date of this section because corporation did not have three shareholders, will

not be defeated by virtue of this section. Lester Bros. v. Pope Realty & Ins. Co., 250 N.C. 565, 109 S.E.2d 263 (1959).

For case decided before the passage of this section and dealing with the effect of the acquisition of all stock in a corporation by one person, see Park Terrace, Inc. v. Phoenix Indem. Co., 243 N.C. 595, 91 S.E.2d 584 (1956), commented on in 34 N.C.L. Rev. 471, 531 (1956).

Stated in Sharpe v. Grindstaff, 329 F. Supp. 405 (M.D.N.C. 1970).

ARTICLE 2.

Execution and Filing of Certain Corporate Documents.

§ 55-4. Execution of corporate documents for filing; filing, recording and effectiveness. — (a) Whenever the provisions of this Chapter require any document relating to a corporation to be executed and filed in accordance with this section, unless otherwise specifically stated in this Chapter:

(1) There shall be an original executed document and also one conformed copy.

(2) The said original document shall, if required to be executed by the corporation, be signed by the president or a vice-president and also by the secretary or an assistant secretary, with or without the corporate seal. In the case of a banking corporation, a cashier or an assistant cashier may act in lieu of a secretary or assistant secretary. If required to be executed by designated individuals, each of them shall sign.

(3) Except where the provisions of this Chapter specifically require acknowledgment, the said original document shall be verified by each of the individuals signing, whether in a representative capacity or otherwise, by a statement under oath, made before and certified by an official who is authorized under the laws of this State to take acknowledgments, declaring that he signed the said document, that the statements therein are true, and, in the case of an individual who signed in a representative capacity, declaring the capacity in which he signed and that he was authorized so to sign.

(4) The conformed copy may either extend its conformation with the original document through all the verifications (or acknowledgments, as the case may be) or may in lieu of such extension contain the legend, after the name of the signers substantially as follows: "Original duly verified (acknowledged) by all signers."

(5) The original document so signed and verified (or acknowledged, as the case may be), together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word "filed" and the hour, day, month, and year of the filing thereof and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the corporation or its representative.

(6) The copy, certified as aforesaid, shall, within 60 days after the receipt by the corporation or its representative be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds

shall note the fact of recordation on the said copy and return it to the corporation or its representative.

(b) Any such document required to be filed shall be completely effective when endorsed by the Secretary of State as provided in subsection (a)(5) above and the transaction to be effectuated thereby shall thereupon be deemed to be completely consummated as if all the required recording had been perfected, provided, however, that in lieu of the time of such endorsement by the Secretary of State, such document may fix an hour, day, month and year not more than 20 days subsequent to the endorsement of the Secretary of State and the transaction shall be deemed to be completely consummated at the time fixed by such document as if all the required recording had been perfected. Unless otherwise provided in this Chapter with respect to some specific document, failure to deliver it for recording in the office of the register of deeds shall only subject the corporation to a penalty of one hundred dollars ($100.00) to be collected by the Secretary of State.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office or, if such be the request, to make or cause to be made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16.)

Cross Reference. — See Editor's note to § 53-5.

Editor's Note. — Under this section verification has taken the place of acknowledgment for most documents, but § 55-6 requires that articles of incorporation be acknowledged. Under subsection (b), despite the local recording requirement, the document becomes effective upon filing with the Secretary of State.

ARTICLE 3.

Formation, Name and Registered Office.

§ 55-5. Purposes. — Corporations for profit may be organized under this Chapter for any lawful purposes. Where by law special provisions are made for the organization of designated classes of corporations such corporations shall be formed under those provisions and not hereunder. (1955, c. 1371, s. 1.)

§ 55-6. Incorporators. — One or more natural persons, whether or not residents of this State, of the age of 18 years or more may act as incorporators of a corporation by signing and acknowledging articles of incorporation, which shall be filed in accordance with the provisions of G.S. 55-4. The acknowledgment shall be before an officer duly authorized under the laws of this State to take the proof or acknowledgment of deeds. (Code, ss. 677, 678, 679, 682; 1885, cc. 19, 190; 1893, c. 318; 1897, c. 204; 1901, c. 2, ss. 8, 9; cc. 6, 41; 1903, c. 453; Rev., ss. 1137, 1139; C. S., s. 1114; 1945, c. 635; G. S., ss. 55-2, 55-3; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1969, c. 751, s. 1; 1971, c. 1231, s. 1.)

Duties and Obligations of Promoters. — The promoters of a corporation are held to the duties of trustees and the obligation of directors. They may not take a secret or undisclosed profit in the organization by way of shares therein or otherwise. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

§ 55-7. Articles of incorporation. — The articles of incorporation shall set forth:

(1) The name of the corporation.

(2) The period of duration, which may be perpetual. When the articles fail to state the period of duration, it shall be considered perpetual.

(3) The purpose or purposes for which the corporation is organized. It shall be sufficient to state, either alone or with other purposes, that the purpose for which the corporation is organized is to engage in any lawful act or activity for which corporations may be organized under this Chapter; and by such statement all lawful acts and activities for corporations organized under this Chapter shall be within the purposes of the corporation, subject to any express limitations.

(4) With respect to the shares which the corporation shall have authority to issue:

a. If the shares are to have a par value, the number of such shares and the par value of each share,

b. If the shares are to be without par value, the number of such shares,

c. If the shares are to be of both kinds mentioned in paragraphs a and b of subdivision (4) of this section, particulars in accordance with those paragraphs,

d. If the shares are to be divided into classes, or into series within a class of preferred or special shares, the articles of incorporation shall also set forth either:

1. A designation of each class, with a designation of each series if there are to be series fixed by the articles of incorporation within a class, and a statement of the preferences, limitations and relative rights of the shares of each class or series, insofar as such preferences, limitations, and rights are to be fixed in the articles of incorporation; or

2. A designation of each class and a statement authorizing the board of directors to fix the preferences, limitations and relative rights of each class, or to establish series within a class and to determine the variations between series, insofar as the same are not to be fixed in the articles of incorporation; or

3. A designation of each class, without the further designation or statements provided for in subparagraphs 1 and 2 of this paragraph d.

To the extent that the preferences, limitations, and relative rights of each class, and provisions for series within a class, are not set out in the articles of incorporation, the same may be fixed by the shareholders or directors in accordance with the provisions of G.S. 55-42.

(5) The minimum amount of consideration for its shares to be received by the corporation before it shall commence business.

(6) Any provision limiting or denying to shareholders the preemptive right to acquire additional or treasury shares of the corporation.

(7) Any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision which under this Chapter is required or permitted to be set forth in the bylaws. No provisions shall make fully paid shares assessable.

(8) The address, including county and city or town, and street and number, if any, of its initial registered office, which shall be in this State, and the name of its initial registered agent at such address.

(9) The number of directors constituting the initial board of directors (who may be classified in accordance with the provisions of G.S. 55-26) and the name and address, including street and number, if any, of each person who is to serve as a director until the first meeting of shareholders or until his successor be elected and qualified.

(10) The name and address, including street and number, if any, of each incorporator.

It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this Chapter. (Code, s. 677; 1885, c. 19; 1889, c. 170; 1891, c. 257; 1893, c. 244; 1901, c. 2, s. 8; c. 47; 1903, c. 453; Rev., s. 1137; 1911, c. 213, s. 1; 1913, c. 5, s. 1; C. S., s. 1114; Ex. Sess. 1920, c. 55; 1924, c. 98; 1935, cc. 166, 320; 1939, c. 222; G. S., s. 55-2; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1957, c. 979, s. 5; 1959, c. 1316, s. $1^1/_2$; 1969, c. 751, s. 2; 1973, c. 469, s. 2.)

Editor's Note. — The 1973 amendment added the second sentence of subdivision (3).

Corporation Limited to Objects Stated. — A charter of incorporation creating a company for the purpose of effecting a communication by a plank-road between designated points, with the privilege of taking tolls, did not authorize the company to establish a stage line upon their road, nor to contract for carrying the United States mail. Wiswell v. Greenville Plank-Road Co., 56 N.C. 183 (1857).

Need Not Use All Powers. — The fact that a corporation avails itself of only one of several privileges granted by its charter does not invalidate the act of incorporation. Wadesboro Cotton Mills Co. v. Burns, 114 N.C. 353, 19 S.E. 238 (1894).

Limit of Corporate Existence. — It is unquestionably true that a corporation whose term of existence is fixed and limited in the act which creates it cannot endure beyond the prescribed time, unless its existence is prolonged by the same authority or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to terminate it. Asheville Div. No. 15, Sons of Temperance v. Aston, 92 N.C. 578 (1885).

De Jure and De Facto Existence. — A corporation de jure is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation de facto is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them. Wood v. Staton, 174 N.C. 245, 93 S.E. 794 (1917).

Proof of Existence of Corporation—By Reputation. — The existence of a corporation may be proved by reputation. Existence or nonexistence is a fact and may be proved as other facts. Gulf States Steel Co. v. Ford, 173 N.C. 195, 91 S.E. 84 (1917).

Same—By Written Contract. — Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. Otis Elevator Co. v. Cape Fear Hotel Co., 172 N.C. 319, 90 S.E. 253 (1916).

Same — Copies Prima Facie Evidence. — Copies of letters of incorporation are admissible to show prima facie the existence of a corporation, and the corporation cannot avoid its liability for debts because in fact it had but an inchoate existence. Marshall v. Macon County Bank, 108 N.C. 639, 13 S.E. 182 (1891).

§ 55-8. Corporate existence; filing of articles of incorporation; effect. — The time when corporate existence begins is determined by the provisions of G.S. 55-4, and a copy of the articles certified by the Secretary of State shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Chapter, except as against this State in a proceeding to annul or revoke the articles of incorporation. (1901, c. 2, s. 10; Rev., s. 1140; C. S., s. 1116; G. S., s. 55-4; 1955, c. 1371, s. 1; 1957, c. 550, s. 3; 1967, c. 13, s. 3.)

Cross Reference. — See § 55-4.

§ 55-9. Requirement before commencing business. — A corporation shall not transact any business or incur any indebtedness except such as shall be incidental to its organization or to obtaining subscription to or payment for its shares, until a certified copy of the articles of incorporation has been filed and recorded in accordance with the provisions of G.S. 55-4 and until there has been

received the amount stated in the articles of incorporation as being the minimum amount of consideration to be received for its shares before commencing business. (1955, c. 1371, s. 1.)

§ 55-10. Exercise of corporate franchises not granted. — The Attorney General may upon his own information or upon complaint of a private party bring an action in the name of the State to restrain any person from exercising corporate franchises not granted. (Code, ss. 607, 686; 1901, c. 2, s. 107; Rev., s. 1197; C. S., s. 1143; G. S., s. 55-47(2); 1955, c. 1371, s. 1.)

§ 55-11. Organization meeting of directors. — After the filing of the articles of incorporation in the office of the Secretary of State, an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of a majority of the directors, for the purpose of adopting bylaws, electing officers, and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least three days' notice thereof by mail to each director so named, which notice shall state the time and place of the meeting, unless notice is waived as hereinafter provided. Any action permitted to be taken at the organization meeting may be taken without a meeting of the board of directors and shall be deemed board action if it complies with the requirements of G.S. 55-29. (Code, s. 665; 1901, c. 2, s. 18; Rev., s. 1142; C. S., s. 1118; G. S., s. 55-6; 1955, c. 1371, s. 1; 1969, c. 751, s. 3.)

§ 55-12. Corporate name. — (a) The corporate name shall contain the wording "corporation," "incorporated," "limited" or "company" or an abbreviation of one of such words.

(b) The corporate name shall not contain any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(c) The corporate name shall not, subject to the provisions of G.S. 55-137(c), be the same as, or deceptively similar to, the name of any domestic corporation or of any foreign corporation authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered by some other person in the manner prescribed in this section.

(d) The exclusive right to a corporate name not prohibited by this section may be reserved for a period of 90 days by:

(1) Any person intending to organize a corporation under this Chapter.
(2) Any domestic corporation intending to change its name.
(3) Any foreign corporation intending to make application for a certificate of authority to transact business in this State.
(4) Any foreign corporation authorized to transact business in this State and intending to change its name.
(5) Any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to transact business in this State.

The same name shall not be reserved for two or more consecutive 90-day periods by the same applicant or for the use and benefit of the same applicant; nor shall such consecutive reservations be made of names so similar as to fall within the prohibition of this section.

(e) Any person or corporation acquiring the goodwill of a domestic corporation or of a foreign corporation authorized to transact business in this State may, on furnishing the Secretary of State satisfactory evidence of such acquisition, reserve the exclusive right to the corporate name of the said corporation for a period of 10 years.

(f) The reservation of name, pursuant to subsections (d) and (e) of this section, shall be made by filing with the Secretary of State a verified application therefor stating the name and address of the applicant, and the Secretary of State shall,

upon tender of the fee hereinafter prescribed, reserve the name exclusively for the applicant unless he finds that the name is not available under the provisions of this section.

(g) The exclusive right to a specified corporate name reserved hereunder, may, on tender of the fee hereinafter prescribed, be transferred to any other person or corporation by filing in the office of the Secretary of State a notice of such transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

(h) Any foreign corporation not transacting business in this State may register its corporate name, if, not prohibited by this section, by filing with the Secretary of State a verified application therefor setting forth the name and address of the principal office of the corporation, the jurisdiction in which it is incorporated, the date of its incorporation, a statement that it is organized and doing business in good standing under the laws of the jurisdiction in which it is incorporated, and a brief statement of the business in which it is engaged; and the Secretary of State shall, upon tender of the fee prescribed by G.S. 55-155(a)(1), register the name exclusively for the use of such foreign corporation, unless he finds that the name is not available under the provisions of this section. Such registration shall be effective for a period of one year, and it may be renewed from year to year, not to exceed 10 years, by filing with the Secretary of State a verified renewal application setting forth the same facts required to be set forth in the original application for registration. Any renewal application filed after the expiration of the registration shall be treated as a new application for registration.

(i) The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing held not less than five days after written notice has been sent by registered mail to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation or registration was false when such application was filed or has thereafter become false.

(j) The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State.

(k) The issuance of a corporate charter to any domestic corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, or the common law; and the issuance of such charter shall not be a defense to an action for violation of any such rights. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C. S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G. S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3.)

Editor's Note. — The 1973 amendment added subsection (k).

Applied in Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

Cited in State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960); State v. Thompson, 6 N.C. App. 64, 169 S.E.2d 241 (1969).

§ 55-13. Registered office and registered agent. — (a) Each corporation shall have and continuously maintain in this State:

(1) A registered office which may be, but need not be, the same as its place of business.

(2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office.

(b) A corporation formed prior to July 1, 1957, which has not designated a principal office is required on and after July 1, 1957, to designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55-14; other corporations formed prior to July 1, 1957, shall not be required to, but may, designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55-14. (1901, c. 5; Rev., s. 1243; C. S., s. 1137; 1937, c. 133, ss. 1-3; G. S., ss. 55-38, 55-39; 1955, c. 1371, s. 1; 1957, c. 979, s. 17.)

Stated in Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

§ 55-14. Change of registered office or registered agent. — (a) A corporation may change its registered office or its registered agent or both. To effectuate such change a statement shall be executed by the corporation and filed, in accordance with the provisions of G.S. 55-4, setting forth:

(1) The name of the corporation;
(2) The address, including county and city or town, and street and number, if any, of its then registered office;
(3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any, to which the registered office is to be changed;
(4) The name of its then registered agent;
(5) If its registered agent be changed, the name of its successor registered agent;
(6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical;
(7) That such change was authorized by resolution duly adopted by its board of directors.

(b) If the change in the registered office is to another county, a copy of such statement certified by the Secretary of State shall be recorded both in the old county and in the new county, and there shall also be recorded in the new county, in the manner prescribed by G.S. 55-4, a similarly certified copy of the corporation's charter.

(c) If the statement purporting to effectuate such changes is not recorded in all the offices wherein recording is required by this section, persons asserting claims against the corporation may treat as the registered agent or registered office of the corporation either the one newly designated in the statement or the preexisting one.

(d) Any registered agent of a corporation may resign as such agent upon filing a written notice thereof executed in duplicate, with the Secretary of State, who shall forthwith mail a copy thereof to the corporation at its registered office, or, in the case of a foreign corporation, to the address of the principal office of the corporation in the state or country under the laws of which it is incorporated. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State. If the corporation fails to record said resignation in the county where it has its registered office, any process served upon the agent shall, despite his resignation, be as effective as if he had not resigned, but the agent in such case shall be under no duty to the corporation with respect to such process.

(e) In lieu of the procedure set out in subsection (a) above the location of the registered office of a domestic corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and

the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of each of the corporations recited in the certificate. Such certificate shall be filed in duplicate in the office of the Secretary of State who shall then furnish a certified copy of the same, showing the date of such filing, and shall return the copy so certified to the registered agent, and the copy, certified as aforesaid, shall, within 60 days after the receipt by the registered agent be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the registered agent. The fee to be charged by the Secretary of State for the filing of such certificate shall be three dollars ($3.00) for each corporation listed in said certificate, the total not to exceed two hundred dollars ($200.00). (1901, c. 2, s. 31; Rev., s. 1176; C. S., s. 1133; G. S., s. 55-34; 1955, c. 1371, s. 1; 1957, c. 979, ss. 6, 7; 1965, c. 298, s. 1; 1967, c. 823, s. 17; 1973, c. 262; c. 469, s. 3.)

Cross Reference. — See Editor's note to § 53-5.

Editor's Note. — The first 1973 amendment deleted "a fee of" preceding "three dollars" and added "the total not to exceed two hundred dollars ($200.00)" in the last sentence of subsection (e).

The second 1973 amendment substituted "not recorded" for "recorded in some but not" near the beginning of subsection (c).

For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

§ 55-15. Service of process on corporation. — (a) Service upon the registered agent appointed by a corporation of any process, notice or demand required or permitted by law to be served upon the corporation shall be binding upon the corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(d) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law. (1937, c. 133, ss. 1-3; G. S., s. 55-39; 1955, c. 1371, s. 1.)

Service on Secretary of State. — See Sisk v. Old Hickory Motor Freight, 222 N.C. 631, 24 S.E.2d 488 (1943).

Service after Forfeiture of Charter. — The continuance of corporate existence by former § 55-132 made service of process on a corporation after it had been adjudged a bankrupt and its charter forfeited reasonable notice and a valid service. Sisk v. Old Hickory Motor Freight, 222 N.C. 631, 24 S.E.2d 488 (1943).

§ 55-16. Bylaws. — (a) The initial bylaws may be adopted by the board of directors at its organization meeting. Thereafter bylaws may be adopted, amended or repealed either by the shareholders or by the board of directors, but

(1) No bylaw adopted or amended by the shareholders shall be altered or repealed by the board of directors, except where the charter or a bylaw adopted or approved by the shareholders authorizes the board of directors to adopt, amend or repeal the bylaws;

(2) Any bylaw changing the statutory requirement for a quorum of directors or action by directors, as permitted by G.S. 55-28(d), or changing the statutory requirement for a quorum of shareholders or action by shareholders, as permitted by G.S. 55-65 and 55-66, may be adopted only by the shareholders, and any such bylaw can itself be amended or repealed only by the shareholders acting pursuant to any different quorum and greater vote so prescribed;

(3) No bylaw authorizing compensation of officers measured by the amount of a corporation's income or volume of business shall be valid after five years from its adoption unless renewed by the vote of the holders of a majority of the outstanding shares regardless of limitation on voting rights;

(4) The charter or a bylaw adopted by the shareholders may limit or eliminate the power of the board of directors to adopt, amend or repeal the bylaws or any specific bylaw.

(b) Any bylaw made by the board of directors shall be adopted by an affirmative vote of a majority of the directors then holding office and any bylaw made by the shareholders shall, except as otherwise provided in paragraph (3) of subsection (a) of this section, be adopted by the affirmative vote of the shareholders entitled to exercise a majority of the voting power of the corporation. However, the charter or the bylaws may, subject to the provisions of paragraph (2) of subsection (a) of this section, require more than the aforesaid majorities on the part of the directors or of the shareholders, as the case may be.

(c) The bylaws may contain any provisions for the regulation and management of the affairs of the corporation, including the transfer of its shares, and restrictions on such transfer, not inconsistent with the law or the charter. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 2, 3; 1973, c. 469, s. 4.)

Editor's Note. — The 1973 amendment rewrote subdivision (2) of subsection (a).

This section is consistent with the policy of § 55-7, whereby the directors adopt the initial bylaws.

For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

The bylaws of the corporation are usually not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them. Smith v. N.C.R.R., 68 N.C. 107 (1873).

The principle by which a shareholder in a corporation is bound by a corporate resolution, regularly passed pursuant to its charter and bylaws, prevails only in reference to his status and rights as a shareholder, and not where he deals independently with it as one of its customers in the line of its business. Cardwell v. Garrison, 179 N.C. 476, 103 S.E. 3 (1920).

ARTICLE 4.

Powers and Management.

§ 55-17. General powers. — (a) Each corporation shall have power:

(1) To have perpetual succession by its corporate name unless a limited period of duration is stated in its charter.

(2) To sue and be sued, complain and defend, in its corporate name.

(3) To have a corporate seal which may be altered at will, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.
(4) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.
(5) To make and alter bylaws, not inconsistent with its charter or with the laws of this State, for the administration and regulation of the affairs of the corporation.
(6) To make contributions or gifts to corporations, trusts, community chests, funds, foundations, or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational, cultural or artistic purposes, or for public welfare, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, when such contributions or gifts are authorized or approved by its board of directors.
(7) In time of war or engagement of the nation's armed forces in hostile military operations, to transact any lawful business in aid of the United States in connection therewith.
(8) To invest its funds not currently needed in its business.
(9) To cease its corporate activities and surrender its corporate franchise.
(10) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans and other incentive plans for its officers, directors and employees.

(b) In connection with carrying out the purposes stated in its charter, and subject to any limitation prescribed by this Chapter or by its charter, every corporation shall also have power:

(1) To acquire, by purchase, lease, gift, will or otherwise, and to own, hold, improve, use and otherwise deal in and with, real and personal property, or any interest therein, wherever situated.
(2) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.
(3) To enter into contracts of guaranty or suretyship or make other financial arrangements for the benefit of any person, firm or corporation.
(4) To provide insurance for its benefit on the life or physical or mental ability of any of its officers or employees or on the life or physical or mental ability of any security holder for the purpose of acquiring at his death or disability its securities owned by such security holder, and for these purposes the corporation is deemed to have an insurable interest in its officers, employees, or security holders; and to provide insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest.
(5) To acquire, by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.
(6) To enter into any arrangement with others for the sharing of profits or union of interest with respect to any transaction, operation or venture which the corporation has power to conduct by itself, even if such arrangement involves sharing or delegation of control of such transaction, operation or venture with or to others.
(7) To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by

mortgage or pledge or other form of security upon all or any of its property, franchises and income.

(8) To lend money for its corporate purposes, invest its funds from time to time, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(9) To conduct its business, carry on its operations, and have offices and exercise the powers granted by this Chapter anywhere in the world.

(10) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

(c) It shall not be necessary to set forth in the charter any of the powers enumerated in this section. (Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; Rev., s. 1128; 1909, c. 507, s. 1; C. S., s. 1126; 1925, cc. 235, 298; 1929, c. 269; 1939, c. 279; 1945, c. 775; G. S., s. 55-26; 1951, c. 1240, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 4, 5; 1969, c. 751, ss. 7, 8.)

I. In General.
II. Suits by and against Corporations.
III. Rights as to Property.

I. IN GENERAL.

Editor's Note. — The paragraphs in the note below appeared under former §§ 55-26 and 55-28, which covered the subject matter of this section in the law in effect prior to July 1, 1957.

Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were formed. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

A corporation may transact business anywhere, unless prohibited by its charter or excluded by local laws. Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907).

The power to have a common seal and to alter or renew the same at will is frequently conferred on corporations by statute, but such power is one of the incidental and implied powers of every corporation when not expressly conferred. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

As a general rule, a corporation may use or adopt any seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

And May Adopt Seal for Special Occasion. — If a corporation adopts a seal different from its corporate seal for a special occasion, or if it has no corporate seal, the seal adopted is the corporate seal for the time and the occasion. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

Any Device May Be Used. — While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

A corporate seal may consist of anything found upon a paper and which appears to have been put there by due authority or to have been adopted and used by such authority as and for the seal of the corporation. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

The simple word "seal" with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

Burden of Proof as to Seal on Contract and Statute of Limitations. — The burden is upon plaintiffs to prove that the action accrued within the time limited by § 1-47, by showing that the company adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there are facts and circumstances which exclude the operation of the 3-year statute, § 1-52, other than the matter of a seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

Cited in Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971); Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

II. SUITS BY AND AGAINST CORPORATIONS.

Suits Must Be in Corporate Name. — A suit against a corporation must be brought against it in its corporate name, and not against its offi-

cers or agents. Britain v. Newland, 19 N.C. 363 (1837); Young v. Barden, 90 N.C. 424 (1884).

However, in case of insolvency, where a receiver has been appointed, he may sue either in his own name or in that of the corporation. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894); Smathers v. Bank, 135 N.C. 410, 47 S.E. 893 (1904).

Misnomer Immaterial. — A misnomer does not vitiate, provided the identity of the corporation with that intended by the parties is apparent, whether it is in a deed, or in a judgment, or in a criminal proceeding. Gordon v. Pintsch Gas Co., 178 N.C. 435, 100 S.E. 878 (1919); McCrea v. Starr, 5 N.C. 252 (1809); Asheville Div. No. 15, Sons of Temperance v. Aston, 92 N.C. 579 (1885).

Same Liability as Natural Person. — A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are. Reddit v. Singer Mfg. Co., 124 N.C. 100, 32 S.E. 392 (1899).

A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for their utterances may be fairly and reasonably inferred under relevant and sufficient circumstances. Cotton v. Fisheries Prods. Co., 177 N.C. 56, 97 S.E. 712 (1919).

III. RIGHTS AS TO PROPERTY.

The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the State is like any other stockholder. Marshall v. Western N.C.R.R., 92 N.C. 322 (1885).

Where the State is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for, by becoming such, it lays aside its character as a sovereign and places itself on a footing of equality with the individual stockholders. Marshall v. Western N.C.R.R., 92 N.C. 322 (1885).

Corporation May Hold Estates in Fee. — Although the existence of a corporation be limited to a certain number of years, yet the corporation is capable of holding estates in fee. Asheville Div. No. 15, Sons of Temperance v. Aston, 92 N.C. 578 (1885).

Deed Not Void, but Voidable.—Where a corporation takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State. Cross v. Seaboard Air Line Ry., 172 N.C. 119, 90 S.E. 14 (1916).

Ejectment and Trespass Will Lie against Corporation. — Corporations, in contemplation of the law, are capable of having actual possession of the land, and whatever may have been supposed to the contrary in the distant past, it is now settled that the actions of ejectment and trespass lie against them. Young v. Barden, 90 N.C. 424 (1884).

A corporation may acquire land by showing sufficient adverse possession for the statutory period. Cross v. Seaboard Air Line Ry., 172 N.C. 119, 90 S.E. 14 (1916).

A private corporation may dispose of its property without express authority of the legislature. Benbow v. Cook, 115 N.C. 324, 20 S.E. 453 (1894).

A strictly private corporation can lawfully sell any of its property, real or personal, just as an individual can. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

A corporation chartered for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Necessity for Authorization by Directors to Sell Corporate Property. — Corporate directors are trustees of its property, and usually a corporation may sell, transfer and convey its corporate real estate only when authorized to do so by its board of directors. And the statutory provisions may be supplemented by stipulation in the corporation's bylaws. Tuttle v. Junior Bldg. Corp., 228 N.C. 507, 46 S.E.2d 313 (1948).

In the absence of charter provisions or bylaws to the contrary, the president of a corporation is the general manager of its corporate affairs, and his contracts made in the name of the corporation in the general course of business and within the apparent scope of his authority are ordinarily enforceable, but ordinarily he has no power to sell or contract to sell the real or personal property of the corporation without authority from its board of directors. Tuttle v. Junior Bldg. Corp., 228 N.C. 507, 46 S.E.2d 313 (1948).

Right to Mortgage Property. — Corporations other than railroad companies have a general power to mortgage their property, unless prohibited by some provision in the charter, the right to mortgage being a natural result of the right to incur an indebtedness. Antietam Paper Co. v. Chronical Publishing Co., 115 N.C. 143, 20 S.E. 366 (1894).

§ 55-18. Defense of ultra vires. — (a) No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

(1) In an action by a shareholder against the corporation to enjoin the doing of any act or the transfer of real and personal property by or to the corporation, but in any such action the plaintiff shall sustain the burden of proof that he has not at any time prior thereto assented to the act or transfer in question and that in bringing the action he is not acting in collusion with officials of the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the action and if deemed equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as loss or damage sustained.

(2) In an action by the corporation or by its receiver, trustee or other legal representative, or by its shareholders in a derivative suit, against the incumbent or former officers or directors of the corporation.

(3) In an action by the Attorney General, as provided in this Chapter, to dissolve the corporation, or in an action by the Attorney General to enjoin the corporation from the transaction of unauthorized business, or in a proceeding by the Secretary of State to revoke a certificate of authority of a foreign corporation pursuant to G.S. 55-151.

(b) This section applies to acts, conveyances and transfers done or made by a foreign corporation in this State and to all conveyances to or by a foreign corporation of real property situated in this State, but if the foreign corporation is itself disqualified by this Chapter from maintaining an action in this State no action may be brought in this State under paragraph (1) of subsection (a) of this section. (Code, ss. 607, 686; 1901, c. 2, s. 107; Rev., s. 1197; C. S., s. 1143; G. S., s. 55-47; 1955, c. 1371, s. 1.)

Editor's Note. — This section represents the modern position on ultra vires including the law of the cases in North Carolina.

The doctrine of ultra vires has been very much modified, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were once declared absolutely void. Hutchins v. Bank, 128 N.C. 72, 38 S.E. 252 (1901).

This section has curtailed to a considerable degree the doctrine of ultra vires. Piedmont Aviation, Inc. v. S & W Motor Lines, Inc., 262 N.C. 135, 136 S.E.2d 658 (1964).

State May Enjoin. — This modification of the doctrine does not involve the right in an appropriate case of the State to enjoin a threatened ultra vires act. Victor v. Louise Cotton Mills, 148 N.C. 107, 61 S.E. 648 (1908).

Stockholder May Bring Action. — If an act of a corporation is ultra vires, any one or more stockholders may by some appropriate method call it in question, and, unless by having consented to or acquiesced in it he is barred, have relief. Victor v. Louise Cotton Mills, 148 N.C. 107, 61 S.E. 648 (1908); Lutterloh v. City of Fayetteville, 149 N.C. 65, S.E. 758 (1908).

The question whether acts are ultra vires is a conclusion of law to be drawn from the facts stated. Spencer v. Railroad, 137 N.C. 107, 49 S.E. 96 (1904).

Applied in Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

§ 55-19. Indemnification of directors, officers, employees or agents; general provisions. — (a) Except as indemnification of a director or officer of a corporation is permitted by this section or by G.S. 55-20 and 55-21, no provision, hereafter made or adopted, whether contained in the charter, the bylaws, a resolution, a contract or otherwise, whereby the corporation purports to exempt or indemnify any director or officer of a corporation with respect to any liability

or litigation expenses arising out of his activities as director or officer shall be valid.

(b) As used in this section and in G.S. 55-20 and 55-21, the term "officer" includes any dominant shareholder engaged to perform services for the corporation, whether as employee or independent contractor; and the term "person" includes the legal representative of such person.

(c) Anything in this section or in G.S. 55-20 or 55-21 to the contrary notwithstanding, a corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability.

(d) Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section or in G.S. 55-20 or 55-21. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5.)

Editor's Note. — The 1973 amendment added "or in G.S. 55-20 or 55-21" at the end of subsection (d).

§ 55-20. Indemnification in actions by outsiders. — (a) When by reason of the fact that he is or was serving as director, officer, employee or agent of a corporation, or in any such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, any person is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceedings, whether civil, criminal, administrative or investigative, not brought by the corporation nor brought by any party seeking derivatively to enforce a liability of such a person to the corporation, such person shall be entitled to indemnification or reimbursement by the corporation for any expenses, including attorneys' fees, or any liabilities which he may have incurred in consequence of such action, suit or proceeding, under the following conditions:

(1) If such person is wholly successful in his defense on the merits, or if the proceeding is an administrative or investigative proceeding which does not result in the indictment, fine or penalty of such person, he shall be entitled to reimbursement from the corporation of all his reasonable expenses of defense or participation, including attorneys' fees.

(2) If such person is wholly successful in his defense otherwise than solely on the merits, the corporation may pay or agree to pay to him such expenses of defense or participation, including attorneys' fees, as the board of directors in good faith shall deem reasonable, regardless of any adverse interest of any or all of the directors.

(3) If such person is not wholly successful or is unsuccessful in his defense, or the proceeding to which he is a party results in his indictment, fine or penalty, the corporation may pay or agree to pay, in whole or in part, such expenses of defense or participation, including attorneys' fees, and the amount of any judgment, money decree, fine, penalty or settlement for which he may have become liable, if

a. A plan for such payment is approved by a consent in writing signed by the holders of all shares entitled to vote or such plan is sent to the holders of all shares entitled to vote, with notice of a shareholders' meeting, whether annual or special, to be held to take action thereon and if at such meeting a plan is approved by the holders of a majority of such shares, exclusive of the shares held directly or indirectly by any persons to be benefited by the plan if approved, or

b. A majority of a quorum consisting of directors who are not parties to such action, suit or proceeding shall determine that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful, and the corporation shall, not later than 60 days before any such payment or agreement to pay is made, send to all shareholders of record on a record date not more than 10 days prior to the date of mailing, at their registered addresses, a statement specifying the persons to be paid, the amounts to be paid, and the nature and status of the suit or proceedings at the time of mailing.

c. In a proceeding brought by such person for such determination in the superior court of the district where the corporation has its registered office it shall be determined that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. In such a proceeding, the court in its discretion may order notice thereof to be sent to the shareholders of the corporation in such manner and in such form as it may deem appropriate, at the expense of the corporation; and it may allow all shareholders so notified to be heard in opposition to the determination requested.

(b) The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6.)

Editor's Note. — The 1973 amendment substituted "by reason of the fact that he is or was" for "because of his duties or activities while" near the beginning of the introductory paragraph of subsection (a), inserted "or not opposed to" in subdivision (3)b of subsection (a) and added in subdivision (3)b the language beginning "and the corporation shall" and ending "at the time of mailing." The amendment also inserted "or not opposed to" in the first sentence of subdivision (3)c of subsection (a).

§ 55-21. Indemnity for litigation expenses in corporate action. — (a) When a present or former director, officer, employee or agent of a corporation or any person who has served or is serving in such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, is sued, alone or with others, in the courts of this State, in any action seeking to establish his liability to the corporation arising out of his alleged dereliction of duty to the corporation, he shall in turn be entitled to indemnification or reimbursement from the corporation for so much of his expenses of defense, including attorneys' fees, as the court in its discretion, upon

motion for indemnification or reimbursement, duly made in such action, finds to be reasonable, if:

(1) Such person is successful in whole or in part in the action against him or in any settlement thereof and the court finds that his conduct fairly and equitably merits such relief; or

(2) The court finds, despite his adjudication of liability, that such person has acted honestly and reasonably and that, in view of all the circumstances of the case, his conduct fairly and equitably merits such relief.

(b) When such action is brought in another state and the result thereof is such as would have entitled the defendant officer or director to make a motion in the cause for indemnification or reimbursement of his expenses of defense under subsection (a) of this section if the action had been brought in this State, but no such relief is available in the state in which the action is actually brought, the defendant officer or director may bring a separate action against the corporation in this State for such indemnification or reimbursement as he might have recovered had the suit against him been brought in this State. Notice of said action for indemnification or reimbursement shall be sent, in such form as the court may approve and at the corporation's expense, to the party or parties plaintiff in the prior action who shall be entitled to be heard.

(c) Whenever indemnification or reimbursement as permitted in this section is sought, the court may in its discretion order notice of the claim thereof to be sent to the shareholders in such manner and in such form as it may approve, at the expense of the corporation. All shareholders so notified may be heard in opposition to the relief requested. (1955, c. 1371, s. 1; 1969, c. 797, s. 3.)

§ 55-22. Loans and guaranties. — (a) Subject to the provisions of subsection (b) hereof, except with the consent of the holders of a majority of all the shares outstanding, regardless of limitation on voting rights, other than the shares held by the adversely interested party, a corporation shall not, directly or indirectly, make any loan of money or property to, or guarantee or otherwise secure the obligation of:

(1) Any directors or officers of the corporation; or

(2) Any corporation of which the officers and directors of the lending or securing corporation own more than fifty percent (50%) of the outstanding securities of any class; or

(3) Any dominant shareholder or any other corporation of which said shareholder is a dominant shareholder, unless that corporation is a subsidiary of the lending or securing corporation; or

(4) Any person upon the security of the shares of any corporation mentioned in subdivisions (2) and (3) of this subsection. A sale on credit in the ordinary course of business is not a loan within the meaning of this section.

(b) If all shareholders, regardless of limitation on voting rights, are adversely interested in the proposed loan, guaranty, or other form of security, such transaction may be entered into by the corporation only with the consent of all such shareholders.

(c) The provisions of this section do not apply to loans, guaranties, or other forms of security extended by banks, industrial banks, building and loan associations, land and loan associations, credit unions or insurance companies, or to loans permitted under any statute regulating any special class of corporations. (1955, c. 1371, s. 1; 1959, c. 1316, s. 6; 1961, c. 198; 1969, c. 751, s. 9.)

Cross Reference. — For definition of dominant shareholder, parent corporation and subsidiary corporation, see § 55-2, subdivisions (6) and (9).

Cited in Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

§ 55-23: Omitted.

§ 55-24. Board of directors. — (a) Subject to the provisions of the charter, the bylaws or agreements between the shareholders otherwise lawful, the business and affairs of a corporation shall be managed by a board of directors.

(b) No limitation upon the authority which the directors would have in the absence of such limitation, whether contained in the charter or the bylaws or otherwise, shall be effective against other persons without actual knowledge of such limitation.

(c) The directors need not be residents of this State or shareholders of the corporation unless the charter or the bylaws so require. The charter or the bylaws may prescribe other qualifications for directors. (1955, c. 1371, s. 1.)

Cross Reference. — See § 55-73.

Editor's Note. — The paragraphs in the note below appeared under former § 55-48, relating to the subject matter of this section in the law in effect prior to July 1, 1957.

Powers of Directors. — It is well settled that the directors of a corporation, unless they are specially restrained by the charter or bylaws, have the power to borrow money with which to conduct its business and to secure payment by mortgage on the corporate property. Wall v. Rothrock, 171 N.C. 388, 88 S.E. 633 (1916).

Directors Establish Policies. — In general, the directors establish corporate policies and supervise the carrying out of those policies through their duly elected and authorized officers. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

A director of a company occupies a fiduciary relation to the company which, by virtue of his office, he represents in the management of its principal functions. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893).

Directors are to be considered and dealt with as trustees or quasi trustees. Besseliew v. Brown, 177 N.C. 65, 97 S.E. 743 (1919).

Stockholder's Agreements on Voting Are Valid Unless There Is Fraud or Prejudice. — The Business Corporation Act clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders by which they agree to vote their stock in a specified manner — including agreements for the election of directors and corporate officers — is not invalid unless it is inspired by fraud or will prejudice the other stockholders. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Agreements for Future Management Must Be "Otherwise Lawful". — Both this section and § 55-73 require that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Will Be Declared Invalid. — Agreements providing for the future management and control of a corporation which violate the express charter or statutory provision, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders, or are made in consideration of a private benefit to the promisor will be declared invalid. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Care Required of Directors. — Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs. Anthony v. Jeffress, 172 N.C. 378, 90 S.E. 414 (1916).

Directors are not, as a rule, responsible for mere errors of judgment (Fisher v. Fisher, 170 N.C. 378, 87 S.E. 113 (1915)), nor for slight omissions from which the loss complained of could not have been reasonably expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances, and are charged with a like duty, usually the care that a prudent man shows in the conduct of his own affairs of a similar kind. Besseliew v. Brown, 177 N.C. 65, 97 S.E. 743 (1919).

Same Good Faith Required of Promoters as Directors. — The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other and the law requires of them the same good faith it exacts from directors and other fiduciaries. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Right of Corporation to Sue Negligent Directors. — Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to the corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receivership, in favor of its receiver. Besseliew v. Brown, 177 N.C. 65, 97 S.E. 743 (1919).

While a director of a company may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction be open

and entirely fair and capable of strict proof as to its bona fides, yet where a corporation is insolvent a director who is a creditor cannot, upon a debt theretofore existing, take advantage of his superior means of information to secure his debt as against other creditors. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893).

A director who is also a creditor of a corporation cannot prefer himself to the other creditors in the application of its assets to the security or payment of its debts. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893); Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894); McIver v. Young Hdwe. Co., 144 N.C. 478, 57 S.E. 169 (1907).

Right of Directors to Security. — By taking a mortgage on corporate property, when the corporation is in failing circumstances, directors, occupying a fiduciary relation, are not permitted to secure themselves against preexisting liabilities of the corporation upon which they are already bound. Wall v. Rothrock, 171 N.C. 388, 88 S.E. 633 (1916); Caldwell v. Robinson, 179 N.C. 518, 103 S.E. 75 (1920).

Judgment Liens of Directors. — Where the directors of a corporation made a bona fide sale of property to it, for value and free from fraud, judgments against the corporation for the purchase price, duly docketed, constitute liens in favor of the directors against the corporate property. Caldwell v. Robinson, 179 N.C. 518, 103 S.E. 75 (1920).

§ 55-25. Number, election and term of directors. — (a) The number constituting the board of directors shall not be fewer than three, except that the initial board of directors fixed by the articles of incorporation may be fewer than three until the issuance of shares and except also that if and so long as all the shares of a corporation are owned of record by either one or two shareholders the number of directors may be fewer than three but not fewer than the number of such shareholders. The number constituting the initial board of directors shall be fixed by the articles of incorporation. In the absence of a provision in the articles of incorporation, the charter, or the bylaws fixing the number of directors, the number shall be the same as that fixed in the articles of incorporation for the initial board of directors, subject to the provisions of this section. The articles of incorporation, the charter, or the bylaws may provide for a maximum and minimum number of directors, and, if so, shall designate the manner in which such number shall from time to time be determined. If the fixing of a maximum and minimum number of directors is authorized, the articles of incorporation, the charter, or the bylaws may provide that any directorships not filled by the shareholders shall be treated as vacancies to be filled by and in the discretion of the board of directors.

(b) The number of directors may be increased or decreased from time to time only by amendment to the charter or to the bylaws adopted by the shareholders, but no such decrease shall be made when the number of shares voting against the proposal for decrease would be sufficient to elect a director if such shares could be voted cumulatively at an annual election. Whenever a class or a series of shares is entitled to elect one or more directors under authority granted by the charter, the provisions of this paragraph apply to the vote of that class or series for such election and not to the vote of the outstanding shares as a whole.

(c) The first board of directors shall consist of those named in the articles of incorporation. Thereafter directors shall be elected at the first meeting of the shareholders held for that purpose and at each subsequent annual meeting.

(d) Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.

(e) If any shareholder so demands, election of directors by the shareholders shall be by ballot, unless the charter or the bylaws otherwise provide.

(f) The number of votes necessary to elect a director and the procedure for election of directors are governed by the provisions of G.S. 55-67(c). (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C. S., ss. 1144, 1175; 1927, c. 138; G. S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11.)

§ 55-26. Staggered board of directors. — When the board of directors shall consist of nine or more members, in lieu of electing the whole number of

directors annually, it may be provided in the charter or in the bylaws adopted by the shareholders that the directors be staggered by division into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes. No such classification of directors shall, unless made in the charter, be effective prior to the first annual meeting of shareholders. Boards of directors may also be classified otherwise than by staggering. Corporations having a lawfully staggered or otherwise classified board of directors when this Chapter goes into effect may continue their existing classification even though not conforming to this section. (1901, c. 2, ss. 14, 44; Rev., ss. 1147, 1148; C. S., s. 1144; 1937, c. 179; 1945, c. 200; 1949, c. 917; G. S., s. 55-48; 1955, c. 914, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, s. 7.)

§ 55-27. Vacancies and removal of directors. — (a) A vacancy in the board of directors exists:

(1) Upon the death or removal of any director, or upon his resignation, which may, if in writing, include terms making it effective at a future date or upon the occurrence of a future event, or

(2) If the authorized number of directors is increased, or

(3) If, at any annual, regular, or special meeting of shareholders at which any director is elected, the shareholders fail to elect the full authorized number of directors to be voted for at that meeting, or

(4) If a vacancy is declared as provided in subsection (b) of this section.

(b) The board of directors may declare vacant the office of a director who has been declared of unsound mind by an order of court, or finally convicted of felony, or adjudged a bankrupt.

(c) Unless the charter or the bylaws otherwise provide, vacancies may be filled by a majority of the remaining directors even though less than a quorum or by a sole remaining director. If a vacancy occurs with respect to a director who had been elected by the votes of a particular class of shares voting as a class, the vacancy shall be filled by the remaining directors or the remaining sole director elected by that class. A vacancy created by an increase in the authorized number of directors shall be filled only by election at an annual meeting or at a special meeting of shareholders called for that purpose, except as provided in G.S. 55-25(a).

(d) The shareholders, or a class thereof if directors are elected by classes of shareholders, may elect a director at any time to fill any vacancy not filled by the directors. In the case of a resignation of a director tendered to take effect at a future time, the board of directors or the shareholders may, at any time after such tender, elect a successor to take office when the resignation becomes effective.

(e) A reduction of the authorized number of directors does not of itself remove any director prior to the expiration of his term of office.

(f) Unless otherwise provided in the charter or a bylaw adopted by the shareholders, the entire board of directors or any individual director may be removed from office with or without cause by a vote of shareholders holding a majority of the outstanding shares entitled to vote at any election of directors. However, unless the entire board is removed, an individual director shall not be removed when the number of shares voting against the proposal for removal would be sufficient to elect a director if such shares could be voted cumulatively

at an annual election. If any or all directors are so removed, new directors may be elected at the same meeting. Whenever a class or series of shares is entitled to elect one or more directors under authority granted by the charter the provisions of this subsection apply to the vote of that class or series as to those directors and not to the vote of the outstanding shares as a whole.

(g) The superior court of the county where the registered office or the principal place of business in this State is located may, at the suit of shareholders holding at least five percent (5%) of the number of outstanding shares with or without voting rights, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion in the discharge of his duties to the corporation, and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made a party to such actions. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7.)

Editor's Note. — The 1973 amendment substituted "Unless otherwise provided in the charter or a bylaw adopted by the shareholders" for "Unless the charter or the bylaws otherwise provide" at the beginning of subsection (f).

§ 55-28. Directors' meetings. — (a) Meetings of the board of directors, regular or special, may be held either within or without this State.

(b) Unless the bylaws otherwise provide, special meetings of the board of directors may be called by the president or by any two directors.

(c) Regular meetings of the board of directors may be held with or without notice, as prescribed in the bylaws. Special meetings of the board of directors shall be held upon such notice as is provided in the bylaws, or in the absence of any such provision, upon notice sent by any usual means of communication not less than five days before the meeting. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting unless required by the bylaws. Notice of an adjourned meeting need not be given if the time and place are fixed at the meeting adjourning and if the period of adjournment does not exceed 10 days in any one adjournment.

(d) A majority of the number of directors fixed by the charter or bylaws shall constitute a quorum for the transaction of business unless a greater number is required by the charter or a bylaw adopted by the shareholders. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by this Chapter, the charter or a bylaw adopted by the shareholders. (1955, c. 1371, s. 1; 1969, c. 751, s. 12; 1973, c. 469, s. 8.)

Editor's Note. — The 1973 amendment substituted "a bylaw adopted by the shareholders" for "the bylaws" at the end of the first and second sentences of subsection (d).

Cited in S & W Realty & Bonded Com. Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

§ 55-29. Informal or irregular action by directors or committees; attendance by telephone. — (a) Action taken by the required majority of the directors or members of a committee without a meeting is nevertheless board or committee action if:

(1) Written consent to the action in question is signed by all the directors or members of the committee, as the case may be, and filed with the

minutes of the proceedings of the board or committee, whether done before or after the action so taken, or if

(2) All the shareholders know of the action in question and make no prompt objection thereto, or if

(3) The directors or committee members are accustomed to take informal action and this custom is generally known to the shareholders and if all the directors or committee members, as the case may be, know of the action in question and no director or committee member makes prompt objection thereto.

(b) If a meeting of directors otherwise valid is held without proper call or notice, action taken at such meeting otherwise valid is deemed ratified by a director who did not attend unless promptly after having knowledge of the action taken and of the impropriety in question he files with the secretary or assistant secretary of the corporation his written objection to the holding of the meeting or to any specific action so taken.

(c) Unless otherwise provided in the charter or bylaws, any one or more directors or members of a committee may participate in a meeting of the board or committee by means of a conference telephone or similar communications device which allows all persons participating in the meeting to hear each other, and such participation in a meeting shall be deemed presence in person at such meeting. (1955, c. 1371, s. 1; 1959, c. 1316, s. 8; 1973, c. 469, ss. 9, 10.)

Editor's Note. — The 1973 amendment inserted "required" near the beginning of the introductory paragraph of subsection (a) and added subsection (c).

For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

§ 55-30. Director's adverse interest. — (a) A corporation may, by action of its board of directors or otherwise, compensate its directors for their services as directors, salaried officers or otherwise.

(b) No corporate transaction in which a director has an adverse interest is either void or voidable, if:

(1) With knowledge on the part of the other directors of such adverse interest, the transaction is approved in good faith by a majority, not less than two, of the disinterested directors present even though less than a quorum, irrespective of the participation of the adversely interested director in the approval, or if

(2) After full disclosure of all the material facts to all the shareholders, the transaction is specifically approved by the vote of a majority or by the written consent of all of the voting shares other than those owned or controlled by the adversely interested directors, or if

(3) The adversely interested party proves that the transaction was just and reasonable to the corporation at the time when entered into or approved. In the case of compensation paid or voted for services of a director as director or as officer or employee the standard of what is "just and reasonable" is what would be paid for such services at arm's length under competitive conditions. (1955, c. 1371, s. 1.)

The words "corporate transaction" were intended to apply to a situation where the corporate director is dealing directly with the corporation. Smith v. Robinson, 343 F.2d 793 (4th Cir. 1965).

A corporate officer acts in a fiduciary capacity and cannot profit at the expense of the corporation. Smith v. Robinson, 343 F.2d 793 (4th Cir. 1965).

Contracts Fixing Compensation Not Void or Voidable Per Se. — Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable per se. Fulton v. Talbert, 255 N.C. 183, 120 S.E.2d 410 (1961).

Adversely Interested Party Must Prove Transaction Was Fair. — While it is true that the North Carolina law and the general law do not prohibit corporate officers from dealing with the corporation, the adversely interested party must prove that the transaction was fair, just and reasonable when entered into. Smith v. Robinson, 243 F.2d 793 (4th Cir. 1965).

Applied in S & W Realty & Bonded Com. Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

§ 55-31. Executive and other committees. — (a) Unless otherwise provided in the charter or a bylaw adopted by the shareholders, the board of directors, by resolution adopted by a majority of the number of directors then in office may designate from among its members an executive committee and one or more other committees, each consisting of two or more directors, and each of which, to the extent provided in the resolution or in the charter or the bylaws of the corporation, shall have and may exercise all of the authority of the board of directors, except that no such committee shall have authority as to the following matters:

(1) The dissolution, merger or consolidation of the corporation; or the sale, lease or exchange of all or substantially all of the property of the corporation.
(2) The designation of any such committee or the filling of vacancies in the board of directors or in any such committee.
(3) The fixing of compensation of the directors for serving on the board or on any such committee.
(4) The amendment or repeal of the bylaws, or the adoption of new bylaws.
(5) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.

(b) Any such committee, or any member thereof may be discharged or removed by action of a majority of the board of directors pursuant to the provisions of G.S. 55-28(d) or 55-29.

(c) The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any member thereof, of any responsibility or liability imposed on him by law; and any resolutions adopted or other action taken by any such committee within the scope of the authority delegated to it by the board of directors shall be deemed for all purposes to be adopted or taken by the board of directors. (1955, c. 1371, s. 1; 1969, c. 751, s. 13; 1973, c. 1087, ss. 1, 2.)

Editor's Note. — The 1973 amendment deleted "in the management of the corporation" following "authority of the board of directors" near the end of the introductory paragraph of subsection (a), substituted "on him" for "upon it or him" near the middle of subsection (c) and added to subsection (c) the language following the semicolon.

Cited in S & W Realty & Bonded Com. Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

§ 55-32. Liability of directors in certain cases. — (a) The liabilities imposed by this section are in addition to any other liabilities imposed by law upon directors of a corporation.

(b) Directors of a corporation who vote for or assent to the declaration of any dividend or other distribution of the assets of a corporation to its shareholders contrary to the provisions of this Chapter or contrary to any lawful restrictions contained in the charter shall be jointly and severally liable to the corporation for the amount of such dividend which is paid or the value of such assets which are distributed in excess of the amount which could have been lawfully paid or distributed.

(c) Directors of a corporation who vote for or assent to the purchase or redemption of its own shares contrary to the provisions of this Chapter shall

be jointly and severally liable to the corporation for the amount of consideration paid for such shares which is in excess of the maximum amount which could have been lawfully paid.

(d) The liability of directors for violation of subsections (b) and (c) of this section shall not exceed the debts, obligations and liabilities existing at the time of the violation which are not thereafter paid and discharged, plus any loss sustained from the violation by holders of shares outstanding at the time of the violation other than the shares receiving the payment in question.

(e) The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known or reasonably ascertainable debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

(f) The directors of a corporation who vote for or assent to the making of any loan or guaranty or other form of security in violation of G.S. 55-22 shall be jointly and severally liable to the corporation for the repayment or return of the money or value loaned, with interest thereon at the rate of six percent (6%) a year until paid, or for any liability of the corporation upon the guaranty.

(g) If a corporation shall commence business before it has received the minimum amount of consideration for the issuance of shares, as stated in the articles of incorporation, the directors who assent thereto shall be jointly and severally liable to the corporation for such part of said minimum as shall not have been received before commencing business, but such liability shall be terminated when the corporation has actually received the said minimum consideration.

(h) A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his contrary vote is recorded or his dissent is otherwise entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action. If action taken by an executive committee is not thereafter formally considered by the board, a director may dissent from such action by filing his written objection with the secretary of the corporation with reasonable promptness after learning of such action.

(i) A director shall not be liable under subsections (b), (c) or (e) of this section if he relied and acted in good faith and reasonably upon financial statements of the corporation represented to him to be correct and to be based upon generally accepted principles of sound accounting practice by the president or the officer of such corporation having charge of its books of account, or certified by an independent public accountant or by a certified public accountant or firm of such accountants to fairly reflect the financial condition of such corporation.

(j) Any director who is held liable upon and pays a claim asserted against him under or pursuant to this section for the payment of a dividend or other distribution of assets of a corporation shall be entitled to reimbursement or exoneration from the shareholders who accepted or received any such dividend or assets, knowing such dividend or distribution to have been made in violation of this section, in proportion to the amounts received.

(k) Any director against whom a claim shall be asserted under or pursuant to this section shall be entitled to contribution from the other directors who voted for or assented to the action upon which the claim is asserted and in any action

against him shall, on motion, be entitled to have such directors made parties defendant.

(l) Except where the properties of a corporation are being administered in liquidation, or under court supervision for the benefit of creditors, or in the event that the official administering such properties refuses to bring an action for violation of this section, any creditor damaged by a violation of this section may in one action obtain judgment against the corporation and enforce the liability of one or more of the directors to the corporation imposed by this section to the extent necessary to satisfy his claim, or he may in a separate action obtain such judgment and then enforce such liability.

(m) No action shall be brought against the directors for liability under this section after three years from the time when the cause of action was discovered or ought to have been discovered. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., s. 1192; C. S., s. 1179; 1927, c. 121; 1933, c. 354, s. 1; G. S., s. 55-116; 1955, c. 1371, s. 1; 1959, c. 1316, s. 35.)

Editor's Note. — The paragraphs in the note below appeared under former § 55-116, which was the counterpart of this section in the law in effect prior to July 1, 1957.

Liability of Director. — A director of a corporation who has not brought himself within the provisions of the statute exonerating him from liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. Claypoole v. McIntosh, 182 N.C. 109, 108 S.E. 433 (1921).

Where Charter Exempts Stockholder from Liability. — A charter provision, that "no stockholder of the corporation shall be individually liable for debt, liability, contract, tort, omission, or engagement of the corporation or any other stockholder therein," does not interfere with the just and equitable principle embodied in the statute holding stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. McIver v. Young Hdwe. Co., 144 N.C. 478, 57 S.E. 169 (1907).

Primary Right to Enforce Liabilities Lies in Corporation. — North Carolina statutory law has not changed, but rather has codified the rule that the primary right of enforcement of liabilities to the corporation lies in the corporation, and as such the corporation is the real party in interest and a necessary party to such action. Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Creditor or Stockholder Cannot Maintain Action without First Demanding Suit by Corporation. — Where the alleged breach or injuries are based on duties owed to the corporation and not to any particular creditor or stockholder, the creditor or stockholder cannot maintain the action without a demand on the corporation, or its receiver if insolvent, to bring the suit and a refusal to do so, and a joinder of the corporation as a party. Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967).

Cited in J.G.Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962).

§ 55-33. Jurisdiction over and service on nonresident director. — (a) Every nonresident of this State who shall become a director of a domestic corporation shall by becoming such director be subjected to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by shareholders or creditors against said director for violation of his duty as director. Every nonresident who is a director of a domestic corporation when this Chapter becomes effective shall be likewise so subject to the jurisdiction of the courts of this State unless he shall within 60 days of the effective date of this Chapter resign his office and file in the office of the Secretary of State a notice of such resignation.

(b) Every nonresident by serving as a director of a domestic corporation at any time after 60 days from the effective date of this Chapter shall be subject to the jurisdiction of the courts of this State in any action or proceeding for violation of his duty while in office.

(c) Every resident of this State who shall become a director of a domestic corporation and thereafter removes his residence from this State shall be subject to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by shareholders or creditors against said director for violation of his duty as a director.

(d) In all actions or proceedings wherein a director or former director is made a party, and cannot with due diligence be found within the State, service of process, notice or demand on said director or former director shall be made by mailing or otherwise delivering duplicate copies thereof to the Secretary of State, who shall be deemed to have been constituted the process agent of such director or former director by the act of such director in becoming a director or continuing as director for the period provided in subsection (a) of this section. When such copies are to be delivered to the Secretary of State the procedure to be followed shall be, as against such director or former director, substantially the same as that set forth in G.S. 55-146 relating to service on foreign corporations by serving the Secretary of State, and service made pursuant to such procedure shall have the same legal force and validity as if the service had been made personally in this State. (1955, c. 1371, s. 1.)

Interpretation and Validity of Section Depend on Facts. — Questions as to the interpretation and validity of this section must be considered in relation to specific factual situations. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

Subsection (c) Refers to Actions against Director as Such. — Subsection (c) refers to (1) actions in which a former resident of this State who was and is a director of a domestic corporation is a necessary or proper party in his capacity as such director; and (2) actions by shareholders or creditors against a director for violation of his duty as such director. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

It Is Inapplicable to Action against One Not Director or for Actions after Removal. — Subsection (c) has no application to an action against a person who is not a director of a corporation at the time the action is instituted, or to an action which seeks recovery against a director for alleged wrongful conduct subsequent to his removal from office as director. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

When It Applies, Subsection (d) Provides Method of Service. — When subsection (c) is applicable, subsection (d) provides the exclusive method of service of process. Lane Trucking Co. v. Haponski, 260 N.C. 514, 133 S.E.2d 192 (1963).

§ 55-34. **Officers.** — (a) Every corporation organized under this Chapter shall have such officers with such titles and duties as shall be stated in the bylaws and as may be necessary to enable it to sign instruments and stock certificates and to conduct its business in compliance with this Chapter. Any number of offices may be held by the same person and any one office may be held collectively by one or more persons unless the articles of incorporation or bylaws otherwise provide, but no officer may act in more than one capacity where action of two or more officers is required. Whenever a specific office is referred to in this Chapter, it shall be deemed to include any person who, individually or collectively with one or more other persons, holds or occupies such office.

(b) All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided either specifically or generally in the bylaws, or as may be determined by action of the board of directors not inconsistent with the bylaws.

(c) The president has authority to institute or defend legal proceedings when the directors are deadlocked.

(d) Any officer or agent elected or appointed by the board of directors may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed. (1901, c. 2,

ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C. S., s. 1145; G. S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217.)

Editor's Note. — The 1973 amendment rewrote subsection (a).

The paragraphs in the note below appeared under former § 55-49, which was the counterpart of this section in the law in effect prior to July 1, 1957.

The day-to-day business of a corporation is actually conducted by its officers, employees and other agents under the authority and control of its board of directors. Under this section, the officers of a corporation have such authority and may perform such duties in the management of the corporation as provided either specifically or generally in the bylaws, or as may be determined by action of the board of directors not inconsistent with the bylaws. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

President Is Head and General Agent of Corporation. — The president of a corporation by the very nature of his position is the head and general agent of the corporation, and accordingly he may act for the corporation, in the business in which the corporation is engaged. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

But the authority of the president to act for the corporation is limited to those matters that are incidental to the business in which the corporation is engaged, that is, to matters that are within the corporation's ordinary course of business. Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974).

Power of President. — The president of a corporation is not bound by any secret limitation upon the authority usually vested in the chief officer of a corporation; hence a defense to a note, issued by the president of a corporation, that it was unauthorized because of an unwritten bylaw, is untenable. Phillips v. Interstate Land Co., 176 N.C. 514, 97 S.E. 417 (1918).

The president of a corporation under former § 55-49 had implied power to sign a note, and secret limitations on his authority were not binding on the payee. White v. Johnson & Sons, 205 N.C. 773, 172 S.E. 370 (1934).

Implied Authority of Secretary. — The secretary of an incorporated garage and automobile repair company has the implied authority to settle claims made for damages upon the corporation, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented. Beck v. Wilkins-Ricks Co., 186 N.C. 210, 119 S.E. 235 (1923).

Implied Authority of General Manager. — The general manager of one of a chain of stores has implied authority to employ clerks by the year, and the corporation is bound by such contract though there exists an undisclosed limitation of the agent's authority to make contracts of employment for more than a month. Strickland v. S.H. Kress & Co., 183 N.C. 534, 112 S.E. 30 (1922).

Individual Liability of Officers. — Where officers of a corporation knowingly participate in a wrong which is actionable they are jointly and severally liable therefor. Cone v. United Fruit Growers' Ass'n, 171 N.C. 530, 83 S.E. 860 (1916).

Necessity for Contract for Compensation. — An officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. There can be no recovery on a quantum meruit. Chiles v. United States Furn. Mfg. Co., 167 N.C. 574, 83 S.E. 812 (1914). See Caho v. Norfolk & S. Ry., 147 N.C. 20, 60 S.E. 640 (1908).

Removal. — The officers of a corporation created for private purposes have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless. Eliason v. Coleman, 86 N.C. 236 (1882).

§ 55-35. Duty of directors and officers to corporation. — Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions. (1955, c. 1371, s. 1.)

Editor's Note. — For a note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967).

For note on the fiduciary duty of interested directors and the business judgment rule, see 45 N.C.L. Rev. 755 (1967).

This section is declaratory of the law prior to the Business Corporation Act. Fulton v. Talbert, 255 N.C. 183, 120 S.E.2d 410 (1961).

Directors owe the corporation fidelity and the duty to use due care in the management of its business. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

Officers Must Act in Good Faith. — The officers of a company have no right to take advantage of their knowledge of its financial condition to secure a preference for themselves on all its property as to a preexisting debt. Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893); Thomson-Houston Elec. Light Co. v. Henderson Elec. Light Co., 116 N.C. 112, 21 S.E. 951 (1895); Graham v. Carr, 130 N.C. 271, 41 S.E. 379 (1902); Holshouser v. Copper Co., 138 N.C. 248, 50 S.E. 650 (1905); Edwards v. Hill Supply Co., 150 N.C. 171, 63 S.E. 742 (1909).

A corporate officer cannot for himself take business from the corporation. Brite v. Penny, 157 N.C. 110, 72 S.E. 964 (1911).

Contracts Fixing Compensation for Services to Be Rendered. — See same catchline under § 55-30.

Action Based on Fraud for Salaries Not Honestly Earned. — The right of action which accrues for the fixing and taking by one in authority of salaries, bonuses, or other moneys not honestly earned and fairly owing is based on fraud. When one seeks to recover for wrongs fraudulently inflicted, he must allege the facts which, if proven, will establish the fraud. It is not sufficient merely to allege as a conclusion that the payments were "exorbitant, unreasonable, and unjust." Fulton v. Talbert, 255 N.C. 183, 120 S.E.2d 410 (1961).

§ 55-36. Execution of corporate instruments; authority and proof. — (a) Notwithstanding anything to the contrary in the bylaws or charter, any deed, mortgage, contract, note, evidence of indebtedness, proxy, or other instrument in writing, or any assignment or indorsement thereof, whether heretofore or hereafter executed, when signed in the ordinary course of business on behalf of a corporation by its president or a vice-president and attested or countersigned by its secretary or an assistant secretary, (or, in the case of a bank, attested or countersigned by its secretary, assistant secretary, cashier, or assistant cashier), not acting in dual capacity, shall with respect to the rights of innocent third parties, be as valid as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The foregoing shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation or to the execution of corporate securities which are required, by a corporate regulations or resolutions formally adopted, to be signed or countersigned by a transfer agent or registrar who has agreed to act in that capacity.

(b) Any instrument purporting to create a security interest in personal property of a corporation, is sufficiently executed on behalf of the corporation if heretofore or hereafter signed in his official capacity by the president, a vice-president, the secretary, an assistant secretary, the treasurer, or an assistant treasurer. Any instrument so executed shall, with respect to the rights of innocent holders, be as valid as if authorized by the board of directors and upon acknowledgment may be ordered to registration as provided by law.

(c) Deeds, mortgages, contracts, notes, evidences of indebtedness and other instruments purporting to be executed, heretofore or hereafter, by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, are prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that such instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(d) The provisions of the foregoing subsections of this section shall apply to all instruments therein mentioned executed on behalf of foreign corporations when their authorization, admissibility in evidence or legal effect is challenged in any action or other proceeding in this State.

(e) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied or apparent authority, ratification, estoppel or otherwise.

(f) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority.

(g) The Home Owners Loan Corporation or any corporation, the majority of whose stock is owned by the United States government, may convey lands or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution, under seal, of the board of directors of said corporation authorizing the said officer, manager or agent to execute, sign, seal, and attest deeds, conveyances or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. All deeds, conveyances or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. (1909, c. 335, s. 1; C. S., s. 1139; 1941, c. 294; 1949, c. 1224, s. 2; G. S., ss. 55-42, 55-43; 1951, c. 395; 1951, c. 66; 1955, c. 1371, s. 1.)

This section is clear. J. Perry Jones Realty, Inc. v. McLamb, 21 N.C. App. 482, 204 S.E.2d 880 (1974).

Instrument Not Attested by Secretary. — Nothing else appearing, an instrument fails when it is not attested by the corporate secretary. J. Perry Jones Realty, Inc. v. McLamb, 21 N.C. App. 482, 204 S.E.2d 880 (1974).

Authority of Agent Must Be Ascertained. — A party relying upon the authority of an agent to act for his principal under subsection (e) must ascertain the extent of such agent's authority. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 262 N.C. 79, 136 S.E.2d 202 (1964).

But Principal Is Liable for Agent's Acts within Apparent Scope of Authority. — A principal is liable not only for acts expressly authorized but also for acts within the apparent scope of the authority with which the principal has clothed the agent. Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 262 N.C. 79, 136 S.E.2d 202 (1964).

Quoted in Krechel v. Mercer, 262 N.C. 243, 136 S.E.2d 608 (1964).

Cited in Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559 (1966).

§ 55-36.1. Declaring certain corporate conveyances prior to January 1, 1969, valid. — Any deed, deed of trust, or other conveyance for land in this State made on behalf of a corporation prior to January 1, 1969, where the president or vice-president has appeared before a notary public and the secretary or assistant secretary has attested and placed the corporate seal of such corporation upon the instrument and the instrument was executed by the president or vice-president on behalf of such corporation by its authority duly given and said certificate recites that the secretary or assistant secretary acknowledges the instrument to be the act and deed of the corporation, in the absence of an acknowledgment of the president or vice-president, the instrument and acknowledgment being otherwise regular, is hereby declared to be a good and valid deed or conveyance by such corporation for all purposes, and shall be admitted to probate and registration, and shall pass title to the property therein conveyed to the grantee as fully as if said deed, deed of trust, or other conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of said deed, deed of trust or other conveyance. (1969, c. 953, s. 1.)

Editor's Note. — Session Laws 1969, c. 953, s. 1½, provides that the act shall not apply to pending litigation.

§ 55-37. Books and records. — (a) Each corporation shall:

(1) Keep correct and complete books and records of account, and

(2) Keep minutes of the proceedings of its shareholders, its board of directors, and executive committee, if any,

(3) Keep in this State at its registered office or principal place of business or at the office of its transfer agent or registrar a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each, and

(4) Cause a true statement of its assets and liabilities as of the close of each fiscal year and of the results of its operations and of changes in surplus for such fiscal year, all in reasonable detail, including the statement required by G.S. 55-44(b) when applicable, to be made and filed at its registered office or principal place of business in this State, within four months after the end of such fiscal year, and thereat kept available for a period of at least 10 years for inspection on request by any shareholder of record, and shall mail or otherwise deliver a copy of the latest such statement to any shareholder upon his written request therefor.

(b) Any shareholder may apply for a writ of mandamus to compel a corporation and its officers and directors to comply with this section. (1901, c. 2, ss. 38, 45; Rev., ss. 1180, 1181; C. S., s. 1170; G. S., s. 55-107; 1955, c. 1371, s. 1.)

Legislative Intent. — It is not logical to conclude that the legislature, in adopting the Business Corporation Act, intended to require a corporation to keep two sets of books, one for its stockholders, the other for the government, if it wished to compute its taxes on a cash receipt basis. Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1961).

Effect of Act on Accepted Methods of Accounting. — Where a corporation has kept its books for a number of years according to an accepted method of accounting, which system is sufficient in computing its capital and surplus for franchise tax purposes and its income for income tax on a cash receipt basis, the Business Corporation Act does not make mandatory the abandonment of such system or adoption of a new system of accounting by the corporation. Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1960).

Subsection (a)(3) of this section is supplemented by § 55-64. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

When Proceedings May Be Proved by Parol Testimony. — When it is shown that no minutes were made of a particular meeting, or that they are incomplete, the proceedings may be proved by parol testimony. S & W Realty & Bonded Com. Agency v. Duckworth & Shelton, Inc., 274 N.C. 243, 162 S.E.2d 486 (1968).

Application to Building and Loan Associations. — Subsection (a)(3) of this section and § 55-64 apply to building and loan associations. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

The provisions of this section concerning shareholders' lists, and § 55-64, concerning voting lists, are applicable to savings and loan associations, and mandamus is expressly authorized by subsection (b) of this section to compel compliance. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Common-Law Right of Shareholder to Inspect Records. — At common law stockholders in private corporations have the right to make reasonable inspection of a corporation's books to assure themselves of efficient management. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Not Abridged but Enlarged by Statute. — The explanatory comment accompanying the bill which became the Business Corporation Act makes it clear that the associates and the extent of their holdings was not abridged but enlarged. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Mandamus to Require Disclosure of Names, Addresses and Holdings of Shareholders. — Shareholders in a building and loan association were entitled to a writ of mandamus, requiring the association and its officers to provide plaintiffs an opportunity to inspect the records of the association to ascertain the names, addresses, and number of shares held by each shareholder so that plaintiffs might solicit proxies for use at shareholders' meetings. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

§ 55-37.1. Form of records. — Any records maintained by a corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated printout or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been. (1969, c. 751, s. 14.)

Purpose of Section Is to Give Approval to Use in Evidence of Corporate Computer Records. — This section was designed to give broad legislative approval to the use in evidence of corporate computer records. However, in declaring such computer records admissible in evidence, it does not deal with the special problems of reliability created by the use of computers. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

And It Authorizes Their Admission under Safeguards. — This section authorizes the admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

But Does Not Preclude Judicial Development of Standards for Admission. — This section does not, and was not designed to, preclude judicial development of workable standards for the admission of computerized business records generally. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Conditions under Which Printouts Are Admissible. — Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) The computerized entries were made in the regular course of business, (2) the entries were made at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources, of information, and the time of preparation render such evidence trustworthy. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Computer printout evidence may be refuted to the same extent as business records made in books of account. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Testimony as to contents of computer printout was inadmissible under the best-evidence rule. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Computer printout referred to in oral testimony was inadmissible where no foundation was laid for its admission and the printout itself was not offered in evidence. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 55-38. Examination and production of books, records and information. — (a) For the purpose of this section, a qualified shareholder is a person, natural or corporate, who shall have been a shareholder of record in a corporation, domestic or foreign, for at least six months immediately preceding his demand or who shall be the holder of record of at least five percent (5%) of its outstanding shares of any class, and the term shareholder includes a holder of a voting trust certificate to the extent of the shares represented by said certificate; provided that the personal representative of the estate of a deceased holder, or the guardian, committee, trustee or conservator of the estate of a ward, incompetent or missing person who is a holder, or a trustee in bankruptcy of a holder, or a receiver or liquidator of the estate or affairs of a holder, shall be deemed to be a qualified shareholder regardless of the period of time he has been a shareholder of record or the number of shares held by him.

(b) A qualified shareholder, upon written demand stating the purpose thereof, shall have the right, in person, or by attorney, accountant or other agent, at any reasonable time or times, for any proper purpose, to examine at the place where they are kept and make extracts from, the books and records of account, minutes and record of shareholders of a domestic corporation or those of a foreign corporation actually or customarily kept by it within this State. A qualified shareholder in a parent corporation shall have the aforesaid rights with respect to the books, records and minutes of a domestic subsidiary corporation or those of a foreign subsidiary corporation actually or customarily kept by it within this State. A shareholder's rights under this subsection may be enforced by an action in the nature of mandamus.

(c) Two or more shareholders whose aggregate holdings equal the percentage of holdings required of a qualified shareholder may join in exercising their rights.

(d) Any officer or agent or corporation refusing to mail a statement as required by G.S. 55-37 or refusing to allow a qualified shareholder to examine and make extracts from the aforesaid books and records of account, minutes and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of ten percent (10%) of the value of the shares owned by such shareholder, but not to exceed five hundred dollars ($500.00), in addition to any other damages or remedy afforded him by law, but the court may decrease the amount of such penalty on a finding of mitigating circumstances. It shall be a defense to any action for penalties under this section that the person suing therefor has at any time sold or offered for sale any list of shareholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of shareholders of such corporation or any other corporation.

(e) Any person, firm, or corporation who sells, offers for sale, or procures for the purpose of sale any list of shareholders of a corporation, or who uses information obtained pursuant to the provisions of G.S. 55-38 for any purposes other than those incident to ownership of the shares as to which such information was obtained, shall be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned in the discretion of the court.

(f) Notwithstanding the foregoing provisions of this section, upon proof of proper purpose by a shareholder of a domestic or foreign corporation, irrespective of the period of time during which such shareholder shall have been a shareholder of record and irrespective of the number of shares held by him:

(1) The superior court of the county wherein a domestic corporation has its registered office or its principal office may compel the production, for examination by such a shareholder, of the books, documents and records of the corporation, whether or not the same are usually kept within or without the State, and

(2) The superior court of the county wherein a foreign corporation keeps any books, documents and records may compel the production, for examination by such a shareholder, of those books, documents and records that are customarily kept in this State by that corporation, even though they may not be within the State at that time.

(g) In any action or proceeding to which a domestic or foreign corporation is a party, any court of record in this State may, upon notice fixed by the court, and after hearing and proper cause shown, and upon such terms as prescribed by the court, order any or all of the pertinent books, documents and records of such corporation, or transcripts from or duly authenticated copies thereof, to be brought within this State, and kept therein at such place and for such time and for such purposes as may be designated in such order.

(h) Any corporation refusing to comply with any final order made by a court pursuant to subsections (f) and (g) of this section shall, if a domestic corporation, be subject to involuntary dissolution under G.S. 55-122 and, if a foreign corporation, shall be subject to revocation of its certificate of authority; and the offending directors and officers of such domestic or foreign corporation shall be subject to be punished for contempt of court for disobedience of such order.

(i) Provided that nothing in this section shall be construed to authorize a shareholder of a banking corporation to examine the deposit records or loan records of a bank customer, except upon order of a court of competent jurisdiction for good cause shown. (1901, c. 2, s. 49; Rev., s. 1179; C. S., s. 1172; G. S., s. 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11.)

Editor's Note. — The 1973 amendment added the proviso to subsection (a).

For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

The purpose of this section was to define with some definiteness the rights of inspection of shareholders and to impose some safeguards against fishing expeditions, especially by recent transferees. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

It Applies to Banks. — The 1965 amendment to this section shows that the General Assembly considered the provisions of this section applicable to banking corporations. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

Stockholders Have Right to Inspect Books. — Since the stockholders are, in a sense, the beneficial owners of the corporate assets, and thus the persons primarily interested in seeing that the concern is efficiently and profitably managed, it has generally been held that they are entitled to inspect the books and records in order to investigate the conduct of the management, determine the financial condition of the corporation, and generally take an account of the stewardship of the officers and directors, at least where there are circumstances justifying some suspicion of mismanagement. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

But Fishing Expedition Is Not Authorized. — This section does not give a stockholder an absolute right of inspection and examination for a mere fishing expedition, or for a purpose not germane to the protection of his economic interest as a shareholder in the corporation. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

When Mandamus Proper. — The writ of mandamus should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes. Cooke v. Outland, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 55-39. Appointment of provisional director. — (a) If the directors of a corporation are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and if injury to the corporation is being suffered or is threatened by reason thereof, the superior court of the county where the registered office of the corporation is located may, notwithstanding any provisions of the charter or bylaws of the corporation and whether or not an action is pending for an involuntary dissolution of the corporation, appoint a provisional director pursuant to this section.

(b) Action for such appointment may be filed by not less than one half of the directors or by the holders of not less than one third of the total outstanding shares of the corporation regardless of voting rights. Notice of such action shall be served upon the directors (other than those who have filed the action) and upon the corporation in the manner provided by law for service of a summons and complaint, and a hearing shall be held not less than 10 days after such service is effected. At such hearing all interested persons shall be given an opportunity to be heard.

(c) The provisional director shall be an impartial person, who is neither a shareholder nor a creditor of the corporation, nor related by blood or marriage to any of the other directors of the corporation, or to any judge of the court by which he is appointed. The provisional director shall have all the rights and powers of a director, and shall be entitled to notice of the meetings of the board of directors and to vote at such meetings, until he is removed by order of the

court or by vote or written consent of the holders of a majority of the voting shares or holders of such higher number of voting shares as may be required under the charter or the bylaws for the election of directors. He shall be entitled to receive such compensation as may be agreed upon between him and the corporation, and in the absence of such agreement he shall be entitled to such compensation as shall be fixed by the court. (1973, c. 469, s. 13.)

Article 5.

Corporate Finance.

§ 55-40. Authorized shares and restrictions thereon. — (a) A corporation shall have power to create and issue the number of shares fixed in its charter. Such shares may be divided into one or more classes, any or all of which may consist of shares with or without par value, with such designations, preferences, limitations, and relative rights, not inconsistent with the provisions of this Chapter, as shall be fixed in the charter or, as permitted by G.S. 55-42, in resolutions adopted by the shareholders or directors. The charter or said resolutions may limit or deny the voting rights of the shares of any class to the extent not inconsistent with the provisions of this Chapter.

Without limiting the foregoing authority, a corporation may, in accordance with its charter or the aforesaid resolutions, issue shares of preferred or special classes:

(1) Subject to the right of the corporation to redeem at its option any such shares at the price fixed for the redemption thereof.

(2) Entitling the holders thereof to cumulative, noncumulative or partially cumulative dividends.

(3) Having preference over any other class or classes of shares as to the payment of dividends.

(4) Having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation.

(5) Convertible into shares of any class or into shares of any series of the same or any other class, except into a class of shares or into other securities having prior or superior rights and preferences as to dividends, income or distribution of assets upon liquidation. The provisions setting forth the rights of conversion may include any statement, not repugnant to law, for the protection of such rights against dilution or otherwise.

(b) Unless the provisions of the charter or of resolutions fixing the characteristics of shares, whether heretofore or hereafter issued, clearly indicate otherwise:

(1) If preferred shares cumulative as to dividends are entitled to preferential payments on liquidation or dissolution, the amount of accrued dividends, as defined in this Chapter, shall be included in the amount of said preferential payment.

(2) Shares entitled to preferences in payments of dividends or on liquidation or dissolution are not entitled to participate in said payments beyond the amount of their stated preferences.

(c) Notwithstanding the provisions of subsection (a)(2) of this section, authorizing the issuance of shares entitling the holders thereof to noncumulative or partially cumulative dividends, noncumulative preferred shares of a class out of which shares were initially issued after June 30, 1957, and before October 1, 1969, shall be entitled to a dividend credit, as defined in this Chapter, and until such dividend credit is fully discharged no dividend shall be paid to any shares that are subordinate to such preferred shares as to dividends.

(d) Unless the provisions of the charter or of resolutions fixing the characteristics of shares clearly indicate otherwise, if noncumulative shares, whether issued before or after the enactment of this Chapter, are entitled to preferential payments on liquidation or dissolution, the amount of any then existing dividend credit shall be added to the said preferential payment.

(e) Except in cases falling within G.S. 55-52(b)(4) or (5), no shares shall be hereafter authorized which purport to be redeemable at the election of the holder or which at the election of the holder purport to change his status to that of a creditor either at a designated time or upon a designated contingency. Nothing herein shall invalidate mandatory sinking fund requirements for the application of net earnings to the redemption of shares. This subsection shall not apply to building and loan associations or to land and loan associations. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C. S., s. 1156; 1921, c. 116, s. 1; 1923, c. 155; C. S., s. 1167(a); 1925, c. 118, ss. 2, 2a; c. 262, s. 1; 1939, c. 199; 1949, c. 929; G. S., ss. 55-61, 55-73; 1953, c. 822, ss. 1, 3; 1955, c. 1371, s. 1; 1969, c. 751, ss. 15-17.)

The preferred stock forms a part of the capital stock of the corporation, entitling the holders to all rights of the stockholder subject to the terms and conditions on which their stock was issued. Kistler v. Caldwell Cotton Mills Co., 205 N.C. 809, 172 S.E. 373 (1934).

A preferred stockholder is not a creditor of the corporation, and must be confined to his rights as a stockholder. Weaver Power Co. v. Elk Mt. Mill Co., 154 N.C. 76, 69 S.E. 747 (1910).

The priorities of preferred stock are always subject to the rights of creditors. So an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter is ineffectual as to the prior rights of creditors. Ellington v. Raleigh Bldg. Supply Co., 196 N.C. 784, 147 S.E. 307 (1929).

§ 55-40.1. Power of directors to issue shares. — Unless the charter or the bylaws otherwise provide, the board of directors of a corporation shall have the power by resolution duly adopted to issue from time to time any part or all of the authorized but unissued shares or dispose of its treasury shares, and to determine the time when, the terms upon which, and the consideration for which the corporation shall issue or dispose of such shares. (1959, c. 1316, s. 10.)

§ 55-41. Issuance of shares of preferred or special classes in series. — If so provided in the charter or in resolutions that are in accordance with G.S. 55-42, the shares of any preferred or special class may be divided into and issued in series. If the shares of any such class are to be issued in series, then each series shall be so designated as to distinguish the shares thereof from the shares of all other series and classes. Any or all of the series of any such class and the variations in the relative rights and preferences as between different series may be fixed and determined by the charter or by resolutions that are in accordance with G.S. 55-42, but all shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series within a class:

(1) The rate of dividend.
(2) The price at and the terms and conditions on which shares may be redeemed.
(3) The amount payable upon shares in event of involuntary liquidation.
(4) The amount payable upon shares in event of voluntary liquidation.
(5) Sinking fund provisions for the redemption or purchase of shares.
(6) The terms and conditions on which shares may be converted, if the shares of any series are issued with the privilege of conversion. (1955, c. 1371, s. 1.)

§ 55-42. Determination by shareholders and directors of classification of shares. — (a) If the charter states that the shares are to be divided into classes

but does not itself fix and does not expressly authorize the directors to fix the preferences, limitations and relative rights of the shares of each class, the same may, to the extent not fixed by the charter, be fixed by a resolution adopted at a shareholders' meeting by the vote of a majority of the shares of each class outstanding, whether or not such shares are otherwise entitled to vote. Such classes of shares may also by such resolution be divided into series within a class of preferred or special shares. Whenever a class is divided into series and the charter does not fix between the series the variations permitted by this Chapter and does not expressly authorize the directors to fix the same, the same may also be fixed by such resolution.

(b) If the charter or a resolution adopted at a shareholders' meeting by the vote prescribed by subsection (a) of this section expressly vests authority in the board of directors so to do, then, to the extent that the charter or shareholders' resolution does not fix the preferences, limitations or relative rights of any classes into which the shares are therein stated to be divided or to the extent that the charter or shareholders' resolution have not established series or have not fixed between series the variations permitted by this Chapter, the board of directors shall have the authority to fix the same by resolution adopted by the board.

(c) No provisions fixed by the shareholders or directors under this section purporting to confer upon any class of shares a priority with respect to dividends or distributions upon liquidation or dissolution over any then outstanding class of shares itself entitled to similar priority over other shares shall be valid.

(d) Nothing herein shall authorize resort to this section to effectuate any change in the preferences, limitations and relative rights, though fixed as permitted in this section, of any shares after their issuance.

(e) Prior to the issuance of any shares of a class or series of which the preferences, limitations or relative rights have been fixed by the shareholders or directors as permitted in this section, a statement of those preferences, limitations and relative rights, entitled Statement of Classification of Shares of (name of corporation), shall be executed by the corporation and filed in accordance with the provisions of G.S. 55-4, setting forth:

(1) The name of the corporation.

(2) The resolution or resolutions of the shareholders or board of directors relating to the fixing of the preferences, limitations and relative rights of the classes, or to the fixing of variations between series within a class.

(3) As to any shareholders' resolution, a statement showing the number of shares of each class outstanding, the number of such shares present or represented at the meeting which adopted the resolution and the number of shares of each class voted for and against the resolution.

(4) The date of the adoption of the foregoing resolution or resolutions. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C. S., s. 1156; 1923, c. 155; 1925, c. 118, ss. 2, 2a; 1939, c. 199; G. S., s. 55-61; 1953, c. 822, s. 1; 1955, c. 1371, s. 1.)

§ 55-43. Subscriptions for shares. — (a) A preincorporation subscription is a promise or contract to take shares in a corporation to be organized and to pay the agreed price thereof to the corporation or to others for its benefit. A postincorporation subscription is a contract made with an existing corporation to purchase its shares, whether on original issue or as treasury shares, regardless of whether the status of the purchaser as shareholder is created at the time of making the contract or later.

(b) No preincorporation or postincorporation subscription is valid unless in writing, signed and delivered by the subscriber.

(c) A valid preincorporation subscription shall be irrevocable for six months, unless the terms of the subscription otherwise provide, or unless all of the

subscribers consent to its revocation. At any time while a preincorporation subscription is irrevocable or remains unrevoked, it may be accepted by the corporation and, if otherwise conforming to law, shall thereupon become enforceable.

(d) The increase of stated capital effected by a subscription is determined by G.S. 55-47.

(e) No preincorporation or postincorporation subscription for shares shall contain provisions or be obtained upon oral or written representations that the payment of the shares subscribed is to be made out of subsequent earnings of the corporation or, except in a subscription by an employee, that the corporation (other than an investment company in cases within G.S. 55-52(b)(5) or a building and loan association) will subsequently repurchase the shares, or that the subscribed shares are entitled to any advantage or preference over other shares of the same class or series; provided, that nothing herein shall invalidate the provisions of written agreements falling within G.S. 55-52(b)(4). Any such provision or representation, or any oral condition purporting to qualify a written subscription, shall not be a defense against enforcement of the subscription or be grounds for rescission or for any other remedy against the corporation by the subscriber, but any promoter or agent of the corporation making or participating in making any such representation shall be liable to any subscriber for any loss resulting from reliance thereon, and any officer or director of a corporation who accepts a subscription which contains such provisions or which he knows was induced by such representations shall be similarly liable.

(f) Unless otherwise agreed in writing, it shall be no defense to the enforcement of a preincorporation subscription that no notice was given to the subscriber of his right to participate in selecting the first board of directors named in the charter, in adopting the first bylaws or in otherwise perfecting the organization.

(g) Unless otherwise provided in the subscription agreement, all subscriptions for shares shall be paid at such time, or in such installments and at such times, as shall be determined by the board of directors. Any call made by the board of directors, pursuant to such determination, for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be.

(h) Regardless of whether the status of the purchaser as holder of the number of shares called for by the subscription has been created upon making the contract of subscription, either party thereto is entitled, upon default by the other and upon tender of his own performance or circumstances excusing such tender, to receive payment of the subscription price or delivery of the share certificate, as the case may be; and the election of the aggrieved party to assert such right shall, despite any alternative remedy by way of damages, entitle the parties to the same remedies as if the purchaser were the holder of said shares.

(i) In case of default in the payment of any balance, installment or call when such payment is due, the corporation may:

(1) Bring action to collect any sum so due, without prejudice to any subsequent action to collect subsequent installments or calls. Until full payment is made the corporation shall have a lien on the subscribed shares, notwithstanding any judgment against the subscriber for the unpaid balance, and until sale of the shares pursuant to the judgment the lien is not lost by any preliminary or final execution upon said shares.

(2) Bring action against the subscriber for damages for breach of the contract of subscription. If this remedy is pursued, title to any shares which may have passed to the subscriber under the subscription agreement reverts to the corporation upon entry of the judgment in favor of the corporation.

(3) Rescind the subscription and keep as liquidated damages all prior payments up to ten percent (10%) of the subscription price and in such event the corporation shall remit to the subscriber forthwith any excess of such prior payments beyond said ten percent (10%).

(j) A subscription, whether unpaid or partly or fully paid, may be rescinded by the subscriber on the ground of fraud unless it is shown that any creditor or investor became such in actual reliance upon such subscription and would be prejudiced thereby, but this subsection shall not apply to representations of the kind designated in subsection (e) of this section.

(k) The board of directors shall have authority, unless otherwise restricted by the charter or bylaws, to determine in good faith whether and upon what terms the obligation of any subscriber shall be released, settled or compromised. The release of a subscription which has been accepted by the corporation is the equivalent of a purchase by the corporation of the shares in question and is subject to the restrictions and liabilities set forth in G.S. 55-32, 55-52 and 55-54 relating to such a purchase.

(l). No provision in any subscription shall, as against creditors, entitle the subscriber to the status of creditor with respect to any amount theretofore or thereafter paid under the terms of the subscription. (1901, c. 2, ss. 23, 24, 25; Rev., ss. 1169, 1170, 1171; C. S., s. 1165; G. S., s. 55-70; 1955, c. 1371, s. 1; 1969, c. 751, s. 18.)

§ 55-44. Conversion rights and option. — (a) Subject to any limitations or restrictions contained in this Chapter or in the charter, a corporation may, by action of its board of directors:

(1) In connection with the issuance of its bonds, debentures, notes or other obligations, grant to the holders thereof the right to convert them into shares, and

(2) Either in connection with the issuance of shares or other securities or independently thereof, grant options to purchase any of its shares.

(b) Every corporation shall include in its statement of assets and liabilities required by G.S. 55-37 a statement of the then current conversion ratio of any outstanding securities and a statement of the number of shares covered by any outstanding options and the price at which the options are exercisable.

(c) The instrument evidencing the security entitled to said conversion rights shall set forth, in full or by summary, the provisions and conditions of such rights, or shall be a share certificate complying with provisions of G.S. 55-57.

(d) A corporation may issue stock purchase warrants, subscription warrants, or other evidences of option rights, setting forth the terms, provisions and conditions thereof.

(e) Option rights may be transferable or nontransferable or separable or inseparable from the shares, obligations or other securities of the corporation.

(f) At the time of granting conversion or option rights the corporation shall reserve and continue to reserve sufficient authorized shares to meet the exercise thereof but the failure of the corporation to do so shall not impair the right to claim damages from the corporation.

(g) The granting of rights to convert into shares which are subject to preemptive rights or of options to acquire such shares must be authorized by such action of the shareholders as would be required to release preemptive rights under the provisions of this Chapter, and such authorization shall operate as such release.

(h) Obligations or shares shall not be converted into shares having a greater aggregate par value than the face amount of the obligation so converted or than the par value of the shares so converted or than the stated capital represented by any no-par shares so converted, unless provision is made for the difference by a transfer from surplus to stated capital. (1955, c. 1371, s. 1; 1959, c. 1316, s. 11.)

Cross References. — See § 55-40(a)(5). As to employee options, see § 55-45.

§ 55-44.1. Rights of holders of debt securities. — In addition to any rights otherwise lawfully conferred, the charter of the corporation may confer upon the holders of any bonds, debentures or other debt obligations issued or to be issued by the corporation any one or more of the following powers and rights upon such terms and conditions as may be prescribed in the charter:

(1) The power to vote on any matter either in conjunction with or to the full or partial exclusion of its shareholders.

(2) The right to inspect the corporate books and records.

(3) Any other rights concerning the corporation which its shareholders have or may have.

Any such power or right shall not be diminished, as to bonds, debentures or other obligations then outstanding, except by an amendment of the charter approved by the vote or written consent of the holders of a majority in principal amount thereof or such larger percentage as may be specified in the charter. (1969, c. 751, s. 19.)

§ 55-45. Sale of shares and options to employees. — (a) Unless otherwise provided in the charter, a corporation may provide for and carry out a plan for the sale of its unissued or treasury shares to its employees or to the employees of its subsidiary corporations or to a trustee on their behalf. Such plan shall be adopted at a special or annual meeting by vote of a majority of the shares entitled to vote. Such plan may include provisions, among others, for: the kind and amount of consideration, payment in installments or at one time; aiding any such employees in paying for such shares by compensation for services, by loans, or otherwise; granting of options, which shall be nontransferable except by operation of law; the fixing of eligibility for participation in the plan; the class and price of shares to be sold under the plan; the number of shares which may be purchased, the method of payment therefor, the reservation of title until full payment; the effect of termination of employment; an option or obligation on the part of the corporation to repurchase the shares; and the time limits and termination of the plan. The term "employees" as used in this section includes officers in the full-time employment of the corporation, but nothing in this section is intended to permit financial aid to such officers in violation of G.S. 55-22.

(b) Unless otherwise provided in the charter, an option to purchase shares otherwise than under a plan as provided in subsection (a) of this section may be granted by action of the board of directors to a person for the purpose of securing or retaining his services as employee, if the option is exercisable at a price not less than one hundred fifty percent (150%) of the market price of the shares at the time the option is granted, or without limitation as to price if the action of the board is authorized by a special resolution adopted by vote of a majority of the shares entitled to vote, excluding any shares held by said employee.

(c) Repealed by Session Laws 1973, c. 469, s. 14.

(d) In any actions by, against, or in behalf of a corporation to challenge the validity of any stock option granted to any employee, the situs of the option is deemed to be at the registered office of the corporation, and such action may be brought as an action quasi in rem with service of process by publication or outside the State as provided by law. Such action may also be brought as an action in personam. If two or more grantees of stock options are necessary or proper parties, they may be joined in accordance with the provisions of law applicable to class actions. (1955, c. 1371, s. 1; 1959, c. 1316, s. 12; 1973, c. 469, s. 14.)

Editor's Note. — Note the preemptive right dispensation in § 55-56(c)(4).

The 1973 amendment repealed subsection (c), relating to issuing shares or granting options for shares when it is planned that 10% or more of such shares are to go to directors or dominant shareholders.

§ 55-46. Consideration for shares. — (a) Shares of a corporation shall not be issued as fully or partly paid nor shall treasury shares be disposed of except for:

(1) Money or property, tangible or intangible, received by, or inuring to the benefit of, the corporation, or

(2) Labor or services actually rendered to the corporation, or for its benefit in its organization or reorganization, or

(3) Shares, securities or other obligations of the corporation actually surrendered, cancelled or reduced, or

(4) Satisfaction of accrued dividends or dividend credits that have arisen with respect to preferred shares, or

(5) Amounts transferred from surplus to stated capital.

(b) Neither promissory notes nor other obligations of a subscriber or purchaser, including any endorsement or guaranty or any obligation of the corporation, shall constitute payment or part payment to a corporation for its shares. An agreement of a person to perform future services as the consideration for shares shall not constitute payment prior to the performance of such services.

(c) Subject to the further restrictions set forth in this section and to the provisions of G.S. 55-53:

(1) Shares having par value, other than treasury shares, shall not be issued for a consideration less than their par value, except that they may be issued as fully paid at such discount from their par value as does not exceed reasonable expense and compensation incurred in the sale or underwriting of such shares.

(2) Shares without par value and treasury shares may be issued or disposed of for such consideration, expressed in dollars, as the board of directors may determine.

(d) That part of the surplus of a corporation which is transferred to stated capital upon the issuance of shares as a share dividend shall be deemed to be pro tanto consideration for the issuance of such shares.

(e) In the event of a conversion or exchange of shares with or without par value into or for the same or into or for a different number of shares with or without par value, whether of the same or a different class or classes, the consideration for the shares so issued in exchange or conversion shall be deemed to be:

(1) The stated capital then represented by the shares so exchanged or converted irrespective of the actual value of such shares, and

(2) That part of surplus, if any, transferred to stated capital upon the issuance of shares for the shares so exchanged or converted, and

(3) Any additional consideration paid to the corporation upon the issuance of shares for the shares so exchanged or converted.

(f) When shares are issued or disposed of by a corporation, in transactions other than those mentioned in subsection (e) of this section for any consideration other than money or satisfaction of dividend accruals or dividend credits, the board of directors shall state by resolution their determination of the fair value to the corporation of such consideration unless the amount of the consideration is determined by the provisions of this section. In the absence of fraud or bad faith, the judgment of the directors as to the value of the consideration received for shares shall be conclusive. When the consideration for the issuance of shares is the satisfaction of any liquidated indebtedness of the corporation or of any

accrued dividends or dividend credits that have arisen with respect to preferred shares, the fair value of the consideration so received may be determined to be the face amount of the indebtedness or of the accrued dividends, or dividend credits so satisfied and no inference of fraud or bad faith arises from such determination.

(g) Shares issued or disposed of for the kind and amount of consideration prescribed by this section shall be deemed fully paid and nonassessable. (1901, c. 2, ss. 19, 53, 54; 1903, c. 660, ss. 2, 3; Rev., ss. 1159, 1160, 1161; C. S., ss. 1157, 1158; G. S., ss. 55-62, 55-63; 1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, ss. 13, 14; 1969, c. 751, s. 20; 1973, c. 469, ss. 15, 45.2.)

Editor's Note. — The 1973 amendment inserted a comma following "corporation" in subdivision (2) of subsection (a) and substituted "payment" for "such a person a shareholder" near the end of subsection (b).

The paragraphs in the note below appeared under former §§ 55-62 and 55-63, counterparts of this section in the law in effect prior to July 1, 1957.

Purpose Is to Prevent Fraud. — Former § 55-62 was passed in order that stock subscriptions should be protected in their integrity and not become a means of deceiving those who dealt with the corporation. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

Effect of Charter Provision. — A provision in the charter of an incorporated company that the capital stock "shall be issued as full-paid stock" does not permit shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation. Clayton v. Ore Knob Co., 109 N.C. 385, 14 S.E. 36 (1891).

Cash Payment Unnecessary. — It is not essential to a bona fide subscription to stock in a corporation that there be a present payment in cash by the subscriber, or that he be solvent; a subscription is considered bona fide whenever made by one who subscribes in good faith, with reasonable expectation and apparent prospect of being able to pay assessments on his stock as they may thereafter be called for. Boushall v. Myatt, 167 N.C. 328, 83 S.E. 352 (1914).

Conditional Subscription. — A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock to a specified amount. Alexander v. North Carolina Sav. Bank & Trust Co., 155 N.C. 124, 71 S.E. 69 (1911). See Penniman v. Alexander, 111 N.C. 427, 16 S.E. 408 (1892); Kelly v. Oliver, 113 N.C. 442, 18 S.E. 698 (1893); Queen City Printing & Paper Co. v. McAden, 131 N.C. 178, 42 S.E. 575 (1902).

Illegal Transaction. — A transaction whereby the defendant borrowed a certain sum and bought a half interest in a company, and let the company that he was promoting take it over as soon as it was incorporated, and pay his note, and also issue to him stock as the consideration, was illegal. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

Judgment of Directors Arbitrary. — The judgment of the board of directors, in fixing the value of property to be accepted in lieu of money, is arbitrary and of artificial weight, in the absence of fraud; and in a suit to recover on stock subscription, where there is no evidence of fraud, a judgment as of nonsuit is properly granted. Gover v. Malever, 187 N.C. 774, 122 S.E. 841 (1924).

Proceedings Where Property Overvalued. — Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders who sell the property individually, as for an unpaid subscription. Hobgood v. Ehlen, 141 N.C. 344, 53 S.E. 875 (1906); Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

Evidence of Fraud. — In an action by the receivers of an insolvent corporation to compel the payment of a subscription to stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912).

Burden of Proof. — The burden of proving that the property was taken in payment at its true value, and, further, that such value was approved by a board of directors acting independently in the interest of the corporation, is upon the person who alleges payment. Goodman v. White, 174 N.C. 399, 93 S.E. 906 (1917).

Quoted in Short v. Commissioner, 302 F.2d 120 (4th Cir. 1962).

§ 55-47. Determination of stated capital. — (a) As used in this section with respect to shares, the term "issued" refers to all shares that have been

subscribed and whose subscribers have the status of shareholders, even though the shares have not been paid in full, and even though no certificate therefor has been issued, but does not include the reissue of treasury shares.

(b) A corporation shall have a stated capital, which except as reduced in accordance with this Chapter, shall be an amount in dollars equal to the sum of:

(1) The aggregate par value of all shares having par value which have been issued from time to time, and

(2) The entire amount of the agreed consideration received or to be received by the corporation for all shares without par value which have been issued from time to time, except such portion thereof as the board of directors prior to or at the time of issuance of such shares designates as paid-in surplus and such portion thereof as may be entered as earned surplus as permitted by G.S. 55-49(k), and

(3) Such amounts, not included in subdivision (1) or (2) of this subsection as are transferred from surplus to stated capital upon declaration of a share dividend, and

(4) Such amounts as are transferred from surplus to stated capital represented by shares without par value by resolution of the board of directors without declaration of a share dividend.

(c) If par value shares are issued for a consideration in excess of their par value, the excess shall be credited to paid-in surplus; if issued at a discount as permitted by G.S. 55-46(c) the amount of the discount may be entered on the books as a debit and be separately shown in financial statements, in accordance with generally accepted principles of sound accounting practice or good business practice.

(d) Whenever the status of shareholder is created by the acceptance of a preincorporation subscription or the making of a postincorporation subscription contract, the corporation shall thereupon credit to its stated capital account such sum as would be so credited upon full payment for the shares in question, and any unpaid balance shall be debited to a separate account designated as balance on unpaid shares or otherwise appropriately designated.

(e) The stated capital of a corporation may be increased from time to time upon declaration of a share dividend or by resolution of the board of directors directing that all or a part of the surplus be transferred to stated capital. The board of directors may direct that the amount of surplus transferred without declaration of a share dividend shall be allocated as stated capital in respect of any designated class of shares without par value.

(f) When any number of its shares with or without par value are changed, exchanged, converted, subdivided or consolidated for or into any number of shares, with or without par value, any shares thereby surrendered to the corporation shall be deemed to be canceled even if no formal steps to that effect are taken, and, subject to any adjustment to be made if additional consideration is to be paid:

(1) If the stated capital represented by the shares so canceled is the same as that of the shares issued therefor, the aggregate stated capital of the corporation is not changed;

(2) If the stated capital represented by the canceled shares is greater than that represented by the shares issued therefor, no reduction of stated capital is legally effective unless proceedings are taken in accordance with this Chapter to reduce the stated capital;

(3) If the stated capital represented by the shares so canceled is less than that represented by the shares issued therefor, the stated capital of the corporation shall be deemed increased accordingly and adjustment of accounts appropriate thereto shall be made.

(g) Notwithstanding any other provisions of this section, if shares are issued in cancellation or satisfaction of dividend accruals or of dividend credits that have arisen with respect to preferred shares, the board of directors shall determine the amount of stated capital to be represented by the shares so issued, which amount shall be not less than the par value, if any, of the shares so issued, and either:

(1) The stated capital of the corporation may remain the same by debiting against the stated capital represented by any then outstanding shares without par value an amount equal to the stated capital represented by the shares so issued and no proceedings for the reduction of stated capital are thereby required, or

(2) The stated capital of the corporation may be increased by a transfer from any surplus to stated capital of an amount equal to the stated capital represented by the shares being so issued, and if there is no surplus the aforesaid amount may be transferred to stated capital even though a deficit is thereby created or increased, or

(3) The stated capital of the corporation may be reduced, in accordance with the provisions of G.S. 55-48, so as to create a surplus from which an amount can be transferred to stated capital with respect to the shares so issued. (1955, c. 1371, s. 1; 1973, c. 469, s. 16.)

Editor's Note. — The 1973 amendment inserted "and such portion thereof as may be entered as earned surplus as permitted by G.S. 55-49(k)" near the end of subdivision (2) of subsection (b).

As to "capital stock" of corporation under former law, see Hill v. Pioneer Lumber Co., 113 N.C. 173, 18 S.E. 107 (1893); Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894); Gilmore v. Smathers, 167 N.C. 440, 83 S.E. 823 (1914); Person v. Board of State Tax Comm'rs, 184 N.C. 499, 115 S.E. 336 (1922).

§ 55-48. Reduction of stated capital. — (a) Whenever, as a result of an amendment of the charter reducing the par value of outstanding shares or of a merger effected in accordance with the provisions of this Chapter, the stated capital of the corporation is reduced, no further proceedings are necessary to consummate a reduction of stated capital.

(b) Subject to the provisions of subsection (d) of this section, the stated capital of a corporation may be reduced by a resolution of the shareholders determining that the stated capital represented by the shares without par value, or any class of such shares, be reduced as stated in the said resolution. The said resolution shall be adopted by the shareholders by such vote and at such meeting and pursuant to such notice thereof, as would be required under G.S. 55-100 for an amendment of the charter if the shares being so reduced were shares having par value.

(c) Subject to the provisions of subsection (d) of this section, the stated capital of a corporation may be reduced, pursuant to action taken by the board of directors to that effect, without assent of the shareholders:

(1) By the cancellation of any shares purchased, redeemed or otherwise acquired by the corporation except shares acquired through exchange of shares or conversion of convertible shares, and thereby the stated capital of the corporation shall be reduced by the amount of stated capital represented by the shares so cancelled; or

(2) By the exchange of shares or conversion of convertible shares for or into shares representing an amount of stated capital less than that represented by the shares surrendered upon such exchange or conversion, in which event the stated capital of the corporation shall be deemed reduced by the difference; or

(3) By the release of shares subject to the limitations of G.S. 55-43(k), other than treasury shares, from subscription, in which event the stated

capital of the corporation shall be deemed reduced by the amount of stated capital represented by the released shares.

(d) To effectuate a reduction of stated capital pursuant to subsections (b) and (c) of this section there shall be executed and filed, in accordance with the provisions of G.S. 55-4, a certificate of reduction of capital, which shall set forth:

(1) The name of the corporation.

(2) A statement that the purpose of the certificate is to consummate a reduction of stated capital and a statement of the manner in which such reduction is being effected.

(3) The number of issued shares, itemized by classes and series, if any, and the amount of stated capital represented thereby, before the reduction.

(4) The number of issued shares, itemized by classes and series, if any, and the amount of stated capital represented thereby, after the reduction.

(5) The total amount by which the stated capital is being reduced by virtue of this certificate.

(6) Either a statement that no action by the shareholders is necessary to effect the foregoing reduction or a statement showing the number of shares outstanding, the number of shares entitled to vote on the reduction, and the number of shares voted for and against the reduction.

(e) If it is desired to take concurrent action to amend the charter and also to effect the reduction of stated capital, whether effected through such an amendment as indicated in subsection (a) of this section or effected otherwise as indicated in subsections (b) and (c) of this section, the statement to be executed by the corporation and filed, in accordance with the provisions of G.S. 55-4, may be designated as articles of amendment and certificate of reduction of stated capital.

(f) Unless made in violation of contract, distributions made to shareholders after a reduction of stated capital and made as authorized in this Chapter give rise to no cause of action in favor of creditors, regardless of whether their claims arose before or after the reduction. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C. S., s. 1156; 1923, c. 155; 1925, c. 118, ss. 2, 2a; 1939, c. 199; G. S., s. 55-61; 1953, c. 822, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, s. 15.)

As to decrease of capital stock of corporation under former law, see Heggie v. Peoples Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890); Weaver Power Co. v. Elk Mt. Mill Co., 154 N.C. 76, 69 S.E. 747 (1910); Meisenheimer v. Alexander, 162 N.C. 226, 78 S.E. 161 (1913); Thompson v. Shepherd, 203 N.C. 310, 165 S.E. 796 (1932).

§ 55-49. Surplus, net profits and valuation of assets. — (a) Surplus is the excess of a corporation's net assets, as defined in this Chapter, over its stated capital. Such surplus consists of earned surplus or capital surplus or both, and shall be so classified on the books.

(b) Except where provisions of this Chapter specifically require a different standard or impose additional limitations, the assets of a corporation may, for the purpose of determining the lawfulness of dividends or of distributions or withdrawals of corporate assets to or for the shareholders, be carried on the books in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.

(c) For the purpose of determining the lawfulness of dividends or of the purchase or redemption of shares, treasury shares shall not be counted as assets.

(d) Earned surplus is the portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses, including gains and losses realized from the disposition or destruction of fixed assets (but not including unrealized appreciation in the value of any assets), from the date of

incorporation, after deducting subsequent distributions to shareholders and transfers to stated capital and to capital surplus to the extent that such distributions and transfers are made out of earned surplus, and after adding all transfers made from capital surplus as permitted by subsection (i) of this section, all computed in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.

(e) Capital surplus is the entire surplus of the corporation other than its earned surplus, and includes, without being limited to, paid-in surplus, surplus arising from reduction of stated capital and surplus arising from a revaluation of assets made in good faith upon demonstrably adequate bases of revaluation. Capital surplus may be classified on a corporation's books and statements according to its derivation.

(f) A surplus arising from the sale of treasury shares at a price in excess of the cost of their acquisition or from the retirement of treasury shares acquired at a price less than the amount of capital reduction to be effected by their retirement is not earned surplus and shall be accounted for as capital surplus or as some classification thereof.

(g) In computing earned surplus or net profits, deduction shall be made for such obsolescence, depletion, depreciation, losses, bad debts and other items as accords with generally accepted principles of sound accounting practice.

(h) Repealed by Session Laws 1969, c. 751, s. 45.

(i) A corporation may, by resolution of its board of directors, apply any part or all of its capital surplus to the reduction or elimination of any deficit in the earned surplus account but if there are outstanding shares entitled to preferential dividends, such action must be approved by the vote of a majority of such shares.

(j) A corporation may, by resolution of its board of directors, create or add to a reserve or reserves out of its earned surplus or current net profits for any proper purpose set forth in the resolution, and may abolish or diminish any such reserve upon determination by the board of directors that such reserve is no longer necessary or that it is in excess of the amount required for the purpose for which it was created; but no such reserve shall, except in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by such corporation, diminish the amount of earned surplus or net profits available for dividends.

(k) Whenever two or more corporations are consolidated or merged, or whenever a corporation purchases all or substantially all of the outstanding shares or assets of another corporation as a going concern and pays all or substantially all the purchase price by the issuance of shares of the purchasing corporation, or whenever a corporation is reorganized, the earned surplus appearing on the books of the constituent or merged or purchased corporation or corporations or on the books of a corporation prior to reorganization may, to the extent that it is not capitalized, be entered as earned surplus on the books of the resultant or purchasing or reorganized corporation.

(l) Where a parent corporation acquires and owns a majority of the shares of a subsidiary corporation or where a group of parent corporations in pursuit of a common interest acquires and owns all or substantially all of the shares of a subsidiary corporation, a share dividend received by such a parent corporation or parent corporations out of surplus earned by the subsidiary after said acquisition may be treated by the recipient parent corporation as earned income in an amount corresponding, pro rata, to the amount of earned surplus of the subsidiary which was capitalized by virtue of the share dividend. (1955, c. 1371, s. 1; 1969, c. 751, ss. 21, 45; 1973, c. 469, s. 17.)

Editor's Note. — The 1973 amendment inserted "or substantially all" and "outstanding shares or" and made a change in punctuation near the beginning of subsection (k).

Quoted in Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1960).

§ 55-50. Dividends in cash or property. — (a) Subject to the restrictions provided in this section, the board of directors of a corporation may declare and pay dividends payable in cash or in property:

(1) Out of the earned surplus of the corporation, or

(2) Out of the amount of net profits earned during the current or preceding accounting period, each said period to be not less than six months or more than one year in duration, regardless of any impairment of stated capital, or

(3) Out of the capital surplus of the corporation, but such dividends from this source may be paid only if the sources in subdivisions (1) and (2) of this subsection are unavailable and then only to shares entitled to preferential dividends and no capital surplus paid in by any class of stock may be used for the payment of dividends on any class junior thereto, or

(4) In partial liquidation as permitted by subsection (e) of this section. A dividend paid from sources other than those indicated in subdivisions (1) and (2) of this subsection to shares not entitled to preferential dividends is a partial liquidation and is subject to the provisions of subsection (e) of this section.

(b) Any provision inserted in any charter or bylaws or resolutions or agreement of the shareholders after this Chapter becomes effective purporting to make unavailable the sources mentioned in subdivisions (1), (2) and (3) of subsection (a) of this section for the payment of dividends to shares entitled to preferential dividends shall be null and void, but nothing herein shall invalidate any agreement between a corporation and its creditors restricting the payment of dividends.

(c) No dividend payable in cash or in property may be declared or paid if upon the payment thereof:

(1) There is reasonable ground for believing that the corporation would be unable to meet its obligations as they become due in the ordinary course of business, or

(2) The liabilities of the corporation would exceed the fair present value of its assets, or

(3) The highest aggregate liquidation preferences of shares entitled to such preference over the shares receiving the dividend would exceed the corporation's net assets.

(d) Subject to any provisions contained in its charter, for the purpose of paying a dividend out of earned surplus or net profits as permitted by subsection (a) of this section, a corporation engaged in the business of exploiting natural resources, patents, copyrights, leaseholds, and other assets wasting in a similar manner, or engaged primarily in the liquidation of specific assets, may compute its earned surplus or net profits derived from such exploitation or liquidation without taking into consideration the depletion or amortization of such assets resulting from lapse of time or from consumption, liquidation, or exploitation of such assets. If a dividend is paid from a source so computed, the corporation shall make the disclosure required by subsection (g) of this section.

(e) The board of directors of a corporation may distribute to its shareholders in partial liquidation, out of capital surplus (including a surplus created by reduction of stated capital), a portion of its assets, subject to the following provisions:

(1) Except in a case within subdivision (2) of this subsection, the distribution shall be made only upon a determination by the board of directors that the assets of the corporation are in excess of the needs of its business, and upon authorization by a resolution adopted by the holders of a majority of the shares of each class, whether or not otherwise entitled to vote, and the distribution shall be made pro rata to the class or classes of shareholders as specified in the said resolution. Such distribution is not deemed to be a liquidation within the liquidation preferences to which any class of shares may be entitled, unless the charter otherwise provides.

(2) If the corporation is organized for the purpose of liquidating specific assets (otherwise than by the exploitation of natural resources) and is solely engaged in that activity, the distribution may be made as specifically provided in the charter with respect to such a distribution, without the vote of shareholders and without regard to the provisions of subsection (g) of this section.

(3) In addition to all other restrictions upon the payment of dividends imposed by this section, no distribution permitted by this subsection shall be made if thereupon the present fair value of the assets of the corporation is less than twice the amount of its liabilities.

(f) Partly paid shares are entitled to participate in dividends on the basis of the percentage of the consideration actually received by the corporation thereon, unless the charter or subscription agreement provides for lesser dividend payments.

(g) Concurrently with the payment of a dividend the corporation shall disclose to the shareholders receiving the same the source from which the dividend is paid if it is paid:

(1) Otherwise than out of earned surplus, or

(2) Out of earned surplus if within one year prior to the dividend payment a deficit in the earned surplus account has been reduced or eliminated as permitted by G.S. 55-49(i), or

(3) Out of earned surplus or net profits computed without deduction for depletion of natural resources.

(h) The provisions of the foregoing subsections shall not apply to banks, insurance companies, and investment companies registered under the Investment Company Act of 1940.

(i) Repealed by Session Laws 1969, c. 751, s. 45.

(j) Nothing in this section shall impair any rights which a shareholder may have on general principles of equity to compel the payment of dividends, but, except for actions started before this Chapter becomes effective, all rights previously conferred by statute upon shareholders to force a corporation to pay dividends are hereby abrogated.

(k) Any action by a shareholder to compel the payment of dividends may be brought against the directors, or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled, in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney's fees, incurred in maintaining such action. If a court orders the payment of a dividend, the amount ordered to be paid shall be a debt of the corporation.

(l) As used in this subsection, net profits shall mean such net profits as can lawfully be paid in dividends to a particular class of shares after making allowance for the prior claims of shares, if any, entitled to preference in the payment of dividends, but in the determination of such profits the provisions of subsection (d) of this section shall not apply. If during its immediately preceding fiscal period a corporation having less than 25 shareholders on the final day of said period has not paid to any class of shares dividends in cash or

property amounting to at least one third of the net profits of said period allocable to that class, the holder or holders of twenty percent (20%) or more of the shares of that class may, within four months after the close of said period, make written demand upon the corporation for the payment of additional dividends for that period. After a corporation has received such a demand, the directors shall, during the then current fiscal period or within three months after the close thereof, either (i) cause dividends in cash or property to be paid to the shareholders of that class in an amount equal to the difference between the dividends paid in said preceding fiscal period to shareholders of that class and one third of the net profits of said period allocable to that class, or in such lesser amount as may be demanded, or (ii) give notice pursuant to subsection (m) of this section to all shareholders making such demand. A corporation shall not, however, be required to pay dividends pursuant to such demand insofar as (i) such payment would exceed fifty percent (50%) of the net profits of the current fiscal period in which such demand is made, or (ii) the net profits are being retained to eliminate a deficit, or (iii) the payment of dividends would be a breach of a bona fide agreement between the corporation and its creditors restricting the payment of dividends, or (iv) the directors of the corporation can show that its earnings are being retained to meet the reasonably anticipated needs of the business and that such retention of earnings is not inequitable in light of all the circumstances. Upon receipt of such a demand a corporation may elect to treat any dividend previously paid in the current fiscal period as having been paid in the preceding fiscal period, in which event the corporation shall so notify all shareholders. If a dividend is paid in satisfaction of a demand made in accordance with this subsection it shall be deemed to have been paid in the period for which it was demanded, and all shareholders shall be so informed concurrently with such payment.

(m) Upon receipt of a demand from the holders of twenty percent (20%) or more of the shares of any class of shares pursuant to subsection (l) of this section, the corporation receiving such demand may, during the then fiscal period or within three months after the close thereof, given [give] written notice to each shareholder making such written demand that the corporation elects to redeem all shares held by such shareholder in lieu of the payment of dividends as provided in subsection (l) of this section and shall pay to such shareholder the fair value of his shares as of the day preceding the mailing or otherwise reasonably dispatching of the notice. A shareholder receiving such notice shall thereafter be entitled to receive the fair value of his shares, subject only to the surrender by him of his certificate representing his shares and to the provisions of G.S. 55-52, which value shall be determined and paid as follows:

(1) If within 30 days after the date upon which a shareholder becomes entitled to payment for his shares under this subsection, the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.

(2) If within the such 30-day period the shareholder and the corporation do not agree as to the value of the shares, the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of appraisers, or a majority of them, if no exceptions be filed thereto within 10 days

after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. Upon payment of the judgment the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

Shares acquired by a corporation pursuant to payment of the agreed value thereof or to payment of the judgment entered therefor, as in this subsection provided, may be held and disposed of by the corporation as in the case of other treasury shares. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., ss. 1191, 1192; C. S., ss. 1178, 1179; 1927, c. 121; 1933, c. 354, s. 1; G. S., ss. 55-115, 55-116; 1955, c. 1371, s. 1; 1959, c. 1316, s. 16; 1965, c. 726; 1969, c. 751, ss. 22, 45; 1973, c. 469, ss. 18-20; c. 683; c. 1087, ss. 3-5.)

Editor's Note. — The first 1973 amendment rewrote the first sentence of subsection (d), substituted "the charter or subscription agreement provides for lesser dividend payments" for "otherwise provided in the charter or subscription agreement" at the end of subsection (f) and added subsections (l) and (m). New subsections (l) and (m) reenact the concept previously found in subsection (i), which was repealed in 1969.

The second 1973 amendment deleted "and" preceding "insurance" and added the language beginning "and investment companies" in subsection (h).

The third 1973 amendment, in the fourth sentence of subsection (l), deleted "insofar as" at the beginning of clause (ii) and present clause (iv), substituted "reasonably" for "reasonable" in present clause (iv), inserted present clause (iii) and designated former clause (iii) as (iv).

For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation. — A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings; and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market for his stock. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

For cases decided under former statute, which required the directors of a corporation to pay the whole of its accumulated profits in dividends, subject only to the limitation that neither the corporation's capital stock nor its working capital should be impaired, see Attorney Gen. v. President & Dirs. of State Bank, 21 N.C. 545 (1837); Burroughs & Springs v. North Carolina R.R., 67 N.C. 376 (1872); Trustees of Univ. v. North Carolina R.R., 76 N.C. 103 (1877); Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912); Winstead v. Hearne Bros. & Co., 173 N.C. 606, 92 S.E. 613 (1917); Cannon v. Wiscassett Mills Co., 195 N.C. 119, 141 S.E. 344 (1928); Amick v. Coble, 222 N.C. 484, 23 S.E.2d 854 (1943); Southern Mills v. Armstrong, 223 N.C. 495, 27 S.E.2d 281, 148 A.L.R. 1248 (1943); Steele v. Locke Cotton Mills Co., 231 N.C. 636, 58 S.E.2d 620 (1950); Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955).

For cases decided under former statute providing that dividends should be paid only from surplus or net profits arising from the corporation's business, see Seminole Phosphate Co. v. Johnson, 188 N.C. 419, 124 S.E. 859 (1924); Cannon v. Wiscassett Mills Co., 195 N.C. 119, 141 S.E. 344 (1928).

As to suits in equity to compel declaration and payment of dividends, see Gaines v. Long Mfg. Co., 234 N.C. 331, 67 S.E.2d 355 (1951).

§ 55-51. Share dividends. — (a) Subject to the restrictions provided in this section, the board of directors of a corporation may declare and pay dividends in its own authorized but unissued shares out of any surplus of the corporation upon the following conditions:

(1) If a dividend is payable in its own shares having a par value, such shares shall be issued at not less than the par value thereof and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate par value of the shares to be issued as a dividend. If such shares are issued at more than the par value thereof, an amount of surplus equal to the excess over the aggregate par value of the shares shall be credited to a capital surplus account in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.

(2) If a dividend is payable in its own shares without par value, such shares shall be issued at a value to be ascertained and stated by the board of directors by resolution adopted at the time such dividend is declared, and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate value so ascertained and stated in respect of such shares; and the amount per shares so transferred to stated capital shall be disclosed to the shareholders receiving such dividend concurrently with the payment thereof.

(b) No dividend payable in shares of any class shall be paid to the holders of shares of any other class nor shall any share dividend be paid to holders of shares entitled to preferential dividends nor shall any share dividend be paid which would change the voting position of different classes of shares with respect to voting for directors, unless:

(1) The share dividend is paid to holders of shares entitled to preferential payment of dividends which by the charter are required or permitted to be paid in a specified number of shares, whether of that same class or of another designated class, or

(2) The share dividend is specifically authorized by the vote of a majority of shares of each class that might be adversely affected by such a share dividend. Such vote may, if so stated in the resolution of the shareholders, be effective authorization to the directors for one year thereafter for the declaration and payment of such a share dividend if the amount of said dividend is specifically fixed or limited for the shares which are to receive it as stated.

(c) Disclosure similar to that required by G.S. 55-50(g) shall be made if a share dividend is paid from a source which in the case of cash dividends would require disclosure under G.S. 55-50(g).

(d) A corporation making a distribution of treasury shares among its shareholders shall, concurrently with delivery of the corresponding certificate or script, designate the transaction as a distribution of treasury shares and shall not represent it to be a share dividend.

(e) A split-up or division of the issued shares of any class into a greater number of shares of the same class without increasing the stated capital of the corporation shall not be construed to be a share dividend within the meaning of this section. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 17, 18.)

As to stock dividends under former law, see Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912).

§ 55-52. Acquisition by a corporation of its own shares. — (a) A corporation may acquire its own shares by gift, bequest, merger, consolidation, distribution of the assets of another corporation, exchange of its shares or as permitted in this section by purchase or redemption.

(b) Subject to the provisions of subsection (e) of this section, a corporation may, by action of its board of directors, purchase and pay for its shares, or redeem such shares if redeemable, regardless of any impairment of stated capital, in the following cases:

(1) To collect, settle, compromise or release in good faith a debt of or claim against any shareholder or subscriber of its shares;
(2) To eliminate fractional shares or to avoid their issuance;
(3) To satisfy claims of dissenting shareholders entitled to payment for their shares under the provisions of G.S. 55-113;
(4) To perform its obligation or exercise its right to purchase shares of an employee or former employee under a written agreement relating to the employment, or to perform its obligation or exercise its right under a written agreement to purchase shares of a deceased or disabled shareholder upon death or disability;
(5) If the corporation is organized to engage in the business of investing in securities and is engaged in no other business, to perform its agreement to repurchase its shares, at prices substantially equivalent to their proportionate interests in the assets of the corporation;
(6) Subject also to the provisions of subsection (f) of this section, to acquire for retirement, at prices not exceeding their redemption price, its shares that are subject to redemption.

(c) Subject to the provisions of subsections (e) and (f) of this section, a corporation may, by the action of its board of directors, purchase and pay for its shares, but only out of surplus and only in the following cases:

(1) If an offer is made to purchase pro rata from all its shareholders or all of a class of shareholders.
(2) From any shareholder shares which at the time are listed on an organized securities exchange.
(3) From any shareholder of any class, if the board of directors shall have obtained authorization so to purchase, within a period of one year preceding the purchase, by vote of a majority of the shares of the corporation entitled to vote after full disclosure to the holders of all such shares of the specific purpose of the proposed purchase, together with a statement of the number and class of shares proposed to be purchased. Such vote shall not be required for each specific purchase, provided the total number of shares purchased from any class shall not exceed the maximum number of shares of that class authorized to be purchased.
(4) From any shareholder in the exercise of the corporation's right to purchase the shares pursuant to restrictions upon the transfer thereof.
(5) In connection with stabilizing operations authorized by the Securities and Exchange Commission or other regulatory authority.
(6) Repealed by Session Laws 1969, c. 751, s. 45.

(d) A corporation may acquire shares issued by a parent corporation by purchase from such parent corporation, gift, bequest, merger, consolidation, distribution of the assets of the parent or another corporation or otherwise, but not by purchase of the outstanding shares of the parent.

(e) A corporation shall not purchase or redeem its shares if at the time of or as a result of such acquisition:

(1) There is reasonable ground for believing that the corporation would be unable to meet its obligations as they become due in the ordinary course of business, or

(2) The liabilities of the corporation would exceed the fair present value of its assets, or

(3) The highest aggregate liquidation preference of the shares to remain outstanding having prior or equal claims to the assets of the corporation would exceed the net assets of the corporation, or

(4) There exists any unpaid accrued dividends or dividend credits with respect to any shares entitled to preferential dividends ahead of the shares to be purchased, but the provisions of this subdivision (4) shall not apply to purchases made as permitted in subdivisions (1), (2), (3) or (4) of subsection (b) of this section.

(f) A corporation shall not purchase its redeemable shares, otherwise than by redemption or as permitted in subdivisions (1) to (5) inclusive of subsection (b) of this section, at a time when there exists a default in the payment of accrued dividends or any dividend credit upon said shares, unless prior to such purchase notice in writing stating the intention so to purchase and the amount intended to be applied thereto is seasonably mailed to the holders of shares of the class to be purchased or unless adequate publicity of such intention and amounts is otherwise given within a time reasonably calculated to apprise the market of the proposed action.

(g) Unless steps are taken to consummate a reduction of capital as provided in G.S. 55-48, the acquisition of treasury shares shall not be deemed to effect a reduction of stated capital, whether or not the said shares are purportedly kept as treasury shares or are purportedly retired or canceled by the corporation.

(h) Redemption of shares by a corporation may be made either pro rata or by lot as provided in the charter or in resolutions adopted in conformity with G.S. 55-42, as the case may be, or, in the absence of such provision, pro rata or by lot as the board of directors may determine.

(i) Treasury shares shall not carry voting or dividend rights, except rights in share dividends paid pursuant to G.S. 55-51.

(j) This section shall apply also to corporations not formed under this Chapter, subject to such further restrictions on the purchase or redemption of shares as may be contained in special statutory provisions applicable to such corporations. (1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, s. 19; 1963, c. 666; 1967, c. 1163; 1969, c. 751, ss. 23-27, 45; 1973, c. 1067.)

Editor's Note. — The 1973 amendment added "except rights in share dividends paid pursuant to G.S. 55-51" at the end of subsection (i).

For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

Corporation May Purchase Its Own Stock. — Even prior to this section a corporation, unless restrained by some provision of its organic law, could purchase its own stock from holders thereof, and the latter were entitled to all rights of other creditors of the corporation for the protection and enforcement of their demand for payment. Blalock v. Kernersville Mfg. Co., 110 N.C. 99, 14 S.E. 501 (1892).

ARTICLE 6.

Shareholders.

§ 55-53. Liability of shareholders arising from acquisition of shares. — (a) As used in this section, the term "watered shares" means shares which:

(1) Were issued for money at less than their par value in contravention of G.S. 55-46(c); or

(2) Were issued, with or without par value, for a consideration other than money to a person who influenced the corporation to enter the said consideration on its books at an overvaluation, unless the value so entered is conclusive under the provisions of G.S. 55-46(f); or

(3) Were issued, with or without par value, for property to a person who held such property as constructive trustee for the corporation and who in transferring said property to the corporation received therefor a greater number of shares than his fiduciary duties permitted; or

(4) Were issued, with or without par value, for an amount of consideration which, after giving full recognition to the freedom of business judgment exercised in good faith, substantially and unfairly diluted the holdings of other shareholders and were issued to a person who had knowledge that the directors of the corporation were thereby violating their fiduciary duties to the corporation or to its shareholders. As used in this paragraph shareholders include, but are not limited to, those persons who purchase shares from the corporation or from its promoters in accordance with a plan already entertained by the promoters and who so purchase without adequate disclosure to them that their shares are diluted by the lesser amount of consideration received by the corporation for shares previously issued to promoters.

(b) Every original holder of watered shares shall be subject to:

(1) Liability to the corporation for the excess of the par value of said shares over the price paid for their issuance or, as the case may be, for the amount of overvaluation of the consideration entered upon its books, unless the valuation so entered is conclusive under the provisions of G.S. 55-46(f), over and above the maximum valuation that could in good faith have been fixed therefor; but this liability exists

a. Only if there is reasonable ground to believe that creditors or shareholders may have relied on such excess or overvaluation and

b. Only to the extent necessary to pay the claims of such creditors or adjust the equities of such shareholders, or

(2) Cancellation, in an action by the corporation, of such a number of shares as shall cure the dilution or breach of fiduciary duty which made the said shares watered shares; and if cancellation is impossible on the ground that such holder no longer retains the said number of shares, he shall be liable for such an amount in money as will fairly redress the injury to other shareholders occasioned by the said dilution or breach of fiduciary duty.

(c) The remedies in subsection (b) of this section are cumulative, but any money recovery had thereunder shall be deemed to be additional consideration paid for the shares in question.

(d) In any action by the corporation to enforce rights under subsection (b) of this section, the relief granted may include orders for the distribution of any recovery by the corporation to such creditors, shareholders, or former shareholders, as may have been damaged by the transaction upon which the action is based.

(e) Except in the case of watered shares, shareholders shall be subject to no assessment or liability thereon other than that arising from the unpaid balance, if any, of the agreed consideration, even if all the shares are owned by one person.

(f) Every original holder of watered shares or of shares not fully paid as agreed shall continue liable thereon to the corporation notwithstanding any transfer of such shares. A transferee of such shares shall not be liable thereon if he acquired them in good faith without knowledge or notice that they were watered shares or shares not fully paid as agreed or if he acquired them from a transferor similarly free from liability. The burden of proof that the transferee

did not so acquire the shares shall be upon the adverse party. No prior holder of such shares can improve his position by taking from a later holder who is free from liability.

(g) No pledgees or other holder of shares as collateral security and no executor, administrator, conservator, guardian, trustee, receiver or other fiduciary shall be personally liable as a holder of or subscriber for shares of a corporation except to the extent that the record of shares issued or subscribed in his name without indication of representative capacity may have induced reliance upon his personal responsibility with respect to watered or unpaid shares, but the estate or funds in the hands of such fiduciary shall be liable, as equity may require. Nothing herein shall relieve a fiduciary from liability for breach of trust.

(h) Nothing in this section shall limit any liability that a shareholder may incur on general principles of law or equity arising from the creation or maintenance of an inadequately capitalized incorporated enterprise or other abuse of the privilege of achieving limited liability by incorporation. (1893, c. 471; 1901, c. 2, s. 22; Rev., s. 1162; C. S., s. 1160; G. S., s. 55-65; 1955, c. 1371, s. 1; 1969, c. 751, s. 28.)

Editor's Note. — The paragraphs in the note below appeared under former § 55-65, which was the counterpart of subsections (b) and (g) of this section.

Stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. McIver v. Young Hdwe. Co., 144 N.C. 478, 57 S.E. 169 (1907); Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912); Claypoole v. McIntosh, 182 N.C. 109, 108 S.E. 433 (1921).

Unpaid Balances to Be Collected. — The capital stock, paid or unpaid, of a corporation being a trust fund for the benefit of creditors, it is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be collected at least to the extent necessary to pay the unpaid debts of the corporation. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N.C. 475, 20 S.E. 770 (1894).

In case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the settlement of outstanding claims. Whitlock v. Alexander, 160 N.C. 465, 76 S.E. 538 (1912).

Agreement for Release. — No agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. Marshall Foundry Co. v. Killian, 99 N.C. 501, 6 S.E. 680 (1888); Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890). See also Gilmore v. Smathers, 167 N.C. 440, 83 S.E. 823 (1914).

Suspension of Corporate Enterprise. — The mere fact that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription according to his agreement. Raleigh Imp. Co. v. Andrews, 176 N.C. 280, 96 S.E. 1032 (1918), aff'd, 178 N.C. 328, 100 S.E. 514 (1919).

Corporation Not Legally Organized. — Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership, he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defense that the corporation was not legally organized. Tar River Nav. Co. v. Neal, 10 N.C. 520 (1825); Elizabeth City Academy v. Lindsey, 28 N.C. 476 (1846); Wilmington, C.R.R.R. v. Thompson, 52 N.C. 387 (1860); Marshall Foundry Co. v. Killian, 99 N.C. 501, 6 S.E. 680 (1888); Wadesboro Cotton Mills Co. v. Burns, 114 N.C. 353, 19 S.E. 238 (1894).

Setoffs. — In a receiver's action to collect unpaid stock subscriptions, a subscriber cannot set off a debt due him by the corporation. Nor can he credit himself with amounts he paid on another subscription. Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N.C. 502, 92 S.E. 376 (1917).

Action by Corporation to Recover Amount Spent to Purchase Stock from Shareholders. — See Park Terrace, Inc. v. Burge, 249 N.C. 308, 106 S.E.2d 478 (1959), discussing right of creditors to require payment of purchase price under former § 55-65.

§ 55-54. Liability of shareholders for receiving unlawful payments. — Any shareholder who receives any redemptive or purchase price upon the redemption or purchase by a corporation of its shares or who receives any dividend or other withdrawal or distribution from the corporation, either at a time when the

corporation is or thereby will be rendered unable to meet its obligations as they mature in the ordinary course of business, or when the shareholder has knowledge that such receipt diminishes assets of the corporation contrary to the provisions of this Chapter, shall be liable to the corporation for the amount so received, including the amount of any obligation to the corporation thereby released, but this liability is subject to the same limitation as to time and amount as is contained in subsections (d) and (m) of G.S. 55-32 with respect to the liability of directors. Any number of shareholders may be sued in the same action. (1955, c. 1371, s. 1.)

Cited in J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962).

§ 55-55. Shareholders' derivative actions. — (a) An action may be brought in this State in the right of any domestic or foreign corporation by a shareholder or holder of a beneficial interest in shares of such corporation; provided that the plaintiff or plaintiffs must allege, and it must appear, that each plaintiff was a shareholder or holder of a beneficial interest in such shares at the time of the transaction of which he complains or that his shares or beneficial interest in such shares devolved upon him by operation of law from a person who was a shareholder or holder of a beneficial interest in such shares at such time.

(b) The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

(c) Such action shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interest of the shareholders or any class or classes thereof, or of the creditors of the corporation, will be substantially affected by such discontinuance, dismissal, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such shareholders or creditors whose interests it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as costs of the action.

(d) If the action on behalf of the corporation is successful, in whole or part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action.

(e) In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action. (1973, c. 469, s. 12.)

§ 55-56. Preemptive rights. — (a) The charter may enlarge, limit or deny what would otherwise be the preemptive rights of shareholders.

(b) Except as otherwise provided in the charter or in this section, the holders of shares of any class, except shares which are limited as to dividends and liquidation rights, shall have the right, in case of the proposed sale by the corporation for cash of additional shares of the same class as those held by them, to purchase the additional shares in proportion to their then respective holdings at a price substantially no less favorable than the price at which such shares are to be offered to others. Such holders shall have a similar right in case of

the granting by the corporation of any option to purchase its shares of the class held by such holders or in case of a proposed sale by the corporation for cash of any securities convertible into or carrying an option to purchase shares of the class held by such holders. Such right exists irrespective of whether the shares to be sold by the corporation are shares authorized in the articles of incorporation as originally filed or are treasury shares or other shares. Nothing herein is meant to give a shareholder the preemptive right to buy shares at a price determined by their par value.

(c) Unless otherwise stated in the charter, there shall be no preemptive rights to acquire:

(1) Shares issued within one year or to be issued pursuant to subscriptions accepted within one year, after the filing of the articles of incorporation, or

(2) Shares issued or to be issued for considerations, other than money, deemed by the board of directors in good faith to be advantageous to the corporation's business, or

(3) Shares released from preemptive rights by vote of two thirds of the shares entitled to such preemptive rights, or

(4) Shares sold or agreed to be sold to employees or options for shares granted to employees as provided in G.S. 55-45, or

(5) Shares issued or to be issued as a share dividend, or

(6) Shares issued or to be issued to satisfy conversion rights or option rights theretofore granted by the corporation, or

(7) Shares with respect to which the notice required by subsection (g) of this section has been given but which have not been purchased or subscribed within the prescribed time and which are thereafter sold or optioned to any other person or persons at a price no lower than and upon the other terms and conditions stated in such notice.

(d) Holders of bonds, notes, debentures or other obligations convertible into shares and holders of shares convertible into shares of another class shall have no preemptive rights in shares into which they are convertible unless expressly granted in the charter or in the contract with said holders.

(e) The issuance of shares that are not subject to preemptive rights shall not impair any remedy which any shareholder may have for a breach of fiduciary duties on the part of the board of directors with respect thereto. The remedy may include the granting of such preemptive rights or the cancellation of such a number of shares or the compulsory issuance by the corporation of such a number of shares, or the allowance of such amount of money damages as the court may order.

(f) The issue or sale by a corporation of shares carrying voting rights does not of itself confer preemptive rights upon shareholders whose voting powers are relatively diminished thereby but the issue or sale of such shares for the purpose of creating in a group or combination of shareholders the power to elect a majority of the board of directors is a breach of fiduciary duty within subsection (e) of this section.

(g) The holders of shares entitled to preemptive rights under the charter or under this section shall be given written or printed notice briefly describing the shares with respect to which such rights exist and the period of time (not less than 15 days) within which and the terms and conditions, including the price, upon which such rights may be exercised. Such notice shall be delivered to each such holder, either personally or by mail, not less than 20 or more than 180 days prior to the expiration of the stated period within which such rights may be exercised. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the holder at his address as it appears on the record of shareholders of the corporation, with postage thereon prepaid. (1955, c. 1371, s. 1; 1969, c. 751, ss. 29-32.)

§ 55-57. Share certificates. — (a) No certificate shall be issued for any share until such share is fully paid.

(b) Every shareholder of a corporation shall be entitled to a certificate or certificates for the fully paid shares owned by him. Each certificate shall be signed by the president or a vice-president of the corporation and by its treasurer, assistant treasurer, secretary or an assistant secretary, or its cashier or an assistant cashier in case of a bank, and may be sealed with the seal of the corporation or a facsimile thereof. The signatures of any such officers upon a certificate may be facsimiles or may be engraved or printed or omitted if the certificate is countersigned by a transfer agent, or registered by a registrar, other than the corporation itself or an employee of the corporation. In case any officer who has signed or whose facsimile or other signature has been placed upon such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if he were such officer at the date of its issue.

(c) Every share certificate issued by a corporation which is authorized to issue shares for more than one class shall state upon the face or back thereof, in full or in the form of a summary, all of the designations, preferences, limitations, and relative rights, so far as the same have at that time been fixed and determined, of the shares of each class, and of the variations therein between any series of any class, authorized to be issued; and to the extent that the same shall not at that time have been fixed and determined, such share certificate shall state the authority of the shareholders or of the board of directors, as the case may be, to fix and determine the same. In lieu of such statement, however, the certificate may state upon the face or back thereof the designation of each class of shares having preferences or special rights in the payment of dividends, in voting, upon liquidation or otherwise and such other information concerning such shares as may be desired and shall state that the corporation will upon request furnish any shareholder, without charge, information as to the number of such shares authorized and outstanding and a copy of the portions of the charter or resolutions containing the designations, preferences, limitations and relative rights of all shares and any series thereof. When so requested, the corporation shall promptly so furnish the said information and copy.

(d) Each share certificate shall also state upon the face thereof:

(1) That the corporation is organized under the laws of this State.

(2) The name of the person to whom issued.

(3) The number and class of shares, and the designation of the series, if any, which such certificate represents.

(4) The par value of each share represented by such certificate, or a statement that the shares are without par value.

(e) The board of directors may authorize the issuance of a new share certificate in place of a certificate claimed to have been lost or destroyed without requiring a bond if in the judgment of the directors the circumstances justify omission of a bond, and they shall incur no liability for taking such action in good faith. (1885, c. 265; 1901, c. 2, s. 94; Rev., ss. 1165, 1166; C. S., s. 1162; 1927, c. 173; 1949, c. 809; G. S., s. 55-67; 1955, c. 1371, s. 1.)

Cross Reference. — See § 25-8-405 which, under certain circumstances, requires a corporation to issue a replacement certificate.

Nature of Stock Certificate. — A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value except that derived from the company issuing it, and its legal status is in the nature of a chose in action. Person v. Board of State Tax Comm'rs, 184 N.C. 499, 115 S.E. 336 (1922).

Evidence of Ownership of Stock. — A certificate for shares is not the stock itself, but constitutes only prima facie evidence of the ownership of that number of shares. Misenheimer v. Alexander, 162 N.C. 226, 78 S.E. 161 (1913).

Certificate Unnecessary. — Issuance of stock certificates is unnecessary either to the existence of the corporation or to confer title to the stockholder. Powell Bros. v. McMullan Lumber Co., 153 N.C. 52, 68 S.E. 926 (1910).

§ 55-58. Issuance of fractional share certificates or script. — A corporation may, but shall not be obligated to, issue a certificate for a fractional share, and, by action of its board of directors, may sell said fractional share in any fair and equitable manner and pay cash equal to the value of said fractional share to the person entitled thereto. In lieu of issuing a certificate for a fractional share, a corporation may issue script in registered or bearer form which shall entitle the holder to receive a certificate for a full share upon the surrender of such script aggregating a full share. A certificate for a fractional share shall, but script shall not unless otherwise provided therein, entitle the holder to exercise proportionate voting rights, to receive dividends thereon, and to participate in any of the assets of the corporation in the event of liquidation. The board of directors may cause such script to be issued subject to the express condition therein that, if not exchanged for certificates representing full shares before a specified date, the shares for which such script is exchangeable may thereupon be sold by the corporation to others, in such fair manner as may be provided therein, or may promptly be purchased by the corporation at the book value as determined upon the aforesaid date, and in either event the proceeds thereof paid to the holders of such script. (1955, c. 1371, s. 1; 1959, c. 1316, s. 20.)

§ 55-59. Recognition of acts of record owners of shares or other securities. — (a) Except where the registration of shares or other securities has been changed by the corporation without surrender of the appropriate instrument and assignment (but regardless of the lack of competency or capacity of the assignor), a corporation may, subject to the further provisions of this section, treat as absolute owner of shares or other securities the person in whose name the shares or other securities stand of record on its books, just as if that person had full competency, capacity and authority to exercise all rights of ownership, irrespective of

(1) Any knowledge or notice to the contrary or
(2) Any description indicating a representative, pledge or other fiduciary relation or any reference to any other instrument or to the rights of any other person appearing upon its records or upon the share certificate or other security.

(b) Notwithstanding the provisions of subsection (a) of this section, a corporation shall treat a person as if he were a holder of record of its shares or other securities if that person shall furnish to the corporation proof of his appointment as:

(1) An executor under the last will of a deceased holder of record of its shares or other securities; or
(2) An administrator or collector of the estate of such holder; or
(3) A guardian, committee, trustee or conservator of the estate of a ward, incompetent, or missing person who is a holder of record of its shares or other securities; or
(4) A trustee in bankruptcy of such a holder; or
(5) A statutory or judicial receiver or liquidator of the estate or affairs of such a holder.

(c) When and as any fiduciary other than one described in subsection (b) of this section shall furnish proof satisfactory to the corporation of his authority to exercise any rights with respect to shares or other securities of the corporation which do not stand of record in his name, the corporation may treat such fiduciary as entitled to exercise such rights.

(d) When one or more fiduciaries shall claim to be entitled to the same rights with respect to the same shares or securities, the corporation may refuse to treat any of them as entitled to such rights unless and until proof, satisfactory to it,

shall be furnished as to which of such fiduciaries is entitled to the rights in question.

(e) A corporation may treat as absolute owner of shares or other securities the survivor or survivors of persons to whom the same have been or may be issued with the words "as joint tenants," "as joint tenants with right of survivorship" or "as joint tenants with right of survivorship and not as tenants in common" following their names, upon the death of one or more of such persons.

(f) A corporation shall incur no liability to any person by the exercise of any privilege to which it is entitled by this section, nor shall any of its rights be thereby impaired nor shall any of its acts or any corporate meeting be thereby invalidated.

(g) The corporation shall not be obligated to inquire into the existence of, or see to the performance or observance of, any duty or obligation to a third person by a holder of record of any of its shares or other securities or by anyone who it treats, as permitted or required by this section, as the absolute owner thereof.

(h) When in accordance with any of the provisions of this section the corporation shall have treated a minor as entitled to exercise any rights of ownership in its shares or other securities, no subsequent disaffirmance or avoidance shall be effective as against the corporation.

(i) The rights, privileges and immunities afforded to the corporation in this section shall extend also to each transfer agent and to each registrar of its shares or other securities, to its voting inspectors and to all agents of the corporation concerned with the exercise of any rights by any of its shareholders or security holders.

(j) Nothing herein shall enlarge or affect the competency, authority, rights or obligations of any holder of record with respect to any other person than the corporation and its representatives described in the preceding subsection.

(k) Nothing herein shall relieve a corporation from any liability which it otherwise would have for breach by it of a contract to which it is a party or for violation of lawful provisions in its charter or bylaws or for participating in bad faith with a fiduciary in breach of trust.

(l) Nothing herein shall impair the duty of a corporation to abide by any valid judgment or decree or court order terminating or restricting the competency, capacity, authority or rights of ownership of any holder of record of shares or other securities or of a fiduciary thereof if and after a certified copy of that judgment, decree or court order is filed with the corporation or if that judgment, decree or order is rendered in a proceeding to which the corporation is a party. (1955, c. 1371, s. 1; 1957, c. 1039.)

Cross Reference. — As to transfer of securities by fiduciaries, see §§ 32-14 to 32-24.

Editor's Note. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966); 46 N.C.L. Rev. 520 (1968).

§ 55-60. Closing of transfer books and fixing record date. — (a) For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors of a corporation may provide that the stock transfer books shall be closed for a stated period but not to exceed, in any case, 50 days. If the stock transfer books shall be closed for the purpose of determining shareholders entitled to notice of or to vote at a meeting of shareholders, such books shall be closed for at least 10 full days immediately preceding the date of such meeting.

(b) In lieu of closing the stock transfer books, the bylaws, or in the absence of an applicable bylaw, the board of directors may fix in advance a date as the record date for any such determination of shareholders, such date in any case to be not more than 60 days and, in case of a meeting of shareholders, not less than 10 full days immediately preceding the date on which the particular action, requiring such determination of shareholders, is to be taken.

(c) If the stock transfer books are not closed and no record date is fixed for the determination of shareholders entitled to notice of or to vote at a meeting or of shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the board of directors declaring such dividend is adopted, as the case may be, shall be the record date for such determination of shareholders.

(d) When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof regardless of its length except where the determination has been made through the closing of the stock transfer books and the stated period of closing has expired. (1955, c. 1371, s. 1; 1973, c. 469, s. 45.1.)

Editor's Note. — The 1973 amendment substituted "60" for "fifty" near the middle of subsection (b).

§ 55-61. Meetings of shareholders. — (a) Meetings of shareholders may be held at such place, either within or without this State, as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held at the registered office of the corporation.

(b) An annual meeting of the shareholders shall be held at such time as may be provided in the bylaws. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation or affect otherwise valid corporate acts. Upon such failure, whether from lack of quorum or otherwise, a substitute annual meeting may be called in accordance with the provisions of subsection (c) of this section and any meeting so called may be designated as the annual meeting, or the judge of the superior court of the county where the corporation has its registered office may, upon the application of any shareholder, order a substitute meeting to be held as and for the annual meeting, and may fix the date therefor, fix the record date for determination of the shareholders entitled to vote thereat, and cause notice of the meeting to be given to said shareholders, in such manner as he may order, at the expense of the corporation. Subject to the provisions of G.S. 55-73(b), at such meeting the shares of stock there represented either in person or by proxy, shall constitute a quorum for the purpose of such meeting, notwithstanding the provisions of any other section of this Chapter or any provision of the bylaws or charter to the contrary.

(c) Special meetings of the shareholders may be called by the president or the board of directors or such other officers or persons as may be provided in the charter or the bylaws or, at the written request of the holders of not less than one tenth of all the shares entitled to vote at the meeting, by any shareholder. When the meeting is thus called by a shareholder the call shall recite that it is made pursuant to the required request, but failure so to recite shall not invalidate an otherwise valid meeting.

(d) Any matter relating to the affairs of a corporation is a proper subject for action at an annual meeting of shareholders, and unless required by some provision of this Chapter, the matter need not be specifically stated in the notice of the meeting. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C. S., ss.

1168, 1169, 1176; G. S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22.)

§ 55-62. Notice of shareholders' meetings. — (a) Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his address as it appears on the record of shareholders of the corporation, with postage thereon prepaid.

(b) If not less than seven days prior to the date of any forthcoming meeting of shareholders a shareholder mails to the shareholders entitled to vote at that meeting, or if not less than three days prior to said date he delivers to them personally, a written notice of his intention to bring before the meeting any specific proposal, that proposal shall be considered and acted upon at that meeting. The officers of the corporation shall, under the penalties of G.S. 55-38, make immediately available to a shareholder seeking to avail himself of this subsection who so requests the voting list prescribed by G.S. 55-64.

(c) When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. When a meeting is adjourned for less than 30 days in any one adjournment it is not necessary, unless the bylaws provide otherwise, to give any notice of the time and place of the adjourned meeting or of the business to be transacted thereat other than by announcement at the meeting at which the adjournment is taken. (1955, c. 1371, s. 1.)

§ 55-63. Irregular meetings; action without meetings. — (a) The transactions of any meeting of shareholders, however called and with whatever notice, if any, are as valid as though had at a meeting duly held after regular call and notice, if:

(1) All the shareholders entitled to vote are present in person or by proxy and no objection to holding the meeting is made by any shareholder, or if

(2) A quorum is present either in person or by proxy and no objection to holding the meeting is made by anyone so present, and if, either before or after the meeting, each of the persons entitled to vote, not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of the meeting, or an approval of the action taken as shown by the minutes thereof. All such waivers, consents, or approvals shall be filed with the corporate records or made a part of the minutes of the meeting.

(b) The absence from the minutes of any indication that a shareholder objected to holding the meeting shall prima facie establish that no such objection was made.

(c) Any action which, under any provision of this Chapter, is required or permitted to be taken at a meeting of the shareholders, may be taken without a meeting if consent in writing, setting forth the action so taken, shall be signed by all of the persons who would be entitled to vote upon such action at a meeting and filed with the secretary of the corporation as part of the corporate records, whether done before or after the action so taken. Such consent shall have the same force and effect as a unanimous vote of shareholders, and may be stated as such in any certificate or document filed with the Secretary of State under this Chapter. (1955, c. 1371, s. 1; 1969, c. 751, s. 33.)

Editor's Note. — For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

§ 55-64. Voting list. — (a) The officer or agent having charge of the record of shareholders of a corporation shall make, at least 10 days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order, with the address of and the number of shares held by each, which list, for a period of 10 days prior to such meeting, shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The record of shareholders required to be kept by subdivision (a)(3) of G.S. 55-37 shall be prima facie evidence as to who are the shareholders entitled to examine such list or the record of shareholders or to vote at any meeting of shareholders.

(b) Failure to comply with the requirements of this section shall not affect the validity of any action taken at such meeting.

(c) An officer or agent having charge of the record of shareholders who shall fail to prepare the list of shareholders, or keep the same on file for a period of 10 days, or produce and keep it open for inspection at the meeting, as provided in this section, shall be liable to any shareholder suffering damage on account of such failure, to the extent of such damage, provided such shareholder has made written request therefor at least 20 days prior to such meeting.

(d) Notwithstanding the foregoing provisions of this section, it shall not be necessary to prepare or produce a list of shareholders in any case where the record of shareholders actually presented readily shows, in alphabetical order or by alphabetical index, and by classes or series if such there be, the names of the shareholders entitled to vote, with their address and the amount of their holdings. (1955, c. 1371, s. 1.)

Cross Reference. — As to mandamus to require disclosure of names, addresses and holdings of shareholders, see note to § 55-37.

Section Supplements § 55-37. — Section 55-37(a)(3) is supplemented by § 55-64. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

Application to Building and Loan Associations. — This section and § 55-37(a)(3) apply to building and loan associations. White v. Smith, 256 N.C. 218, 123 S.E.2d 628 (1962).

§ 55-65. Quorum of shareholders. — (a) Unless otherwise provided in this Chapter or in the charter or in a bylaw adopted by the shareholders, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one third of the outstanding shares entitled to vote.

(b) Shares shall not be counted to make up a quorum for a meeting if voting of them at the meeting has been enjoined or for any reason they cannot be lawfully voted.

(c) The shareholders at a meeting at which a quorum is present may continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum.

(d) In the absence of a quorum at the opening of any meeting of shareholders, such meeting may be adjourned from time to time by the vote of a majority of the shares voting on the motion to adjourn, but no other business may be transacted until and unless a quorum is present. (1901, c. 2, s. 39; Rev., s. 1182; C. S., s. 1175; 1927, c. 138; G. S., s. 55-112; 1955, c. 1371, s. 1; 1973, c. 469, s. 21.)

Editor's Note. — The 1973 amendment substituted "a bylaw" for "bylaws" near the beginning of subsection (a).

Effect of Motion of Adjournment. — When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding, an election of officers cannot be lawfully held thereafter at that meeting, though the adjournment was carried by an illegal vote. Bridgers v. Staton, 150 N.C. 216, 63 S.E. 892 (1909).

§ 55-66. Votes required. — (a) A majority of the shares voted at a meeting of shareholders, duly held and at which a quorum is present, shall be sufficient to take or authorize action upon any matter which may properly come before the meeting, unless more than a majority is required by this Chapter or by the charter or a bylaw adopted by the shareholders.

(b) Except where other provisions of this Chapter expressly make this subsection inapplicable, any corporation may by its charter or a bylaw adopted by its shareholders require for any purpose the concurrence of a greater proportion of the votes of any class or classes of shares than required by this Chapter for such purpose.

(c) Any provision in the charter or bylaws prescribing the vote required for any purpose as permitted by this section may not itself be amended by a vote less than the vote therein prescribed. (1955, c. 1371, s. 1; 1973, c. 469, s. 22.)

Cross Reference. — See § 55-73(b) and (c).

Editor's Note. — The 1973 amendment substituted "a bylaw" for "bylaws" near the end of subsection (a), inserted "or a bylaw adopted by its shareholders" in subsection (b) and added subsection (c).

§ 55-67. Voting of shares. — (a) Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except as otherwise lawfully provided in the charter and except as otherwise prescribed by subsection (b) of this section. Except as otherwise stated in the charter or in the subscription agreement, shares shall be entitled to full vote notwithstanding that they have not been fully paid. No shares shall be voted upon which an installment of the purchase price due to the corporation is past due and unpaid.

(b) Except as otherwise provided in this subsection, shares of its own stock owned by a corporation, directly or indirectly, through a subsidiary corporation or otherwise, shall not be voted and shall not be counted in determining the total number of shares entitled to vote.

Notwithstanding any other provisions in this Chapter, shares of its own stock held by a corporation or by its subsidiary corporation in a fiduciary capacity shall not be voted in the election of directors and shall not be counted in determining the total number of shares entitled to vote in the election of directors if such corporation is the sole fiduciary, unless the instrument or court order establishing the fiduciary relationship provides that such shares may be voted as directed by some person other than the fiduciary and unless such person actually directs how such shares shall be voted; but if such corporation is not the sole fiduciary, then such shares may be voted in the election of directors by the other fiduciary or fiduciaries in accordance with the provisions of G.S. 55-69, and such shares shall be counted in determining the total number of shares entitled to vote in the election of directors. In all other matters, shares of its own stock held directly or indirectly by a corporation or through a subsidiary thereof as sole fiduciary or as a cofiduciary may be voted by the registered owner or owners, unless the instrument creating the fiduciary relationship provides otherwise.

(c) Except where some inconsistent agreement exists for choosing directors, valid under the provisions of G.S. 55-73, directors shall be elected by a plurality

of the votes cast and at each election for directors every shareholder entitled to vote at such election shall have the right to vote, in person or by proxy, the number of shares standing of record in his name for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of such candidates. This right of cumulative voting shall not be exercised unless some shareholder or proxy holder announces in open meeting, before the voting for directors starts, his intention so to vote cumulatively; and if such announcement is made, the chair shall declare that all shares entitled to vote have the right to vote cumulatively and shall announce the number of shares present in person and by proxy, and shall thereupon grant a recess of not less than one hour nor more than four hours, as he shall determine, or of such other period of time as is unanimously then agreed upon. Stockholders in any corporation now in existence under a charter which does not grant the right of cumulative voting may not exercise this right of cumulative voting when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that there is no stockholder who owns or controls more than one fourth of the voting stock of such corporation. Shares represented at a meeting by revocable proxy relating to that meeting or adjourned meetings thereof shall not be deemed shares "controlled" within the meaning of this subsection. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C. S., s. 1173; 1945, c. 635; G. S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c. 1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35.)

When Cumulative Voting Applies. — See Bridgers v. Staton, 150 N.C. 216, 63 S.E. 892 (1909).

Agreement Depriving Stockholders of Right to Vote. — See Harvey v. Linville Imp. Co., 118 N.C. 693, 24 S.E. 489 (1896); Sheppard v. Rockingham Power Co., 150 N.C. 776, 64 S.E. 894 (1909).

§ 55-68. Proxies. — (a) Shares may be voted either in person or by one or more agents authorized by a written proxy executed by the shareholder or by his duly authorized attorney in fact. A telegram, cablegram, wireless message or photogram appearing to have been transmitted by a shareholder, or a photographic, photostatic or equivalent reproduction of a writing appointing one or more agents shall be deemed a written proxy within the meaning of this section.

(b) A proxy is not valid after the expiration of 11 months from the date of its execution unless the person executing it specifies therein the length of time for which it is to continue in force, or limits its use to a particular meeting, but no proxy, whether or not designated as irrevocable as permitted by subsection (g) of this section, shall be valid after 10 years from the date of its execution, unless renewed or extended at any time before its expiration for not more than 10 years from the date of such renewal or extension.

(c) Any proxy duly executed is not revoked, and continues in full force and effect, until an instrument revoking it, or a duly executed proxy bearing a later date, is filed with the secretary of the corporation. A proxy is not revoked by the death or incapacity of the maker unless, before the vote is counted or the authority is exercised, written notice of the death or incapacity is given to the corporation. Notwithstanding that a valid proxy is outstanding the powers of the proxy holder are suspended, except in the case of a valid proxy which is designated as irrevocable as permitted by subsection (g) of this section, if the person executing the proxy is present at the meeting and elects to vote in person.

(d) If a proxy for the same shares confers authority upon two or more persons and does not otherwise provide, a majority of them present at the meeting, or if only one is present then that one, may exercise all the powers conferred by the proxy; but if the proxy holders present at the meeting are divided as to the right and manner of voting in any particular case and there is no majority, the voting of said shares shall be prorated.

(e) Unless a proxy otherwise provides, any proxy holder may appoint in writing a substitute to act in his place.

(f) A proxy shall be irrevocable only when it clearly indicates that it is to be irrevocable and is held by any of the following or by a nominee of any of the following:

(1) A pledgee of the shares which are the subject of the proxy; or

(2) A person who has purchased or contracted to purchase the shares which are the subject of the proxy; or

(3) A creditor or creditors of the corporation who extend or continue credit to the corporation in consideration of a proxy, if such proxy specifically states that it was given in consideration of such extension or continuation of credit, and sets forth the amount of, and the name of the person extending or continuing, credit; or

(4) A person who has contracted to perform services for the corporation under a contract which requires a proxy, if the proxy states that it was given in consideration of the contract, the name of the person, and the period of the contract; or

(5) A person, including an arbitrator, designated by or under a shareholders' agreement permitted by G.S. 55-73.

Any such proxy shall become revocable after the pledge is redeemed, or the contract of purchase has been performed and the purchaser has become a shareholder of record, or the debt of the corporation is paid, or the period of the contract has been terminated, or the agreement permitted by G.S. 55-73 has terminated.

(g) A proxy may be revoked, notwithstanding a provision making it irrevocable, by a purchaser of shares without knowledge of the existence of such provision, unless notice of the proxy and of its irrevocability plainly appears on the face or back of the certificate representing such shares.

(h) The foregoing provisions shall be applicable to proxies given by the holders of a corporation's bonds, debentures or other obligations where a right to vote is conferred upon such holders by the charter as permitted by G.S. 55-44.1. (1955, c. 1371, s. 1; 1959, c. 1316, s. 24; 1973, c. 469, ss. 23-25.)

Editor's Note. — The 1973 amendment substituted "designated as irrevocable as permitted by subsection (g) of this section" for "coupled with an interest or otherwise irrevocable by law" and inserted "before its expiration" in subsection (b), substituted "designated as irrevocable as permitted by subsection (g) of this section" for "by law irrevocable and which states on its face that it is irrevocable" in the third sentence of subsection (c) and added subsections (f), (g) and (h).

Assignment Reserving Possession and Right to Dividends. — A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors who retain possession the right to all dividends, amounts only to a proxy. Bridgers v. Staton, 150 N.C. 216, 63 S.E. 892 (1909).

Applied in Stein v. Capital Outdoor Adv., Inc., 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-69. Voting by corporations, pledgees, life tenants, fiduciaries and coowners. — (a) The president, any vice-president, the secretary or the treasurer of a domestic corporation holding shares of another corporation, domestic or foreign, and any such officer or the cashier or any trust officer of a banking or trust corporation holding shares of another corporation, domestic or foreign, and any like officer of a foreign corporation holding shares of a domestic

corporation, shall be deemed by the corporation issuing such shares to have authority to vote such shares and to execute proxies and written waivers and consents in relation thereto, whether such shares are held in a fiduciary capacity or otherwise, unless before a vote is taken or a waiver or consent is acted upon it is made to appear by a certified copy of the bylaws or resolution of the board of directors or executive committee of the corporation holding such shares that such authority does not exist or is vested in some other officer or person. In the absence of such certification or of an instrument executed in accordance with G.S. 55-36(a), a person executing any such proxies, waivers or consents or presenting himself at a meeting as one of such officers of a domestic or foreign corporation shall for the purposes of this section be prima facie deemed to be duly elected, qualified and acting as such officer and to be fully authorized, and in case of conflicting representation, the corporate shareholder shall be deemed represented by its senior officer, in the order first stated in this section.

(b) A shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so long as they stand of record in his name.

(c) If shares stand of record in the name of a person as life tenant, the corporation may treat such person as entitled to vote or represent such shares as if he were absolute owner, unless the record itself shows that he is not entitled to vote or unless G.S. 55-59(1) is applicable.

(d) A fiduciary may, in person or by proxy, vote and execute waivers, consents or objections in respect of shares standing of record in his name, and a proxy executed by a fiduciary may confer general or discretionary power.

(e) Any fiduciary described in G.S. 55-59(b), upon satisfactory proof of his appointment and qualification, and any other fiduciary upon satisfactory proof to the corporation of his actual authority to vote, may vote or execute waivers, consents or objections with respect to any shares of a corporation even if the shares stand of record in the name of the person for whom he is such fiduciary, but nothing herein is meant to curtail the privileges and immunities to which a corporation is entitled under G.S. 55-59.

(f) If shares stand of record in the names of two or more persons, whether fiduciaries, joint tenants, tenants in common, tenants in partnership, or otherwise, or if two or more persons shall have the same fiduciary relationship respecting the same shares, then unless the instrument or order appointing them or creating the tenancy otherwise directs and it or a copy thereof is filed with the secretary of the corporation, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, his act binds all;

(2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;

(3) If more than one vote in person or by proxy but the vote is evenly split on any particular matter, each faction is entitled to vote the shares in question proportionally.

If the instrument so filed shows that any such tenancy is held in unequal interests, a majority or even-split for the purpose of this subsection shall be a majority or even-split in interest.

(g) The principle of the preceding subsection shall apply, insofar as possible, to execution of proxies, waivers, consents or objections and for the purpose of ascertaining the presence of a quorum. (1901, c. 2, ss. 42, 43; c. 474, ss. 1, 2; Rev., ss. 1185, 1186, 1187; C. S., s. 1174; G. S., s. 55-111; 1955, c. 1371, s. 1; 1959, c. 1316, s. 36.)

When Trustee May Vote. — See Haywood v. Wright, 152 N.C. 421, 67 S.E. 982 (1910).

Vote of One Trustee Is Act of All Trustees. — Under North Carolina law, the vote of one

trustee ordinarily is the act of all the trustees where the trust owns shares of corporate stock. Fulk & Needham, Inc. v. United States, 411 F.2d 1403 (4th Cir. 1969).

§ 55-70. Voting inspectors. — (a) Unless the charter or the bylaws otherwise provide, the board of directors in advance of any meeting of shareholders may appoint one or three voting inspectors to act at any such meeting or adjournment thereof, and in the absence of such appointment the officer or person acting as chairman of the meeting may, and shall if so requested by any shareholder or proxy holder, make such appointment. Any vacancy, whether from refusal to act or otherwise, may be filled by appointment of the chairman. If there are three inspectors, the decision or certificate of any two shall be effective as the act of all.

(b) The voting inspectors shall determine the number of shares outstanding, the voting power of each, the shares represented at the meeting, the existence of a quorum, the authenticity, validity and effect of proxies, receive votes, ballots, assents or consents, hear and determine all challenges and questions in any way arising in connection with the vote, count and tabulate all votes, assents and consents, determine and announce the result, and do such acts as may be proper to conduct the election or vote with fairness to all shareholders.

(c) On request, the inspectors shall make a report in writing of any challenge, question or matter determined by them and make and execute a certificate of any fact found by them.

(d) The certificate of the inspectors shall be prima facie evidence of the facts stated therein and of the vote as certified by them, unless overruled by a vote of a majority of the shares represented at the meeting, exclusive of the shares as to which there is a controversy. (1955, c. 1371, s. 1.)

§ 55-71. Proceeding to determine validity of election or appointment of directors or officers. — (a) Any shareholder or director of a domestic corporation may commence a summary proceeding in the superior court to determine any controversy with respect to any election or appointment of any director or officer of such corporation, and any shareholder or director of a foreign corporation authorized to transact business in this State shall have the same right with respect to any election held within this State.

(b) The proceeding shall be brought in the county in which the registered office of the corporation is located in this State.

(c) The proceeding shall be commenced by filing a verified petition in the superior court directed to the resident judge or any judge holding court in the district.

(d) The petition shall include:

(1) The name of the county and court in which the proceeding is brought, and the title of the proceeding, which shall include as respondents the corporation, the person or persons whose purported election or appointment is questioned, and any person other than the petitioner, whom the petitioner alleges to have been elected or appointed.

(2) A plain and concise statement of the facts constituting the grounds for contesting the validity of the election or appointment, and a prayer for the relief sought.

(e) Upon filing of the petition a notice to the respondents fixing a time and place for the hearing, which place may be anywhere in the district, shall be signed and issued by any petitioner or his counsel. No summons shall be necessary, but a copy of the notice and petition shall be served upon each respondent at least 10 days prior to the hearing. If it appears by the petition or separate affidavits to the satisfaction of the judge that the respondent to be served cannot, after due diligence, be found in the State, the judge shall, at the election of the petitioner, either:

(1) Make an order for service by publication and direct that one publication of a notice, which shall include the time and place of the hearing, and statement of the notice of the relief sought be made in a designated newspaper qualified for legal advertising pursuant to G.S. 1-597; or

(2) Make an order for service of the notice and a copy of the petition outside the State pursuant to G.S. 1-104.

In the cases in which service by publication is allowed, the notice and petition is deemed served at the expiration of seven days from the date of the publication, and the party so served is then in court.

(f) Upon or after the filing of the petition and issuance of the notice the judge may, upon application, issue an interlocutory order restraining the directors or officers whose election or appointment is challenged from acting, and may make such other order as he may deem proper with respect to the directors or officers who shall hold the contested offices pending the determination of the matter in controversy.

(g) The petition shall be heard at the time and place fixed in the notice or at such later time or other place in the district as the judge may designate. The hearing may be in chambers and shall be heard upon affidavit or oral testimony or both, in the discretion of the judge.

(h) Upon completion of the hearing the judge, in determining the matter, may:

(1) Declare the result of the election or appointment in controversy;

(2) Order a new election or appointment and may include in such order provisions with respect to the directors or officers who shall hold the contested offices until a new election is held or appointment is made;

(3) Determine the respective voting rights of shareholders and of persons claiming to own shares;

(4) Direct such other relief as may be just and proper.

The order may be signed, either in or out of the district in which the hearing is held. (1901, c. 2, s. 47; Rev., s. 1189; C. S., s. 1177; 1935, c. 413; 1937, c. 347; G. S., s. 55-114; 1955, c. 1371, s. 1.)

Editor's Note. — The paragraphs in the note below appeared under former § 55-114, which was the counterpart of this section in the law in effect prior to July 1, 1957.

Section 1-104, referred to in subdivision (e)(2), was repealed by Session Laws 1967, c. 954, s. 4.

Statute Is Constitutional. — This statute, empowering the court to continue corporate officers in their respective offices with the same authority and emoluments enjoyed by them prior to controversy, provides an emergency remedy which does not affect the status of the corporation but merely preserves the status quo pending determination of controversy in order that the corporation may continue to function, not under the supervision of the court, but by virtue of corporate authority theretofore given, and therefore the remedy violates no constitutional right of stockholders or directors, but only imposes upon them the rules of fair play in the exercise of their property rights. Thomas v. Baker, 227 N.C. 226, 41 S.E.2d 842 (1947).

The statute is remedial in character. Thomas v. Baker, 227 N.C. 226, 41 S.E.2d 842 (1947).

The corporation shall continue to function pending settlement of the dispute, not under the supervision of the court, but by virtue of corporate authority theretofore bestowed. Hence the summary proceeding to avoid temporary corporate paralysis. Thomas v. Baker, 227 N.C. 226, 41 S.E.2d 842 (1947).

Authority and Emoluments of Officers Continued in Office. — An order continuing corporate officers in their respective offices necessarily carries with it authorization and direction that such officers should continue to exercise the same functions and receive the same emoluments as before the controversy giving rise to the proceeding. Thomas v. Baker, 227 N.C. 226, 41 S.E.2d 842 (1947).

Dispute as to Powers of President. — Where the directors of a corporation are evenly divided in a dispute as to whether its president should exercise managerial powers, and by reason of such division are unable to elect any officers of the corporation or resolve their differences over the management of the corporation, the superior court has jurisdiction in the premises under the statute upon petition properly filed. Thomas v. Baker, 227 N.C. 226, 41 S.E.2d 842 (1947).

Interference with Officers in Performance of Their Duties. — The jurisdiction of the superior court to grant relief against the wrongful interference with the officers in the performance of their duties or the wrongful refusal of an officer to perform the duties of his office

cannot be invoked in a proceeding under this section. Thomas v. Baker, 227 N.C. 226, 41 S.E.2d 842 (1947).

Appointment of Receiver. — In a proceeding under this section the judge of the superior court has no jurisdiction to appoint a receiver for the corporation. In re Hotel Raleigh, Inc., 207 N.C. 521, 177 S.E. 648 (1935).

Applied in Stein v. Capital Outdoor Adv., Inc., 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-72. Voting trust. — (a) Any number of shareholders of a corporation may, for any proper business purpose, create a voting trust, revocable or irrevocable, conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed 10 years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing an executed copy of the agreement with the corporation at its registered office, and by transferring their shares to such trustee or trustees for the purposes of the agreement. Trust certificates shall be issued by the trustees for the shares so transferred. The said copy of the voting trust agreement so deposited with the corporation shall be subject to the absolute right of examination by any shareholder of the corporation, in person or by agent, or by any holder of a beneficial interest in the voting trust, either in person or by agent, at any reasonable time.

(b) Such trustee or trustees shall also cause to be kept a record of trust certificate holders similar to the record of shareholders required to be kept by corporations under this Chapter and such record shall be made available for inspection by trust certificate holders or by shareholders of the corporation who submit to the trustee or trustees satisfactory proof of their ownership of shares, all subject to the same terms, conditions, qualifications and penalties as are prescribed in G.S. 55-38 with respect to inspection by shareholders of the record of shareholders. The holder of a trust certificate shall be considered to be a shareholder of the shares represented by his trust certificate with respect to his right to inspect corporate books and records.

(c) Notwithstanding the provisions of this section or of G.S. 55-59, the holders of record of the voting trust certificates shall have the same rights as if they were shareholders of record with respect to voting upon any amendment of the charter, amendment of the bylaws, reduction of stated capital, sale of the entire assets, merger, consolidation or dissolution. For this purpose the trustees, upon timely and adequate information and requests from the corporation, shall prepare and furnish the corporation with a list of the trust certificate holders, which shall conform substantially to the requirements of this Chapter relating to voting lists of shareholders, and the corporation shall send all proper notices, maintain and make available the said list for inspection and make all appropriate arrangements to permit the trust certificate holders to vote in person or by proxy at the meeting in question as if they were shareholders of record. This subsection (c) shall not apply to any voting trust initially created on or after October 1, 1973; and any voting trust created before that date may be amended by unanimous consent of the holders of record of the voting trust certificates to provide that this subsection (c) shall not thereafter be applicable to such voting trust.

(d) The trustee or trustees under a voting trust agreement shall, except to the extent otherwise provided by the agreement or subsection (c) of this section, have the right to vote upon and exercise any rights of dissent with respect to any charter amendment, merger, consolidation, dissolution, sale of assets or reduction of stated capital of the corporation.

(e) At any time before the expiration of a voting trust agreement as originally created or as extended under this subsection, one or more holders of voting trust certificates may, by agreement in writing, extend the duration of such agreement, nominating the same or substitute trustee or trustees, for an additional period not to exceed 10 years from the date of such expiration. Such extension agreement shall not affect the rights or obligations of persons not

parties to the extension agreement, and such persons shall be entitled to remove their shares from the trust upon the expiration of the voting trust agreement and promptly to have their share certificates reissued to them. The extension agreement shall comply with all provisions of this section applicable to the original voting trust agreement.

(f) The validity of a voting trust agreement, otherwise lawful, shall not be affected during a period of 10 years from the date of its creation or extension by the fact that by its terms it will or may last beyond such 10-year period. (1955, c. 1371, s. 1; 1963, c. 1233; 1973, c. 469, ss. 26-28.)

Editor's Note. — The 1973 amendment added the last sentence of subsection (c), rewrote subsection (d) and added subsections (e) and (f).

For note entitled "Voting Trusts — Should Trust Principles Apply to Close Corporations?" see 48 N.C.L. Rev. 342 (1970).

Cited in Stein v. Capital Outdoor Adv., Inc., 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-73. Shareholders' agreements. — (a) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in the exercise of any voting rights of shares held by the parties, including any vote with respect to directors, such shares shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with any procedure (including arbitration) specified in the agreement. Such agreement shall be valid and enforceable as between the parties thereto for a period not to exceed 10 years from the date of its execution; and in an action by a shareholder who is a party to such an agreement a court of competent jurisdiction may enjoin another party or parties to the agreement from voting his or their shares in violation thereof, or, if the corporation is made a party to the action, may set aside an election of directors or other action resulting from the voting of shares in violation of the agreement, and may grant such other or further relief as may appear appropriate under the circumstances for the enforcement of the agreement. Such agreement may be extended or renewed in like manner as a voting trust may be extended or renewed as provided by G.S. 55-72(d). Nothing herein shall impair the privilege of the corporation to treat the shareholders of record as entitled to vote the shares standing in their names, as provided in G.S. 55-59 nor impair the power of a court to determine voting rights as provided in G.S. 55-71.

(b) Except in cases where the shares of the corporation are at the time or subsequently become generally traded in the markets maintained by securities dealers or brokers, no written agreement to which all of the shareholders have actually assented, whether embodied in the charter or bylaws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners. Notwithstanding any other provision of this section or of this Chapter, the provisions of G.S. 55-59(a) shall not apply to such an agreement. A transferee of shares covered by such agreement who acquires them with knowledge thereof is bound by its provisions.

(c) An agreement between all or less than all of the shareholders, whether solely between themselves or between one or more of them and a party who is not a shareholder, is not invalid, as between the parties thereto, on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board of directors, but the making of such an agreement shall impose upon the shareholders who are parties thereto the

liability for managerial acts that is imposed by this Chapter upon directors. (1955, c. 1371, s. 1; 1973, c. 469, s. 29.)

Editor's Note. — The 1973 amendment rewrote subsection (a).

It would seem that the reference to § 55-72(d) in the next-to-last sentence of subsection (a) should be to § 55-72(e).

For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

For note entitled "Voting Trusts — Should Trust Principles Apply to Close Corporations?" see 48 N.C.L. Rev. 342 (1970). For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

Agreement as to Voting Is Valid Unless There Is Fraud or Prejudice. — The Business Corporation Act clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders to which they agree to vote their stock in a specified manner — including agreements for the election of directors and corporate officers — is not invalid, unless it is inspired by fraud or will prejudice the other stockholders. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964); Stein v. Capital Outdoor Adv., Inc., 273 N.C. 77, 159 S.E.2d 351 (1968).

Agreements for Future Management Must Be "Otherwise Lawful". — Both this section and § 55-24 require that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Held Invalid. — Agreements providing for the future management and control of a corporation which violate the express charter or statutory provision, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders or are made in consideration of a private benefit to the promisor, will be declared invalid. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

§ 55-74: Omitted.

ARTICLE 7.

Uniform Stock Transfer Act.

§§ 55-75 to 55-98: Repealed by Session Laws 1965, c. 700, s. 2.

Cross Reference. — For provisions of the Uniform Commercial Code as to investment securities, see §§ 25-8-101 to 25-8-406.

ARTICLE 8.

Fundamental Changes.

§ 55-99. Right to amend charter. — (a) Subject to the limitations set forth in G.S. 55-100, 55-101 and 55-103, a corporation may amend its charter at any time in any respect that may be desired, but no amendment shall contain provisions which would be forbidden in original articles of incorporation. No inference shall be drawn from the broad power of amendment conferred by this Chapter that the exercise of that power in a particular case is fair and equitable.

(b) In particular, and without limitation upon the foregoing general power of amendment, a corporation may amend its charter from time to time, so as:

(1) To change its corporate name.

(2) To change its period of duration.

(3) To change, enlarge or diminish its corporate purposes.

(4) To increase or decrease the aggregate number of shares, or shares of any class, which the corporation has authority to issue.

(5) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued.
(6) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued.
(7) To change the designation of all or any part of its shares, whether issued or unissued, and to change any rights, preferences or limitations in respect of all or any part of its shares, whether issued or unissued.
(8) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or a different number of shares having a par value.
(9) To change the shares of any class, whether issued or unissued, and whether with or without par value, into a different number of shares of the same class or into the same or a different number of shares, either with or without par value, of other classes.
(10) To create new classes of shares having rights and preferences either prior and superior or subordinate and inferior to the shares of any class then authorized, whether issued or unissued.
(11) To cancel or otherwise affect the right of the holders of the shares of any class with respect to accrued dividends or dividend credits as defined in this Chapter.
(12) To divide any preferred or special class of shares, whether issued or unissued, into series and fix and determine the designations of such series and the variations in the relative rights and preferences as between the shares of such series.
(13) To authorize the board of directors to establish, out of authorized but unissued shares, series of any preferred or special class of shares and fix and determine the relative rights and preferences of the shares of any series so established.
(14) To authorize the board of directors to fix and determine the relative rights and preferences of the authorized but unissued shares of series theretofore established in respect of which either the relative rights and preferences have not been fixed and determined or the relative rights and preferences theretofore fixed and determined are to be changed.
(15) To revoke, diminish, or enlarge the authority of the board of directors to establish series out of authorized but unissued shares of any preferred or special class and fix and determine the relative rights and preferences of the shares of any series so established.
(16) To limit, deny or grant to shareholders of any class the preemptive right to acquire additional or treasury shares of the corporation, whether then or thereafter authorized.
(17) To change the corporation into a nonprofit corporation or a cooperative organization.

(c) Any amendment of the charter made pursuant to this Chapter extends to all rights theretofore existing under the charter as fully as if this Chapter, including such future changes therein as may be made, had been in effect at the time of the filing of the original articles of incorporation. (1901, c. 2, ss. 29, 30, 37; 1903, c. 510; Rev., ss. 1175, 1178; C. S., s. 1131; 1927, c. 142; G. S., s. 55-31; 1955, c. 1371, s. 1; 1959, c. 1316, s. 29.)

Amendment Operates Prospectively. — Whether the law itself makes an amendment, or confers the power of amendment on the corporation, the amendment will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939).

A charter provision requiring consent of three fourths in interest of the preferred stockholders to the issuing of bonds or securities of prior or equal rank is prospective in effect, and does not constitute a waiver of the right to the declara-

tion of accrued, accumulated dividends, when earned, by permitting the interposing of new preferred stock by agreement of three fourths of the preferred stockholders, nor does legislative authority to amend the charter extend to authority to defeat the vested right to the declaration of such dividends by amendment of the charter. Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939).

§ 55-100. Procedure to amend charter. — (a) Before the issuance of any shares, including acceptance of any subscriptions for shares, amendments to the charter may be made, either by the directors named therein or by the incorporators, by preparing and delivering to the Secretary of State articles of amendment complying with the provisions of G.S. 55-103. If any such amendment makes a material change, nonassenting subscribers for shares are entitled to rescind their subscriptions.

(b) After the issuance of any shares, including acceptance of any subscription for shares, amendments to the charter shall be made in the following manner:

(1) The board of directors or the executive committee shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. In lieu thereof, a resolution setting forth a proposed amendment and requesting its submission to such a meeting may be approved in writing by such shareholders as would be entitled to a call of a shareholders' meeting pursuant to the provisions of G.S. 55-61(c).

(2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given in or with the notice of the meeting to each shareholder of record entitled to vote thereon. If the amendment would give rise to a dissenter's right of payment for his shares under this Chapter, such notice shall contain a statement, displayed with a reasonable prominence, to the effect that dissenting shareholders are entitled, upon compliance with G.S. 55-113 including the 20-day notice requirement, to be paid the fair value of their shares as therein provided, but failure of the notice to contain such a statement shall not invalidate the amendment.

(3) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least a majority of all the outstanding shares entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least a majority of all the outstanding shares of each class of shares entitled to vote thereon as a class and a majority of all the other outstanding shares entitled to vote thereon. If the charter prescribes a different quorum or requires more than the majority vote herein prescribed, either for all amendments or for a specific amendment, such charter provision can itself be amended or repealed only by the shareholders acting pursuant to any different quorum and greater vote so prescribed. An amendment to the charter which adds a provision for liquidation or dissolution of the corporation as permitted by G.S. 55-125(a)(3), or which changes or repeals such a provision, must be approved by the affirmative vote of the holders of all the outstanding shares of the corporation, whether or not otherwise entitled to vote, or by the holders of such lesser number of shares, but not less than the number required for a regular charter amendment, as may be specifically provided in the charter for adding, changing or repealing such a provision.

(4) There shall be prepared and delivered to the Secretary of State articles of amendment complying with the provisions of G.S. 55-103.

(c) Any number of amendments may be submitted to the shareholders, and voted upon by them, at one meeting.

(d) At any time before delivery of the articles of amendment to the Secretary of State the board of directors may, in their discretion, abandon an amendment if so empowered in the resolutions of the shareholders adopting the amendment. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C. S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G. S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30.)

Editor's Note. — The 1973 amendment rewrote the third sentence and added the fourth sentence of subdivision (3) of subsection (b).

Subscriber Released by Fundamental Change. — Any fundamental change in the charter of a corporation relieves a nonassenting subscriber from liability upon his stock. Bank (First Nat'l) v. City of Charlotte, 85 N.C. 433 (1881).

§ 55-101. Class voting and objecting shareholders' rights on amendments. — (a) The holders of outstanding shares of a class shall be entitled as a class to vote, whether or not otherwise entitled to vote by the provisions of the charter, upon a proposed amendment which would:

(1) Cancel or otherwise affect their rights to accrued dividends or dividend credits as defined in this Chapter,
(2) Reduce the dividend preference thereof,
(3) Make noncumulative, in whole or in part, the dividends thereof which had theretofore been cumulative,
(4) Reduce the redemption price thereof or make them subject to redemption when they are not otherwise redeemable,
(5) Reduce any preferential amount payable thereon upon voluntary or involuntary liquidation,
(6) Eliminate, diminish, or alter adversely conversion rights pertaining thereto,
(7) Eliminate, diminish or alter adversely voting rights pertaining thereto, either directly or by increasing the relative voting rights per share of the shares of another class,
(8) Diminish or alter adversely any options or rights of the holders thereof to purchase other shares of the corporation,
(9) Change adversely any sinking fund provision relating thereto,
(10) Rearrange the preferences of such outstanding shares so as to make them subject to the preferences of other than authorized shares, issued or unissued, as to distribution by way of dividends or otherwise,
(11) Increase the rights and preferences of any other class of shares having equal or prior or superior rights or preferences,
(12) Authorize a new class of shares having prior or superior rights or preferences or confer voting rights on holders of debt securities as permitted by the provisions of G.S. 55-44.1, or
(13) Change the corporation into a nonprofit corporation or a cooperative organization.

(b) Any objecting shareholder shall have the right to be paid the value of his shares in accordance with the provisions of G.S. 55-113, if an amendment of the charter would change the corporation into a nonprofit corporation or cooperative organization; and an objecting holder of shares entitled to any preference as to dividends or liquidation shall have the right to be paid the value of his shares in accordance with the provisions of G.S. 55-113 if:

(1) An amendment of the charter would effect the changes in his shares described in subdivisions (1), (2), (3), (4), or (5) of subsection (a) of this section or would to his prejudice create or increase any priority, dividend preference, cumulative dividend right, redemption price or liquidation preference of any other then issued shares, or

(2) Pursuant to a plan of recapitalization involving an offer to shareholders of his class to exchange their shares, on which there are accrued dividends or dividend credits as defined in this Chapter, for a new class of shares having preferences as to dividends or liquidation prior to shares of the class, a currently adopted amendment would authorize the corporation to issue shares of such new class, and such plan of recapitalization if consummated. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 30, 31; 1969, c. 751, s. 36.)

§ 55-102. Offer of exchange of securities for preferred shares; rights of objecting shareholders. — (a) If an offer is made by the corporation to holders of any class of its shares having accrued dividends or dividend credits, as defined in this Chapter, to exchange said shares for securities which would be entitled to preference in the receipt of any periodical payment or dividend over said shares, and if the authority of the corporation to issue such securities would require no amendment of the charter, and if the offer is accepted by any shareholder, then any holder of said shares who objects to the terms of the offer shall have the right to be paid the value of his shares in accordance with the provisions of G.S. 55-113.

(b) All such offers shall be in writing and shall contain the statement, displayed with reasonable prominence, to the effect that shareholders objecting to its terms are entitled, upon compliance with the provisions of G.S. 55-113, including the 20-day notice requirement, to be paid the fair value of their shares as therein provided, but failure to set forth such a statement shall not invalidate any consummated exchanges. (1955, c. 1371, s. 1.)

Cross References. — See §§ 55-100(b)(2) and 55-108(a) for the corresponding requirement calling attention to cash-to-dissenter rights on amendments, mergers, consolidations. For effect of failure so to call attention, see § 55-113(f).

§ 55-103. Articles of amendment. — (a) The articles of amendment, other than for an amendment under subsection (b) of this section, shall be executed by the corporation and filed, as provided in G.S. 55-4 and shall set forth:

(1) The name of the corporation.

(2) The amendment so adopted. And if the amendment changes the corporation into a nonprofit corporation or a cooperative organization, there shall be included a statement of purpose appropriate for a nonprofit corporation or a cooperative organization as the case may be.

(3) The date of the adoption of the amendment by the shareholders.

(4) The number of shares outstanding, and the number of shares entitled to vote thereon, and if the shares of any class are entitled to vote thereon as a class, the designation and number of outstanding shares entitled to vote thereon of each such class.

(5) The number of shares voted for and against such amendment, respectively, and, if the shares of any class are entitled to vote thereon as a class, the number of shares of each such class voted for and against such amendment, respectively.

(6) If such amendment provides for an exchange, reclassification or cancellation of issued shares, and if the manner in which the same shall be effected is not set forth in the amendment, then a statement of the manner in which the same shall be effected.

(7) If such amendment effects a change in the amount of stated capital of the corporation, then a statement of the manner in which the same is effected and a statement expressed in dollars, of the amount of stated capital as changed by such amendment. If the amendment would reduce the stated capital of the corporation, the articles may be entitled "Articles of Amendment and Reduction of Capital."

(8) Either, (i) a recital of the statement, if any, contained in the notice to shareholders informing them, as and if required by G.S. 55-100(b)(2), of dissenter's rights to payment, or (ii) a brief explanation of why the amendment does not give rise to dissenter's rights under G.S. 55-101(b).

(b) If the amendment is made by the directors or incorporators as permitted by subsection (a) of G.S. 55-100, the articles of amendment shall be executed by the directors or incorporators, as the case may be, and be filed, as provided in G.S. 55-4, and shall set forth the name of the corporation, the amendment so adopted, and the statement that the amendment is made by the directors or incorporators before the issuance of any shares. (1955, c. 1371, s. 1; 1959, c. 1316, s. 32.)

§ 55-104. Effect of amendment. — No amendment shall affect any existing cause of action in favor of or against such corporation, or its officers or directors, or any pending suit to which such corporation or its officers or directors shall be a party, or the existing rights of persons other than shareholders; and, in the event the corporate name shall be changed by amendment, no suit brought by or against such corporation under its former name shall abate for that reason. (1955, c. 1371, s. 1.)

§ 55-105. Restated charter. — (a) At any time after its charter has been amended a corporation may by action of its board of directors, without necessity of vote of the shareholders, cause to be prepared a document entitled "Restated Charter," which shall integrate into one document its original articles of incorporation (or articles of consolidation) and all amendments thereto, including those effected by articles of merger, and any statement of classification of shares filed pursuant to G.S. 55-42(e), except that:

(1) In lieu of the statement in the articles of incorporation regarding the minimum consideration to be received for its shares before commencing business, the restated charter shall set forth the then stated capital of the corporation;

(2) In lieu of the address of the initial registered office and the name of the initial registered agent, the restated charter shall state the address of the then registered office and the name of its then registered agent.

(b) The restated charter shall also set forth that it purports merely to restate but not to change the provisions of the original articles of incorporation as supplemented and amended and that there is no discrepancy, other than as expressly permitted by this section, between the said provisions and the provisions of the restated charter.

(c) The restated charter shall be executed by the corporation and be filed as provided in G.S. 55-4.

(d) A copy of the restated charter certified by the Secretary of State shall be presumed, until otherwise shown, to be the full and true charter of the corporation as in effect on the date when so certified.

(e) A corporation may also integrate its articles of incorporation and all amendments thereto by the procedure provided in this Chapter for amending the charter. (1955, c. 1371, s. 1.)

§ 55-106. Procedure for merger. — (a) One or more domestic corporations may merge into another corporation, hereinafter designated as the surviving corporation, pursuant to a plan of merger approved in the manner provided in

this Chapter. All corporations which are parties to such merger are hereinafter designated collectively as the constituent corporations.

(b) The board of directors of each constituent corporation shall by resolution adopted by each such board, approve a plan of merger setting forth:

(1) The name of each constituent corporation, and a designation of which constituent corporation is to be the surviving corporation.

(2) The name which the surviving corporation is to have after the merger, which name may be that of any of the constituent corporations or any other available name permitted by this Chapter.

(3) The terms and conditions of the proposed merger.

(4) The manner and basis of converting the shares of each of the constituent corporations into shares or other securities or obligations of the surviving corporation, and, if any shares of any of the constituent corporations are not to be converted solely into shares or other securities or obligations of the surviving corporation, the cash, property, rights or shares or other securities or obligations of any other corporation which the holders of such shares are entitled to receive in exchange for such shares or upon their conversion and the surrender of the certificates evidencing such shares, which cash, property, rights or shares or other securities or obligations of any other corporation may be in addition to or in lieu of the shares or securities or obligations of the surviving corporation; or, if any constituent corporation is the wholly owned subsidiary of the surviving corporation and no cash or shares or other securities or obligations will be distributed, or issued upon conversion or cancellation of the shares of any such constituent corporation, a statement to that effect.

(5) A statement of any changes in the charter of the surviving corporation to be effected by such merger.

(6) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G. S., s. 55-165; 1955, c. 1371, s. 1; 1969, c. 751, s. 37; 1973, c. 469, s. 31.)

Editor's Note. — This section must be considered in the light of § 55-108 (shareholders' approval) and § 55-109 (filing of "articles of merger").

The 1973 amendment inserted "hereinafter designated as the surviving corporation" in the first sentence and added the second sentence of subsection (a), inserted "constituent" in the introductory paragraph of subsection (b), rewrote subdivision (1) and inserted "after the merger" and substituted "constituent corporations" for "corporations involved in the merger" in subdivision (2) of subsection (b), and, in subdivision (4) of subsection (b), substituted "the constituent corporations" for "each merging corporation" and "any of the constituent corporations" for "any merging corporation" near the beginning and "constituent corporation" for "merging corporation" in two places near the end of the subdivision. The amendment also inserted "property, rights" in two places in subdivision (4) of subsection (b) and deleted "amount of" preceding "cash" the first time that word appears in the subdivision.

Statute Controls as to Merger or Consolidation. — Where two corporations enter into an agreement for their union and the continuation of business under the name of one with the combined assets of both, the statute controls as to whether there is a merger or a consolidation. Carolina Coach Co. v. Hartness, 198 N.C. 524, 152 S.E. 489 (1930).

§ 55-107. Procedure for consolidation. — (a) Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this Chapter.

(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

(1) The names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation. The name of the new

corporation may be that of any of the corporations involved in the consolidation or any other available name permitted by this Chapter.

(2) The terms and conditions of the proposed consolidation.

(3) The manner and basis of converting the shares of each corporation into shares or other securities or obligations of the new corporation, and, if any shares of any consolidating corporation are not to be converted solely into shares or other securities or obligations of the new corporation, the cash, property, rights or shares or other securities or obligations of any other corporation which the holders of such shares are entitled to receive in exchange for such shares or upon their conversion and the surrender of the certificates evidencing such shares, which cash, property, rights or shares or other securities or obligations of any other corporation may be in addition to or in lieu of the shares or securities or obligations of the new corporation.

(4) With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this Chapter, except the names and addresses of the incorporators.

(5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G. S., s. 55-165; 1955, c. 1371, s. 1; 1969, c. 751, s. 38; 1973, c. 469, s. 32.)

Editor's Note. — The 1973 amendment substituted "new corporation" for "surviving corporation" and deleted "amount of" preceding "cash" near the middle of subdivision (3) of subsection (b) and inserted "property, rights" in two places in subdivision (3) of subsection (b).

§ 55-108. Approval of merger or consolidation by shareholders. — (a) The board of directors of each corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. Written or printed notice shall be given to each shareholder of record, not less than 20 days before such meeting, in the manner provided in this Chapter for the giving of notice of meetings of shareholders, and shall state this as a purpose of the meeting, whether the meeting be annual or a special meeting. A copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice. Such notice shall contain a statement, displayed with reasonable prominence, to the effect that dissenting shareholders are entitled, upon compliance with G.S. 55-113, including the 20-day notice requirement, to be paid for the fair value of their shares as provided in that section, but failure of the notice to contain such a statement shall not invalidate the merger or consolidation.

(b) At each such meeting, a vote of the shareholders shall be taken on the proposed plan of merger or consolidation. Each outstanding share of each such corporation shall be entitled to vote on the proposed plan of merger or consolidation, whether or not such share otherwise has voting rights. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least a majority of the outstanding shares of each such corporation, unless any class of shares of any such corporation is entitled to vote as a class thereon, in which event, as to such corporation, the plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least a majority of the outstanding shares of each class of shares entitled to vote as a class thereon and a majority of all the other outstanding shares. Any class of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to the charter, would entitle such class of shares to vote as a class; and if the plan of merger or

consolidation contains any provisions which, if contained in a proposed amendment to the charter of a constituent corporation, would require by the express provisions of said charter a greater vote of its shareholders than is herein otherwise required for approval of a merger or consolidation, the said plan requires the approval of the thus prescribed greater vote of the shareholders of that corporation.

(c) After such approval by a vote of the shareholders of each corporation, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G. S., s. 55-165; 1955, c. 1371, s. 1.)

§ 55-108.1. Mergers without approval of the shareholders of the surviving corporation. — (a) Unless otherwise provided in the charter or bylaws, no approval by shareholders of the surviving corporation shall be required for a merger if at the time of approval of the plan of merger by the board of directors of each of the corporations, domestic or foreign, who are parties thereto, the surviving corporation is the owner of all the outstanding shares of the other corporation, or corporations, domestic or foreign, who are parties to the merger, and the plan of merger does not provide for any changes in the charter of, or the issuance of any shares by, the surviving corporation.

(b) Unless otherwise provided in the charter or bylaws, no approval by shareholders of the surviving corporation shall be required for a merger if (i) the plan of merger does not provide for any changes in the charter of the surviving corporation, (ii) each share of the surviving corporation outstanding immediately prior to the merger becoming effective shall remain outstanding immediately after the merger as an identical share of the surviving corporation, and (iii) either no common shares of the surviving corporation and no shares, securities or obligations convertible into common shares are to be issued or delivered under the plan of merger, or the authorized unissued common shares or the treasury common shares of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed twenty percent (20%) of the common shares of the surviving corporation outstanding immediately prior to the effective date of the merger.

(c) In case of a merger under the provisions of this section, the articles of merger shall contain statements showing compliance with the conditions of this section, and, in lieu of statements required by G.S. 55-109(b) relating to the outstanding shares and the vote of shareholders of the surviving corporation, need only state the approval by its board of directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33.)

Editor's Note. — The 1973 amendment divided the former provisions of this section into present subsections (a) and (c), added subsection (b), and substituted "In case of a merger under the provisions of this section" for "and in such case" and inserted "required by G.S. 55-109(b)" and "the outstanding shares and" in subsection (c).

§ 55-109. Articles of merger or of consolidation. — (a) After the approval by the directors and shareholders to the extent required by G.S. 55-108 and 55-108.1, articles of merger or of consolidation shall be executed by each corporation and be filed as provided in G.S. 55-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent corporations have their registered offices. Certificates of merger or consolidation shall also be registered as provided in G.S. 47-18.1.

(b) The articles of merger or of consolidation shall set forth:

(1) The plan of merger or the plan of consolidation.
(2) As to each corporation, the number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class.
(3) As to each corporation, the number of shares voted for and against such plan, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against such plan, respectively.

(c) The time when the merger or consolidation is effected is determined by the provisions of G.S. 55-4. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G. S., s. 55-165; 1955, c. 1371, s. 1; 1967, c. 823, s. 18; 1973, c. 469, s. 34.)

Cross Reference. — See Editor's note to § 53-5.

Editor's Note. — The 1973 amendment substituted "directors and shareholders to the extent required by G.S. 55-108 and 55-108.1" for "shareholders as required by G.S. 55-108" in the first sentence and added the second sentence of subsection (a).

§ 55-110. Effect of merger or consolidation. — (a) When such merger or consolidation has been effected:

(1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;
(2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;
(3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Chapter.

(b) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The provisions of this subsection are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.

(c) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities, obligations and penalties of each of the corporations so merged or consolidated; and any claim existing or action or proceeding, civil or criminal, pending by or against any such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place; and any judgment rendered against any of the merged or consolidated corporations may be enforced against the surviving or new corporation. Neither the rights of creditors nor any liens upon the property of any merged or consolidated corporations shall be impaired by the merger or consolidation.

(d) In the case of a merger, the charter of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its charter are stated in the plan of merger. In the case of a consolidation, the articles of consolidation

shall be deemed to be the articles of incorporation of the new corporation. (1925, c. 77, s. 1; 1943, c. 270; G. S., s. 55-166; 1955, c. 1371, s. 1; 1967, c. 950, s. 1.)

A merger does not create new or additional rights. The surviving corporation is vested with all the rights which each party to the merger could exercise but only those rights. Good Will Distribs. (Northern), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957), construing former § 55-166.

§ 55-111. Merger or consolidation of domestic and foreign corporations. — (a) One or more foreign corporations and one or more domestic corporations may be merged or consolidated into a corporation of this State or of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized.

(b) Each domestic corporation shall comply with the provisions of this Chapter with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new corporation, as the case may be, is a corporation of any state other than this State, it shall comply with the provisions of this Chapter with respect to foreign corporations if it is to transact business in this State; and, if after the merger or consolidation it transacts no business in this State, the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State arising out of the merger or consolidation or out of any act or omission of such constituent corporation prior to or contemporaneous with the merger or consolidation, and process therein may be served as provided in G.S. 55-146 or 55-146.1.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be a corporation of this State. If the surviving or new corporation is to be a corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise.

(e) If the new or surviving corporation is not a corporation in this State, then notwithstanding anything in the foregoing provisions of this section:

(1) The rights of any holder of shares in any constituent corporation that is a corporation of this State to receive notice of dissenters' rights, to file his dissent, upon dissent to demand and receive payment of the fair value of his shares or to avail himself of any equitable relief to which he would be entitled if the surviving or new corporation were a corporation of this State shall not be impaired, and

(2) The courts of this State shall have jurisdiction in actions to enforce the aforesaid rights against the surviving or new corporation regardless of whether or not said corporation is otherwise subject to the jurisdiction of the courts of this State and in any such action service of process may be made in the manner provided in this Chapter that would be applicable if said corporation were transacting business in this State. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G. S., s. 55-165; 1955, c. 1371, s. 1; 1973, c. 469, s. 35.)

Editor's Note. — The 1973 amendment inserted the language beginning "arising out of the merger" and ending "contemporaneous with the merger or consolidation" in subsection (c) and substituted, at the end of subsection (c), "G.S. 55-146 or 55-146.1" for "G.S. 55-145."

§ 55-112. Sale, lease, exchange and mortgage of assets. — (a) A mortgage of or other security interest in all or any part of the property of a corporation may be made by authority of the board of directors without authorization of the shareholders, unless otherwise provided in the charter or in bylaws adopted by the shareholders.

(b) Unless otherwise provided in the charter or in the bylaws adopted by the shareholders, a sale, lease or exchange of all or substantially all the property and assets of a corporation, not made for shares of the purchasing corporation, foreign or domestic, whether in a single transaction or a series of transactions, may be made by the board of directors without authorization from the shareholders if:

(1) In the judgment of the board of directors the corporation is in a failing condition and a sale for cash or its equivalent is deemed by them advisable in meeting the liabilities of the corporation, or

(2) The corporation was incorporated for the purpose of liquidating such property and assets, or

(3) The sale, lease or exchange is not made to terminate or dispose of the business in which the corporation was organized to engage, but merely as a transaction or one of a series of transactions, whether usual or unusual, to further the said business.

(c) Any other sale (whether for cash or for securities of the purchasing corporation or otherwise), or any other lease or exchange of all or substantially all the property of a corporation requires approval of the shareholders in the following manner:

(1) The board of directors shall adopt a resolution recommending such sale, lease or exchange and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(2) Written notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or a special meeting, shall state that the purpose or one of the purposes of such meeting is to consider the proposed sale, lease or exchange. If the sale, lease or exchange would give rise to a dissenter's right of payment for his shares under this Chapter, such notice shall contain a statement, displayed with reasonable prominence, to the effect that the dissenting shareholders are entitled, upon compliance with G.S. 55-113, including the 20-day notice requirement, to be paid the fair value of their shares as therein provided, but failure of the notice to contain such a statement shall not invalidate the sale, lease or exchange.

(3) At such meeting the shareholders may authorize such sale, lease or exchange and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Each outstanding share of the corporation shall be entitled to vote thereon, whether or not otherwise entitled to vote. Such authorization shall require the affirmative vote of at least two thirds of the outstanding shares of the corporation, unless any class of shares is entitled to vote as a class thereon, in which event such authorization shall require the affirmative vote of at least two thirds of the outstanding shares of each class of shares entitled to vote as a class thereon and two thirds of all other outstanding shares. Any class of shares shall be entitled to vote as a class if the sale, lease or exchange is for securities of another corporation, foreign or domestic, and such sale, lease or exchange is part of a plan of distribution of such securities that would effectuate such changes in

that class of shares as would entitle those shares to vote as a class if the changes were contained in a proposed amendment to the charter.

(d) The board of directors may, if so empowered by such authorization of the shareholders, abandon such sale, lease or exchange, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders. (1925, c. 235; 1929, c. 269; 1939, c. 279; G. S., s. 55-26; 1955, c. 1371, s. 1.)

Editor's Note. — For comment on the disposition of corporate assets, see 43 N.C.L. Rev. 957 (1965).

§ 55-113. Rights of objecting shareholders upon fundamental changes and certain exchanges of shares. — (a) As used in this section:

(1) "Sale of assets for shares" means a sale, exchange or other disposition of all, or substantially all, the property and assets of a corporation, if made for, or substantially for, shares of another corporation, foreign or domestic.

(2) "Corporation" includes, if the context so indicates, the successor corporation which acquires the property of the predecessor corporation upon merger, consolidation or sale of assets for shares.

(3) With respect to offers of exchange of shares which entitle the preferred shareholders designated in G.S. 55-102 to rights under this section, the term "effective date of the exchange" means the date on which the corporation first actually consummated such an exchange of shares or, in case it reserved the right to postpone the operation or effectiveness of all acceptances of its offer of exchange, the date on which it declared the acceptance operative or effective.

(b) Any shareholder designated in G.S. 55-101(b) as having rights under this section in connection with amendment of the charter or designated in G.S. 55-119(b) as having rights under this section in connection with dissolution and liquidation of assets in kind, or any shareholder of a corporation effecting a merger, consolidation or sale of assets for shares may give to the corporation, prior to or at the meeting of the shareholders to which the proposal of amendment, dissolution, merger, consolidation or sale of assets for shares is submitted to a vote, written notice that he objects to such proposal. Within 20 days after the date on which the vote was taken, such shareholder may, unless he voted in person or by proxy in favor of the proposal, make written demand on the corporation for payment of the fair value of his shares. Such demand shall state the number and class of shares owned by him. In addition to any other right he may have in law or equity, a shareholder giving such notice shall be entitled, if and when the amendment, dissolution, merger, consolidation or sale of assets for shares is effected, to be paid by the corporation the fair value of his shares, as of the day prior to the date on which the vote was taken, subject only to the surrender by him of the certificate representing his shares.

(c) Any holder of preferred shares designated in G.S. 55-102 as having a right to payment for his shares in connection with an offer of exchange of securities may, within 20 days after the date when the offer was mailed or otherwise reasonably dispatched to him, give to the corporation written notice that he objects to the terms of said offer of exchange and that he demands payment for his shares. Such notice shall state the number and class of shares owned by him. Twenty days after the effective date of the exchange or 20 days after the date of mailing or otherwise reasonably dispatching such notice, whichever date is later, a shareholder giving such notice shall, in addition to any other right he may have in law or equity, be entitled to be paid by the corporation the fair value of his shares as of the day preceding the mailing or otherwise reasonably

dispatching of the notice, unless all exchange or agreements to exchange theretofore made shall have been rescinded within the applicable 20-day period above mentioned, subject only to the surrender by him of his certificate representing his shares.

(d) If within 30 days after the date upon which the objecting shareholder becomes entitled to payment of his shares under subsections (b) and (c) of this section the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.

(e) If within the 30-day period mentioned in subsection (d) of this section the shareholder and the corporation do not agree as to the value of the shares the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of the appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. The fair value of any shares entitled to preference on liquidation shall in no event be found to be less than two thirds of the amount of the preference to which said shares would have been entitled on a voluntary liquidation on the date herein prescribed for determining fair value if under the corporate change giving rise to the preferred shareholder's rights of payment any shares junior thereto retain a participation in the corporation without payment for such retention, or if the participation received by them upon any payment for such retention is found to exceed in value the amount of the said payment. Upon payment of the judgment the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

(f) If in the notices sent to shareholders in connection with the meeting to vote upon a proposed amendment of the charter, dissolution, merger, consolidation or sale of assets for shares or if in the offer of exchange of securities described in G.S. 55-102 no reference is made as required by this Chapter to the provisions of this section, any shareholder entitled to but who did not avail himself of the provisions of this section, unless he voted for the proposal or accepted the offer of exchange of securities, is entitled, if he so demands in writing within one year after the effective date of the amendment, dissolution, merger, consolidation, sale of assets for shares or exchange of securities in question, to recover from the corporation any damage which he suffered from failure of the corporation to make the aforesaid reference.

(g) The liability to pay for shares or to pay damages imposed by this section on a corporation extends to the successor corporation which acquires the assets of the predecessor, whether by merger, consolidation or sale of assets for shares.

(h) Shares acquired by a corporation pursuant to payment of the agreed value thereof or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by the corporation as in the case of other treasury shares.

(i) The provisions of this section shall not apply to a merger if on the date of the filing of the articles of merger the surviving corporation is the owner of all the outstanding shares of the other corporation or corporations, domestic or foreign, participating in the merger and if such merger makes no changes in the relative rights of the shareholders of the surviving corporation. The provisions of this section shall also not apply to the shareholders of the surviving corporation if their approval of the merger is not required, as provided in G.S. 55-108.1(b).

(j) A shareholder may not exercise his rights under this section as to less than all of the shares owned beneficially by him and with respect to which such rights exist. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner with respect to which the right of dissent exists. (1925, c. 77, s. 1; 1943, c. 270; G. S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37.)

Editor's Note. — The 1973 amendment deleted "to the Supreme Court" following "right of appeal" near the end of the fourth sentence of subsection (e) and added the second sentence of subsection (i).

For note as to bad faith of the majority in close corporations, see 35 N.C.L. Rev. 271 (1957).

§ 55-113.1. Fundamental changes in reorganization proceedings. — (a) Whenever a plan of reorganization of a corporation has been or shall be confirmed by decree or order of a court of competent jurisdiction in proceedings for the reorganization of such corporation pursuant to the provisions of any applicable statute of the United States relating to reorganizations of corporations, the corporation may put into effect and carry out such plan and the decrees and orders of the court relative thereto and may take any proceeding and do any act provided in such plan or directed by such decrees and orders without further action by its directors or shareholders. Such action may be taken, as may be directed by such decrees or orders, by the trustee or trustees of such corporation appointed in the reorganization proceedings, or by designated officers of the corporation, or by a master or other representative appointed by the court, with like effect as if taken by unanimous action of the directors and shareholders of the corporation. In particular and without limiting the generality or effect of the foregoing, such corporation may:

(1) Amend its charter or bylaws, or both, so long as the charter and bylaws as amended contain only such provisions as might be lawfully contained therein at the time of making such amendment;
(2) Constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in addition to all or any of the directors or officers then in office;
(3) Make any change in its stated capital or surplus or in any or all of its outstanding shares or other securities, or cancel any or all of such outstanding shares or other securities;
(4) Dissolve and liquidate;
(5) Merge or consolidate;
(6) Transfer all or part of its assets;
(7) Change its registered office or registered agent, or both;

(8) Authorize the issuance of bonds, debentures or other obligations of the corporation, whether or not convertible into shares of any class or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of any class, and fix the terms and conditions thereof.

(b) Any articles of amendment, statement of classification of shares, statement of change or registered office and registered agent, certificate of reduction of capital, restated charter, articles of merger, articles of consolidation, articles of dissolution, statement of revocation of dissolution, certificate of completed liquidation, or any other document appropriate to complete any action permitted by this section shall be executed and filed in accordance with the provisions of this Chapter on behalf of the corporation by such person or persons as may be authorized to take such action pursuant to subsection (a).

(c) No action taken under this section shall give rise to any rights under G.S. 55-113, except as provided in the plan of reorganization.

(d) No action authorized by this section shall be taken after the entry of a final decree in the reorganization proceedings closing the case and discharging the trustee or trustees, if any. (1973, c. 469, s. 38.)

ARTICLE 9.

Dissolution and Liquidation.

§ 55-114. Dissolution and its effect. — (a) A corporation may be dissolved in any of the following ways:

(1) Upon expiration of any period of duration to which the corporation is limited by its charter, by executing and filing in the office of the Secretary of State in accordance with the provisions of G.S. 55-4 articles of dissolution setting forth (i) the name of the corporation, (ii) the names and respective addresses of its officers and directors, and (iii) a statement of the expiration date presently contained in its charter;

(2) By filing in the office of the Secretary of State articles of dissolution in voluntary proceedings for dissolution as prescribed in G.S. 55-116, 55-117 and 55-118;

(3) By entry of a decree of dissolution by the superior court in involuntary proceedings for dissolution by the Attorney General, as prescribed in G.S. 55-122, or in proceedings to liquidate the assets and business of the corporation, as described in G.S. 55-125;

(4) By suspension of its charter under the provisions of G.S. 105-230 when the time within which the corporation's rights might be restored under G.S. 105-232 has expired; however, the provisions for liquidation of corporate assets in such cases shall be those provided in G.S. 105-232 instead of those provided in this Chapter.

(b) A dissolved corporation, however dissolved, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and distribute its assets, but not for the purpose of continuing business except so far as necessary for winding up its affairs or except where G.S. 55-115 applies. Title to property of a dissolved corporation does not by reason of dissolution vest in its shareholders.

(c) After the end of the tax year in which dissolution occurs a dissolved corporation is not subject to the annual franchise tax unless it engages in business activities not reasonably incidental to winding up its affairs.

(d) The dissolution of a corporation shall not take away or impair any remedy available to or against such corporation for any right or claim, not covered by

subsection (f) of this section, existing or for any liability incurred prior to such dissolution if the action or proceeding is commenced within two years after the filing of a certificate of completed liquidation, and the plaintiff or petitioner must allege and prove that the action or proceeding is commenced within such period. Nothing herein shall extend any applicable period of limitation. No action or proceeding, civil or criminal, to which a corporation is a party shall abate by reason of such dissolution or filing. Any action or proceeding by or against a dissolved corporation may be prosecuted or defended by the corporation in its corporate name, and such use of the corporate name is also available to a shareholder prosecuting or defending in a derivative capacity on behalf of a dissolved corporation.

(e) A corporation dissolved under this or any prior act shall have the power to maintain, or to reestablish after failure to maintain, a board of directors and officers to wind up its affairs, and its shareholders, directors and officers shall have the power to take corporate action appropriate to that end.

(f) Even after the filing of a certificate of completed liquidation or the entry of a court order declaring liquidation completed, title to any corporate assets inadvertently omitted from a liquidation purportedly completed shall remain in the corporation and, for the purpose of administering or liquidating any such assets or determining the corporation's interest therein, the dissolved corporation shall have power to sue and defend in legal actions or proceedings and fully to act in its corporate name through either its board of directors and officers maintained or reestablished as permitted in this section or through a majority of the last board of directors then living, however reduced in numbers, acting either directly themselves or through the last officers of the corporation. (1955, c. 1371, s. 1; 1973, c. 469, ss. 39, 40.)

Editor's Note. — The 1973 amendment substituted "Upon" for "Automatically by" at the beginning of subdivision (1) of subsection (a) and added to that subdivision the language beginning "by executing and filing." The amendment also deleted "or in proceedings under G.S. 55-135" at the end of subdivision (3) of subsection (a).

Temporary Suspension of Charter. — Allegations in the complaint to the effect that plaintiff corporation's charter was temporarily suspended under § 105-230 less than a year prior to the institution of the action do not disclose that the corporation did not have legal capacity to institute the action. Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

When a corporation's charter is suspended pursuant to § 105-230, the same may be reinstated within five years upon payment of fees and taxes due the Revenue Department; and if the charter is not so reinstated within five years, then liquidation of corporate assets is as provided in § 105-232 rather than § 55-114 et seq. Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

Where a corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution. Lertz v. Hughes Bros., 208 N.C. 490, 181 S.E. 342 (1935).

Standing to Maintain Action on Contract. — A corporation whose articles of incorporation were suspended under § 105-230 for failure to pay taxes had standing under subsection (b) of this section to maintain an action to recover the amount due on a contract. Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

§ 55-115. Extension of duration after expiration. — (a) If a corporation has continued to conduct its business after the expiration of its charter, it may at any time amend its charter so as to extend or perpetuate its period of existence. Expiration of a charter does not of itself create any vested right on the part of any shareholder or creditor to prevent such charter amendment.

(b) No acts or contracts of a corporation during the period within which it could have extended its existence as permitted in this section, whether or not it has taken action so to extend its existence, shall be in any degree invalidated

by the expiration of the charter. (1929, c. 271; 1935, c. 6; G. S., s. 55-32; 1955, c. 1371, s. 1.)

Cited in Raleigh Swimming Pool Co. v. Wake Forest Country Club, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

§ 55-116. Voluntary dissolution by directors. — (a) A corporation may be voluntarily dissolved by majority vote of the directors then in office in the following cases:

(1) When the corporation has not commenced business and has not received any payment on any subscription to its shares.
(2) When a corporation has been adjudged to be bankrupt.
(3) When a corporation has made a general assignment for the benefit of creditors.
(4) By leave of court, when a receiver has been appointed in any suit in which the affairs of the corporation are to be wound up.
(5) When substantially all of the assets have been sold at judicial sale or have been sold for the purpose of terminating the business of the corporation.

(b) To effectuate dissolution under this section, articles of dissolution shall be executed by a majority of the directors then in office and shall be filed, in accordance with the provisions of G.S. 55-4, setting forth:

(1) The name of the corporation.
(2) The names and respective addresses of its officers, if any.
(3) The names and respective addresses of its directors.
(4) A statement showing one or more of the grounds of voluntary dissolution mentioned in subdivisions (1) to (5), inclusive, of subsection (a) of this section.
(5) That a majority of the directors have determined by majority vote to dissolve the corporation. (1955, c. 1371, s. 1.)

Cited in J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962).

§ 55-117. Voluntary dissolution by written consent of shareholders. — A corporation may be voluntarily dissolved pursuant to the written consent of all of its shareholders. No meeting or notice of meeting is necessary. To effectuate such dissolution, articles of dissolution shall be executed by the corporation and shall be filed, in accordance with the provisions of G.S. 55-4, setting forth:

(1) The name of the corporation.
(2) The names and respective addresses of its officers.
(3) The names and respective addresses of its directors.
(4) A statement that written consent to the dissolution of the corporation has been signed by all shareholders of the corporation or signed in their names by their attorneys thereunto duly authorized, which statement shall have attached thereto such written consent duly signed. (1901, c. 2, s. 34; Rev., s. 1195; C. S., s. 1182; 1941, c. 195; G. S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1.)

Cross Reference. — See note to § 55-118.

§ 55-118. Voluntary dissolution by action of directors and shareholders. — (a) A corporation may be voluntarily dissolved by action of the directors and shareholders in the following manner:

(1) The board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(2) Written or printed notice shall be given to each shareholder of record within the time and in the manner provided in this Chapter for giving of notice of meeting of shareholders, and, whether the meeting be an annual or special meeting, shall state that the purpose or one of the purposes is to consider the advisability of dissolving the corporation. If the proposal to dissolve contemplates a plan of liquidation whereby substantially all the assets distributable to the shareholders are to be conveyed, transferred, or assigned to them collectively as coowners, the notice shall so inform the shareholders and shall contain a statement displayed with reasonable prominence to the effect that dissenting shareholders are entitled, upon compliance with G.S. 55-113, to be paid the fair value of their shares as provided in that section, but failure of the notice to contain such a statement shall not invalidate the dissolution.

(3) At such meeting a vote may be taken on any resolution to dissolve the corporation. Each outstanding share of the corporation shall be entitled to vote thereon, whether or not otherwise entitled to vote. Such resolution shall be adopted upon receiving the affirmative vote of at least two thirds of the outstanding shares of the corporation, unless any class of shares is entitled to vote as a class thereon, in which event the resolution shall require for its adoption the affirmative vote of at least two thirds of the outstanding shares of each class of shares entitled to vote as a class thereon and of two thirds of the other outstanding shares.

(b) To effectuate such dissolution, articles of dissolution shall be executed by the corporation and shall be filed, in accordance with the provisions of G.S. 55-4, setting forth:

(1) The name of the corporation.

(2) The names and respective addresses of its officers.

(3) The names and respective addresses of its directors.

(4) A copy of the resolution adopted by the shareholders authorizing the dissolution of the corporation.

(5) The number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class.

(6) The number of shares voted for and against the resolution, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class and of the other outstanding shares voted for and against the resolution, respectively. (1901, c. 2, s. 34; Rev., s. 1195; C. S., s. 1182; 1941, c. 195; G. S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1.)

Editor's Note. — The paragraphs in the note below appeared under former § 55-121, which was the counterpart of this section and § 55-117 in the law in effect prior to July 1, 1957.

Statute Settled Mooted Questions. — As far as North Carolina is concerned, former § 55-121 settled the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

A Part of Every Charter. — The provision of the statute enters into every charter, and unless otherwise enacted by the legislature, every stockholder takes and holds his stock subject to the power of voluntary dissolution, by resolution of the directors concurred in by two thirds in interest of the stockholders. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

Directors Are Trustees. — The directors of a corporation in proceedings for dissolution are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

Motive for Dissolution Generally Immaterial. — When a corporation lawfully proceeds to wind up its affairs in accordance with the statute, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. White v. Kincaid, 149 N.C. 415, 63 S.E. 109 (1908).

Liquidation to Escape Judgment. — An attempted liquidation by a corporation, to escape judgment for the refund of money wrongfully distributed, is in fraud of creditors. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

Suits Pending Dissolution. — Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had under the statute, the proper party plaintiff being the corporation or a receiver appointed therefor. Worthington v. Gilmers, Inc., 190 N.C. 128, 129 S.E. 153 (1925).

§ 55-119. Procedure after filing articles of dissolution. — (a) After the filing of articles of dissolution in the office of the Secretary of State, the corporation shall, except in case of dissolution under G.S. 55-116(a)(2), (3) and (4), immediately cause notice of the dissolution to be mailed to each known creditor of the corporation, and to the Secretary of Revenue, and such notice shall be published once a week for four successive weeks in a newspaper published in the county wherein the corporation has its registered office, and, if there be no newspaper published in such county, then in some newspaper of general circulation in such county. The corporation shall then proceed to collect its assets, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs, including the collection of unpaid subscriptions necessary to equalize the agreed payments by subscribers of its shares. After paying or adequately providing for the payment of all its obligations, the corporation shall distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests.

(b) If liquidation is effected by transfer of assets in kind to the shareholders collectively as coowners, an objecting shareholder so demanding is entitled to be paid the fair value of his shares or damages in accordance with the provisions of G.S. 55-113. (1955, c. 1371, s. 1; 1973, c. 476, s. 193.)

Editor's Note. — The 1973 amendment substituted "Secretary of Revenue" for "Commissioner of Revenue."

The paragraphs in the note below were decided under the former statute relating to the distribution of funds upon the dissolution of a corporation.

How Assets Distributed. — When the receiver has collected the assets he is required to pay all the debts, if the funds are sufficient, and, if the funds are not sufficient, to distribute the same ratably, among all the creditors who prove their claims. When once the court of equity, through its receiver, takes charge of the assets, they are to be distributed pro rata among the creditors, subject to such priorities as have already accrued. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Property Does Not Revert or Escheat. — Upon the dissolution or extinction of a corporation for any cause, the real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. Wilson v. Leary, 120 N.C. 90, 26 S.E. 630 (1897), overruling Fox v. Horah, 36 N.C. 358 (1841).

Creditors Come before Stockholders. — A corporation cannot settle with its members, by the application of assets to the retirement or redemption of the stock of the shareholders, until it has first settled and discharged all its liabili-

ties, and any agreement among the shareholders looking to such arrangement will be void as to creditors. Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890).

Bondholders Held General Creditors. — Where payment of interest on bonds issued to preferred stockholders in reorganization of corporation was not restricted to payment out of earnings, but on the contrary the obligation was fixed and certain in the payment of interest out of assets of the corporation, this made and constituted the holders of such bonds under North Carolina statutory law general creditors. Bemis Hardwood Lumber Co. v. United States, 117 F. Supp. 851 (W.D.N.C. 1954).

§ 55-120. Revocation and cancellation of voluntary dissolution proceedings. — (a) At any time after the filing of articles of dissolution and prior to the filing of a certificate of completed liquidation, a dissolution effected under G.S. 55-116, 55-117 or 55-118 may be revoked by the filing of a statement of revocation of dissolution. The contents of such a statement and the proceedings taken so as to revoke a dissolution shall conform with such adaptations as are appropriate to revocation to either (i) those prescribed in the section under which the dissolution was effected, or (ii) those prescribed in G.S. 55-117 or 55-118.

(b) Upon the filing of such statement of revocation of dissolution in the office of the Secretary of State, the revocation of the voluntary dissolution proceedings shall become effective and the corporation may again carry on business.

(c) If a dissolution has been effected by the filing of articles of dissolution containing false statements of facts which if truthfully stated would not have met the requirements of this Chapter for a dissolution, any shareholder may maintain an action to cancel the said articles of dissolution and to restore the charter of the corporation unless liquidation has theretofore proceeded so far as to make such cancellation and restoration impracticable. Such action shall be brought in the county in which the corporation has its registered office or its principal place of business. Upon the filing in the office of the Secretary of State of a decree of cancellation of said articles of dissolution, the corporation's charter and its right to do business thereunder shall be thereby restored. (1955, c. 1371, s. 1.)

§ 55-121. Completion of liquidation in voluntary dissolution proceedings. — (a) When all liabilities and obligations of a dissolved corporation have been paid and discharged, or adequate provision has been made therefor, and all of the remaining property and assets of the corporation have been distributed to its shareholders pursuant to G.S. 55-119, a certificate of completed liquidation shall be executed by the corporation and shall be filed in accordance with the provisions of G.S. 55-4, setting forth:

(1) The name of the corporation.

(2) That articles of dissolution have theretofore been filed in the office of the Secretary of State, the date on which articles were filed, and that the dissolution thereby effected has not been revoked.

(3) That all liabilities and obligations of the corporation have been paid and discharged or that adequate provision has been made therefor.

(4) That the remaining property and assets of the corporation have been distributed among its shareholders in accordance with their respective rights and interests.

(b) Upon the filing of such certificate in the office of the Secretary of State in accordance with G.S. 55-4, the existence of the corporation shall cease except as otherwise provided in this Article.

(c) The Secretary of State shall not file the certificate of completed liquidation until the receipt by him of a notice from the Secretary of Revenue to the effect that such corporation has met the requirements with respect to reports and taxes required by the revenue laws of the State of North Carolina. (1901, c. 2, s. 34;

Rev., s. 1195; C. S., s. 1182; 1941, c. 195; G. S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1; 1973, c. 476, s. 193.)

Editor's Note. — The 1973 amendment substituted "Secretary of Revenue" for "Commissioner of Revenue."

§ 55-122. Involuntary dissolution in action by Attorney General. — A corporation may be dissolved involuntarily by a decree of the superior court in an action brought by the Attorney General in the name of the State when it is established that:

(1) The charter of the corporation was procured through fraud; or

(2) The corporation has without justification refused to comply with a final court order for the production of its books, records, or other documents as provided in G.S. 55-38; or

(3) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, continued to exceed or abuse the authority conferred upon it by law to the injury of the public or of its shareholders, creditors, or debtors; or

(4) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days to meet the requirements of G.S. 55-13 with respect to appointing and maintaining a registered agent in this State; or

(5) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days after change of its registered office or registered agent to file in the office of the Secretary of State the statement required by G.S. 55-14. (Code, ss. 604, 605, 694; 1889, c. 533; 1901, c. 2, s. 73; Rev., ss. 1196, 1198; C. S., ss. 1185, 1187; G. S., ss. 55-124, 55-126; 1955, c. 1371, s. 1.)

Cited in Starbuck v. Town of Havelock, 252 N.C. 176, 113 S.E.2d 278 (1960).

§ 55-123. Duties of Attorney General with respect to actions for involuntary dissolution. — Whenever the Attorney General has reason to believe that any corporation has given cause for dissolution as provided in G.S. 55-122 and the case involves the public interest, it is the duty of the Attorney General to bring an action under that section. If the cause for dissolution does not involve the public interest, the Attorney General has a duty to bring an action if satisfactory security is given to indemnify the State against the costs and expenses to be incurred thereby. (Code, s. 605; Rev., s. 1198; C. S., s. 1187; G. S., s. 55-126; 1955, c. 1371, s. 1.)

§ 55-124. Venue and service of process. — Every action by the Attorney General for the involuntary dissolution of a corporation shall be commenced in the superior court of the county in which the registered office of the corporation is situated. Summons shall issue and be served as in other civil actions. (1955, c. 1371, s. 1.)

§ 55-125. Power of courts to liquidate and decree involuntary dissolution. — (a) The superior court shall have power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that:

(1) The directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, so that the business can no longer be conducted to the advantage of all the shareholders; or

(2) The shareholders are deadlocked in voting power, otherwise than by virtue of special provisions or arrangements designed to create veto power among the shareholders, and for that reason have been unable at two consecutive annual meetings to elect successors to directors whose terms had expired; or

(3) All of the present shareholders are parties to, or are transferees or subscribers of shares with actual notice of a written agreement, whether embodied in the charter or separate therefrom, entitling the complaining shareholder to liquidation or dissolution of the corporation at will or upon the occurrence of some event which has subsequently occurred; or

(4) Liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder.

(b) The superior court shall have power to liquidate the assets and business of a corporation in an action by a creditor:

(1) When the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied; or

(2) When the corporation admits in writing that the claim of the creditor is due and it is established that the corporation is unable to pay its debts in the ordinary course of business.

(c) A court that has undertaken the liquidation of the assets and business of a corporation under subsections (a) or (b) of this section may at any time enter a decree dissolving the corporation, and shall upon application of any interested party enter an order declaring liquidation completed.

(d) Actions under this section shall be brought in the county in which the corporation has its registered office or its principal place of business.

(e) Summons shall issue and be served on the corporation as in other civil actions, and it shall not be necessary to make shareholders parties to any such actions unless relief is sought against them personally.

(f) The superior court shall have power to liquidate the assets and business of a corporation when an action has been filed by the Attorney General to dissolve a corporation and it is established that liquidation of its assets and business should precede the entry of a decree of dissolution. (1955, c. 1371, s. 1; 1959, c. 1316, s. 26.)

Showing Required under Subsection (a)(4). — When the power of the court in the exercise of its equitable jurisdiction is invoked to liquidate and decree involuntary dissolution under subsection (a)(4), there must be a showing that the liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

Sufficient Allegations under Subdivision (4) of Subsection (a). — The superior court has authority, in the exercise of its discretion, under subsection (a)(4) of this section, to order the liquidation of a corporation upon application of a stockholder alleging that the corporation had been operating at a loss and that to allow it to continue operations would deplete its assets and seriously damage the stockholders. Royall v. Carr Lumber Co., 248 N.C. 735, 105 S.E.2d 65 (1958).

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation. — A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings; and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market for his stock. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

Directors Are Proper Parties to Shareholder's Suit. — Directors are proper parties to a suit to dissolve the corporation upon the complaint of one shareholder, even though no relief is sought against them personally. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

They May Be Joined or Become Parties on Own Application. — The implication in this section is that directors and other interested shareholders may be made, or, on their own application, may become parties to a complaining shareholder's action to liquidate and dissolve

the corporation. Certainly, the directors are not improper parties. Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

As to necessity for service on shareholders in suit under former statute for dissolution of corporation, see Glod v. Castle Hayne Growers & Shippers, Inc., 239 N.C. 304, 79 S.E.2d 396 (1954).

As to involuntary liquidation under former statutes, see Asheville Div. No. 15, Sons of Temperance v. Aston, 92 N.C. 578 (1885); Simmons v. Norfolk & Baltimore Steamboat Co., 113 N.C. 147, 18 S.E. 117 (1893); Greenleaf v. Land & Lumber Co., 146 N.C. 505, 60 S.E. 424 (1908); Lasley v. Walnut Cove Mercantile Co., 179 N.C. 575, 103 S.E. 213 (1920); Jones v. A. & W.R.R., 193 N.C. 590, 137 S.E. 707 (1927); Bank of Andrews v. Gudger, 212 F. 49 (4th Cir. 1914).

§ 55-125.1. Discretion of court to grant relief other than dissolution. — (a) In any action filed by a shareholder to dissolve the corporation under G.S. 55-125(a), the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including, without limitation, an order:

(1) Canceling or altering any provision contained in the charter or the bylaws of the corporation; or

(2) Canceling, altering, or enjoining any resolution or other act of the corporation; or

(3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or

(4) Providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders, such fair value to be determined in accordance with such procedures as the court may provide.

(b) Such relief may be granted as an alternative to a decree of dissolution, or may be granted whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate. (1973, c. 469, s. 41.)

§ 55-126. Application for liquidation by court after dissolution. — A corporation, at any time after voluntary dissolution and during the liquidation of its business and affairs, may make application to the superior court of the county in which the registered office or principal place of business of the corporation is situated to have the liquidation conducted or continued under the supervision of the court and, upon the granting of such application, the liquidation shall proceed as provided in this Chapter. Similar application may be made after liquidation has been purportedly completed in either voluntary or involuntary dissolution, when it subsequently appears that newly discovered or inadvertently omitted assets require liquidation, and if no director or appropriate officer makes such application, the application may be made by any creditor or any shareholder or any person having an interest in such liquidation, including the University of North Carolina. (Code, ss. 619, 668, 669; 1901, c. 2, ss. 61, 62; Rev., ss. 1203, 1204; C. S., s. 1195; G. S., s. 55-134; 1955, c. 1371, s. 1.)

§ 55-127. Procedure in liquidation of corporation by court. — In an action to liquidate the assets and business of a corporation, the court shall appoint receivers and the receivers so appointed shall have such powers and duties as are provided in Article 38, Chapter 1 of the General Statutes of North Carolina. (1955, c. 1371, s. 1.)

Applied in Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964).

§ 55-128. Discontinuance of liquidation action. — The liquidation of the assets and business of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no

longer exists. In such event the court shall dismiss the action and direct the redelivery to the corporation of all its remaining property and assets, and shall decree cancellation of any prior dissolution. (1955, c. 1371, s. 1.)

Proceedings on motion by intervening stockholders to vacate an order appointing receivers are without prejudice to the rights of the interveners to petition the court to discontinue liquidation of the corporation under this section. Royall v. Carr Lumber Co., 248 N.C. 735, 105 S.E.2d 65 (1958).

§ 55-129. Duties of officials as to decrees and orders concerning dissolution or charter amendment. — A court decree effecting or canceling a dissolution of a corporation or canceling or altering any provision contained in its charter, or a court order declaring liquidation completed shall contain a direction to the clerk of that court promptly to file one certified copy of such decree or order with the Secretary of State and also to file a certified copy thereof with the register of deeds of the county wherein the corporation has its registered office. The fees for the preparation, certificates, and filing of such decree or order shall be taxed as a part of the costs in the action. The register of deeds shall record and index the order or decree in the Record of Incorporations; promptly after the recordation, the register shall note the fact of recordation on the said copy and return it to the corporation or its representative. If the corporation or its representative cannot be located, the register may destroy the copy. (1955, c. 1371, s. 1; 1967, c. 823, s. 19; 1969, c. 965, s. 1; 1973, c. 469, s. 42.)

Cross Reference. — See Editor's note to § 53-5.

Editor's Note. — The 1973 amendment inserted "or canceling or altering any provision contained in its charter" in the first sentence.

§ 55-130. Disposition of amounts due to unavailable shareholders and creditors. — Upon liquidation of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found shall be reduced to cash and deposited with the clerk of the superior court of the county of the registered office of the corporation to be held three months for the persons respectively entitled thereto, as and when satisfactory evidence of their right to the same is furnished. After the clerk has held the unclaimed cash for the aforesaid period of three months, he shall pay such assets to the State Treasurer, to be held without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. (1947, c. 613; c. 621, s. 1; G. S., s. 55-132; 1955, c. 1371, s. 1; 1971, c. 1135, s. 4.)

Editor's Note. — For comment on escheat of intangible property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

§ 55-130.1. Voluntary surrender of corporate rights and franchises by incorporators. — The incorporators named in the articles of incorporation may, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, surrender the existing corporate rights and franchises, by filing a certificate in the office of the Secretary of State in the manner prescribed by G.S. 55-4, verified by oath, that no part of the capital stock has been paid and received by the corporation and such business has not been begun, and surrendering all rights and franchises. Thereupon the

corporation becomes nonexistent and is cancelled as if such corporation had never been created. (1959, c. 1316, s. 26½.)

ARTICLE 10.

Foreign Corporations.

§ 55-131. Right to transact business. — (a) A foreign corporation shall procure a certificate of authority from the Secretary of State before it shall transact business in this State. No foreign corporation shall be entitled to procure a certificate of authority under this Chapter to transact in this State any business which a corporation organized under this Chapter is not permitted to transact. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or county under which such corporation is organized governing its organization and internal affairs differ from the laws of this State.

(b) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purpose of this Chapter, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions.

(4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts.

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State.

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same.

(8) Transacting business in interstate commerce.

(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature.

(c) No part of this section applies to insurance companies except subsection (b)(6). (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C. S., s. 1180; G. S., s. 55-117; 1955, c. 1371, s. 1.)

Editor's Note. — The paragraphs in the note below appeared under former § 55-117, relating to foreign corporations' powers existing independently of permission to do business.

For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966). For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971). For article on "Foreign Corporation Laws: The Loss of Reason," see 47 N.C.L. Rev. 1 (1968).

A Matter of Comity Only. — A corporation of one state may do business in another only by comity of the latter state, when not so permitted

by a valid federal statute, as in matters of interstate commerce, and may be prohibited from doing business therein entirely, or may be restricted with conditions made a prerequisite by statute. Lunceford v. Commercial Travelers Mut. Accident Ass'n, 190 N.C. 314, 129 S.E. 805 (1925). See Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896); Blackwell's Durham Tobacco Co. v. American Tobacco Co., 145 N.C. 367, 59 S.E. 123 (1907).

Power to Acquire and Sell Land. — Foreign corporations, having a right under their charters to acquire and sell land, can exercise such rights in this State to the same extent that corporations of this State can do so. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Substituted Service Proper against Domesticated Foreign Corporation Wherever Cause of Action Arose. — A foreign corporation which has complied with this Article and has been duly authorized to do business in this State, may be sued in this State by substituted service on the Secretary of State on a cause of action arising either inside or outside the State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Mere soliciting or procuring orders through employees or agents, where such orders require acceptance without this State before becoming binding contracts, does not constitute "transacting business" in this State. Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Facts held to constitute more than "soliciting or procuring orders" requiring acceptance without the State. See Dumas v. Chesapeake & O. Ry., 253 N.C. 501, 117 S.E.2d 426 (1960).

Stated in Westarc Leasing Corp. v. Capital Sign Serv., Inc., 268 N.C. 601, 151 S.E.2d 204 (1966).

Cited in Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

§ 55-132. Powers of foreign corporation. — (a) A foreign corporation which shall have received a certificate of authority under this Chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this Chapter, enjoy the same, but not greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued.

(b) A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death, except that a foreign corporation chartered under the banking laws of Georgia, South Carolina, Tennessee or Virginia or as a national banking association in any said states may act as testamentary trustee, or executor in this State if:

(1) It has a bona fide capital of at lease two hundred and fifty thousand dollars ($250,000) actually paid in;

(2) It is authorized to act in such fiduciary capacity in the state in which it is incorporated or if such foreign corporation be a national banking association in the state in which it has its principal place of business; and

(3) Any bank or other corporation organized under the laws of this State or a national banking association having its principal place of business in this State is permitted by law to act in such fiduciary capacity in the state in which such foreign corporation seeking to act in this State is organized or in which it has its principal place of business if it is a national banking association without further showing or qualification other than that it is authorized to act in such fiduciary capacity in this State and upon compliance with the laws of such other state, if any, concerning service of process on nonresident fiduciaries.

Unless assets of the estate are to be removed from within the State of North Carolina, such foreign corporations seeking to act as testamentary trustee, or executor in this State, upon qualifying to act in such fiduciary capacity, shall not be required by law to give bond except as required of a resident corporate fiduciary in like circumstances. No officer, employee or agent of any such foreign corporation shall be eligible or entitled to serve as testamentary trustee, or executor in this State whether such officer, employee, or agent is a resident

or a nonresident of this State if such officer, employee, or agent is acting as testamentary trustee, or executor on behalf of any such foreign corporation except when such foreign corporation itself shall be eligible to so serve.

A foreign corporation qualifying as testamentary trustee or executor under the provisions of this section shall appoint a process agent in the same manner as now provided under G.S. 28-186 in the case of nonresident executors. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C. S., s. 1180; G. S., s. 55-117; 1955, c. 1371, s. 1; 1969, c. 839.)

Editor's Note. — Section 28-186, referred to in the last paragraph of this section, was repealed by Session Laws 1973, c. 1329, s. 1, effective July 1, 1975.

The paragraphs in the note below appeared under former § 55-118, which provided for domestication of foreign corporations in the law in effect prior to July 1, 1957.

Corporation Not Restricted to Authority Conferred in Home State. — A corporation incorporated in another state with authority to conduct business in North Carolina, which has complied with the statutes of this State, can maintain an action in the courts of this State although its charter may not authorize it to do business in the state of its incorporation. Troy & N.C. Gold Mining Co. v. Snow Lumber Co., 173 N.C. 593, 92 S.E. 494 (1917).

Right to Sue and Be Sued. — Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of the statute, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation. Smith-Douglass Co. v. Honeycutt, 204 N.C. 219, 167 S.E. 810 (1933).

When a foreign corporation complies with the provisions of the statute as to "domestication," it subjects itself to the laws of this State and acquires in return certain compensating rights and privileges. Among these is the right to sue and be sued in the State courts under the rules and regulations which apply to domestic corporations. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

Section 1-80 Does Not Apply. — A foreign corporation domesticated under the statute may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. In such case § 1-80 does not apply. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

For purposes of venue domesticated foreign corporations are residents of the State. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

Right to Remove to Federal Courts. — A foreign corporation by compliance with the statute as to "domestication" does not lose its right to remove to the federal courts on the ground of diverse citizenship. Southern Ry. v. Allison, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903).

Property Not Removed to State. — The statute requiring "domestication" enables a plaintiff to get personal service upon a foreign corporation, but does not remove its property to the State nor the situs of its debts created elsewhere. Strause Bros. v. Aetna Fire Ins. Co., 126 N.C. 223, 35 S.E. 471 (1900).

How Charter Proven. — The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the Secretary of State of the state in which the corporation was created. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Effect of Domestication of Insurance Company. — See Occidental Life Ins. Co. v. Lawrence, 204 N.C. 707, 169 S.E. 636 (1933).

§ 55-133. Dismissal of actions against foreign corporations. — (a) No action in the courts of this State shall be dismissed solely on the ground that it involves the internal affairs of a foreign corporation but the court may in its discretion dismiss such an action if it appears that more adequate relief can be granted or that the convenience of the parties would be better served by an action brought in the jurisdiction of its incorporation or in the jurisdiction where the corporation has its executive or managerial headquarters or, because of the circumstances, in some other jurisdiction.

(b) Any action upon a cause of action not arising out of business transacted or activities performed in this State brought against a foreign corporation by a nonresident of this State may in the discretion of the court be dismissed if it appears that the convenience of the parties would be better served by an action brought in some other jurisdiction. (1955, c. 1371, s. 1.)

Under the former law it was held that the courts of North Carolina had not the power to and would not interfere with the internal management of the business matters of foreign corporations. Howard v. Mutual Reserve Fund Life Ass'n, 125 N.C. 49, 34 S.E. 199 (1899); Reid v. Norfolk S.R.R., 162 N.C. 355, 78 S.E. 306 (1913).

Action to Compel Declaration of Dividend by Foreign Corporation. — Whether the courts of North Carolina will entertain an action to compel the declaration of a dividend by a foreign corporation rests on expediency and convenience under subsection (a) of this section, and where in such action it appears that the foreign corporation is doing business in North Carolina, that the question of declaring dividends had heretofore been determined by its directors in regular meetings in this State, and that the court has power to enforce any decree it may render by order directed to a majority of the directors of the corporation who reside in the State, a motion to dismiss the action for want of jurisdiction was properly denied. Belk v. Belk's Dep't Store of Columbia, S.C., Inc., 250 N.C. 99, 108 S.E.2d 131 (1959).

§§ 55-134 to 55-136: Omitted.

§ 55-137. Corporate name of foreign corporation. — (a) No certificate of authority shall be issued to a foreign corporation unless the corporate name of such corporation shall contain the wording "corporation," "incorporated," "limited," or "company," or shall contain an abbreviation of one of such words, or such corporation shall, for use in this State, add at the end of its name one of such words or an abbreviation thereof.

(b) The corporate name shall not contain any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(c) The corporate name shall not be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or any foreign corporation, whether for profit or not for profit, authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered in the manner prescribed in G.S. 55-12, except that the Secretary of State may in his discretion issue a certificate of authority to a foreign corporation which has a corporate name the same as or similar to that of some other domestic corporation or foreign corporation authorized to transact business in this State:

(1) If the Secretary of State finds, upon proof by affidavit or otherwise, that such corporations are not engaged in the same or similar businesses and that the public is not likely to be confused or deceived, and if, upon requirement by the Secretary of State in his discretion, such foreign corporation agrees in its application for certificate of authority to add to its corporate name in this State words indicating the state or country under the laws of which it is incorporated; or

(2) If the foreign corporation agrees in its application for certificate of authority to do business in this State only under an assumed name that would be available for use in this State, in which event such corporation shall thereafter comply with all of the provisions of law, including the provisions of G.S. 66-68 through 66-71, relating to doing business under an assumed name and such assumed name shall be deemed to be the name of such foreign corporation in this State and shall be entitled to the same protection under this Chapter as if it were the name of such foreign corporation.

(d) Whenever a foreign corporation which is authorized to transact business in this State shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of such corporation shall not be deemed to permit the use in its business in this State of the new name nor shall any new certificate of authority be granted to it under the new name.

(e) The issuance of a certificate of authority to any foreign corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, or of the common law; and the issuance of such certificate shall not be a defense to an action for violation of any such rights. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C. S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G. S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 27; 1969, c. 751, s. 40; 1971, c. 1093, s. 1; 1973, c. 469, s. 45.4.)

Editor's Note. — The 1973 amendment added subsection (e).

§ 55-138. Application for certificate of authority. — (a) A foreign corporation, in order to procure a certificate of authority to transact business in this State, shall make application therefor to the Secretary of State, which application shall set forth:

(1) The name of the corporation and the state or country under the laws of which it is incorporated.

(2) If the name of the corporation does not contain the word "corporation," "incorporated," "limited," or "company," or does not contain an abbreviation of one of such words, then the name of the corporation with the word or abbreviation which it elects to add thereto for use in this State; or if the corporation agrees under G.S. 55-137(c) to add to its corporate name in this State words indicating its jurisdiction of incorporation or agrees to do business under an assumed name, then the name of the corporation with the words so added or the assumed name which name must contain the words or abbreviations required by this subdivision.

(3) The date of incorporation and the period of duration of the corporation.

(4) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated.

(5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the corporation in this State, and the name of its proposed registered agent in this State at such address.

(6) The purpose or purposes of the corporation which it proposes to pursue in the transaction of business in this State.

(7) The names and respective addresses of the directors and officers of the corporation.

(8) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(9) A statement of the aggregate number of issued shares itemized by classes, par value of shares, shares without par value, and series, if any, within a class.

(10) A statement that, in consideration of the issuance of a certificate of authority to transact business in this State, the corporation appoints the Secretary of State of North Carolina as its agent to receive service of process, notice, or demand whenever the corporation fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office.

(b) Such application shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application. (1955, c. 1371, s. 1; 1957, c. 979, s. 8; 1969, c. 751, s. 41.)

Cross References. — As to required filing of corporate charter, see § 55-139. As to limitations on authority of Secretary of State to act as process agent, see § 55-143.

The location of the principal office and place of business of a corporation is a fact. The instrument a foreign domesticated corporation is required to file in the office of the Secretary of State under this section is merely notice of that fact. It is not required for the benefit of the corporation but for the information of the public. And it does not, in and of itself, fix the location of the place of business of the corporation which files the same. Noland Co. v. Laxton Constr. Co., 244 N.C. 50, 92 S.E.2d 398 (1956), construing former § 55-118.

Venue of Action against Domesticated Foreign Corporation. — Where it was found that defendant was a domesticated foreign corporation doing extensive business in the middle district of North Carolina and maintained warehouses in Salisbury, High Point, Asheboro, Greensboro and Durham from which it distributed in the middle district its products, under both the State law and federal rules of procedure the venue was properly placed in the middle district of North Carolina. Graham v. Taylor Biscuit Co., 157 F. Supp. 496 (M.D.N.C. 1957), construing former § 55-118.

A foreign corporation which duly domesticates in this State pursuant to subdivision (5) of subsection (a) is to be treated like a domestic corporation for venue purposes. Moore Golf, Inc. v. Shambley Wrecking Contractors, Inc., 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Section Inapplicable Where Foreign Corporation Has Complied with Requirements for Domestication. — Where a foreign corporation has complied with the statutory requirements for domestication it is not required to file with the Secretary of State the certificate prescribed by this section, nor is it required to notify the Secretary of State of its principal office in this State. Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

§ 55-139. Filing of application for certificate of authority. — (a) The application of the corporation for a certificate of authority and one conformed copy thereof shall be delivered to the Secretary of State, together with one copy of its articles of incorporation and all amendments thereto, or where that is permitted by the laws of the place of its incorporation, one copy of its restated or integrated or consolidated charter, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

(b) If the Secretary of State finds that the application conforms to law he shall, when all taxes and fees have been tendered as in this Chapter prescribed:

(1) Endorse on each of such documents the word "filed" and the hour, day, month, and year of the filing thereof.

(2) File in his office the application and the copy of the articles of incorporation and amendments thereto or of one of the substitute documents mentioned in subsection (a) of this section.

(3) Issue a certificate of authority to transact business in this State to which he shall affix the conformed copy of the application.

(4) Send to the corporation or its representative the certificate of authority, together with the conformed copy of the application affixed thereto. (1901, c. 2, s. 57; 1903, c. 76; Rev., s. 1194; 1915, c. 263; C. S., s. 1181; 1935, c. 44; 1939, c. 57; G. S., s. 55-118; 1953, c. 1152; 1955, c. 1371, s. 1.)

§ 55-140. Effect of certificate of authority. — Upon the issuance of a certificate of authority by the Secretary of State, the corporation shall be authorized to transact business in this State for those purposes set forth in its application, subject, however, to the right of this State to suspend or to revoke such authority as provided in this Chapter. (1955, c. 1371, s. 1.)

§ 55-141. Registered office and registered agent of foreign corporation. — Each foreign corporation authorized to transact business in this State shall establish and continuously maintain in this State:

(1) A registered office which may be, but need not be, the same as its place of business in this State.

(2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office,

or a domestic corporation or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office. (1901, c. 5; Rev., s. 1243; C. S., s. 1137; G. S., s. 55-38; 1955, c. 1371, s. 1.)

Merger of Express Companies. — An express company conveyed its property used in transportation, for its appraised value, to the American Railway Express Company, formed at the suggestion of the Director General of Railways, etc., under government control, but retained property of very large value, so that it remained perfectly solvent, and continued to do business under its franchise, having its own officials and shareholders distinct from those of the new corporation. In such a case the American Railway Express Company was not affected by the provisions of former § 55-38, requiring foreign corporations to keep a process agent in this State. McAlister v. American Ry. Express Co., 179 N.C. 556, 103 S.E. 129 (1920).

§ 55-142. Change of registered office or registered agent of foreign corporation. — (a) A foreign corporation authorized to transact business in this State may change its registered office or change its registered agent, or both, upon filing in the office of the Secretary of State a statement setting forth:

(1) The name of the corporation.

(2) The address, including county and city or town, and street and number, if any, of its then registered office.

(3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any, to which the registered office is to be changed.

(4) The name of its then registered agent.

(5) If its registered agent be changed, the name of its successor registered agent.

(6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(b) Such statement shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and vertified by one of its officers signing the statement.

(c) If the Secretary of State finds that such statement conforms to the provisions of this Chapter, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective.

(d) In lieu of the procedure set out in subsection (a) above, the location of the registered office of a foreign corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of each of the corporations recited in the certificate. The fee to be charged by the Secretary of State for the filing of such certificate shall be a fee of three dollars ($3.00) for each corporation listed in said certificate. (1955, c. 1371, s. 1; 1957, c. 979, ss. 9, 10; 1965, c. 298, s. 2.)

Editor's Note. — For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

Effect of Failure to File Notice of Change of Residence. — A foreign corporation which neglected for a period of 18 days to file notice of change of its residence could not take advantage of its own delay by filing a suit in the county of its old residence. Noland Co. v. Laxton Constr. Co., 244 N.C. 50, 92 S.E.2d 398 (1956), decided

under former statute, requiring a foreign corporation to file certain information, including the location of its principal office in this State, with the Secretary of State as a prerequisite to obtaining permission to do business in this State.

§ 55-143. Suits against foreign corporations authorized to transact business in this State. — (a) The registered agent appointed by a foreign corporation authorized to transact business in this State shall be an agent of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

(b) Whenever a foreign corporation authorized to transact business in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served.

(c) Service on any such agent may be made in a suit upon any cause of action, whether or not arising in this State or arising out of business transacted in this State, and whether or not the cause of action runs in favor of a resident of this State. (1901, c. 5; Rev., s. 1243; C. S., s. 1137; G. S., s. 55-38; 1955, c. 1371, s. 1.)

Cross Reference. — As to what constitutes doing business in State, see note under § 55-144.

Editor's Note. — The paragraphs in the note below appeared under former § 55-38, which was the counterpart of this section and § 55-144 in the law in effect prior to July 1, 1957.

Subsection (c) of this section changed the rule laid down in Central Motor Lines v. Brooks Transp. Co., 225 N.C. 733, 36 S.E.2d 271, 162 A.L.R. 1419 (1945); Hamilton v. Atlantic Greyhound Corp., 220 N.C. 815, 18 S.E.2d 367 (1942); King v. Robinson Transfer Motor Lines, 219 N.C. 223, 13 S.E.2d 233 (1941); Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

Constitutionality. — Former § 55-38, similar to this and the following section, was held constitutional. Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956); Fisher v. Ins. Co., 136 N.C. 217, 48 S.E. 667 (1904); Currie v. Golconda Mining & Milling Co., 157 N.C. 209, 72 S.E. 980 (1911).

The purpose of former § 55-38 was, in recognition of reciprocal duties, to prevent a foreign corporation from accepting protection of our laws in the transaction of its ordinary business, create obligations and, by reason of its remoteness from any forum available to a local citizen, secure immunity from liability. State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 225 N.C. 198, 34 S.E.2d 78 (1945).

Liberal Construction. — Within reasonable limits the statute relating to service of process on foreign corporations should be liberally construed to accomplish its remedial purpose. State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 225 N.C. 198, 34 S.E.2d 78 (1945).

Domesticated Foreign Corporation May Be Sued Like Domestic Corporation. — The policy of this section is to treat the foreign corporation which is authorized to transact business in this State just as a domestic corporation is treated, insofar as suability is concerned. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Service on Insurance Company. — In Fisher v. Ins. Co., 136 N.C. 217, 48 S.E. 667 (1904), it was held that service of process on an insurance company was not restricted to the method prescribed by § 58-153 but might be made also in the manner prescribed by former § 55-38. Pardue v. Absher, 174 N.C. 676, 94 S.E. 414 (1917).

Secretary of State Becomes Process Agent If There Is No Registered Agent. — If a foreign corporation fails to appoint or maintain a registered agent in this State, or whenever such agent cannot be found, then the Secretary of State becomes an agent upon whom process may be served. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Service on Process Agent of Subsidiary Owned by Foreign Corporation. — A foreign corporation, which contracted with and sold farm equipment to dealers in North Carolina for resale through a wholly owned subsidiary, was not doing business in the State and was not subject to suit in North Carolina by virtue of process served on the process agent of the subsidiary corporation. Harris v. Deere & Co., 128 F. Supp. 799 (E.D.N.C.), aff'd, 223 F.2d 161 (4th Cir. 1955).

Express consent to substituted service is required at the time the foreign corporation domesticates, and such express consent has been held to cure the constitutional difficulty presented by transitory causes of action. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Thus, Domesticated Foreign Corporation May Be Sued by Substituted Service on Transitory Cause of Action. — A foreign corporation which has complied with this Article and has been duly authorized to do business in this State, may be sued in this State by substituted service on the Secretary of State on a cause of action arising either inside or outside the State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Whether or Not Suit Relates to Business Transacted in State. — This section sanctions a suit in this State against a foreign corporation authorized to transact business in this State by service on the registered agent, or on the Secretary of State if there is no such agent, whether or not it relates to business transacted in this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

But Section Is Inapplicable to Undomesticated Foreign Corporations. — This section applies to service of process on a foreign corporation only in those instances in which the corporation has domesticated here, regardless of whether or not the cause of action arose in this State and regardless of whether the action relates to business transacted in this State, and this section has no application to a foreign corporation which has not domesticated here. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Substituted Service in Action against Such Corporation for Tort Committed outside State Is Unauthorized. — No statute in North Carolina authorizes service upon the Secretary of State in an action against an undomesticated foreign corporation doing business in this State or a tort committed outside this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

A federal land bank created by act of Congress and deriving its right to own property and to do business in this State solely through a federal statute is not a foreign corporation exercising such functions under express or implied authority of this State, and former § 55-38 was not applicable to such a corporation, and our courts acquired no jurisdiction over it by service as provided in that section. Leggett v. Federal Land Bank, 204 N.C. 151, 167 S.E. 557 (1933).

Foreign Corporation May Plead Statute of Limitations. — A foreign corporation which has complied with the requirements of the statute in maintaining an agent in this State upon whom process may be served, as well as a public service corporation doing business in this State, may plead the statute of limitations. Volivar v. Richmond Cedar Works, 152 N.C. 656, 68 S.E. 200 (1910), overruling Green v. Insurance Co., 139 N.C. 309, 51 S.E. 887 (1905). See also State ex rel. Anderson-Oliver v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

The nonresidence of a foreign corporation will not prevent the running of the statute of limitations in its favor, where constantly from the accrual of the cause of action it might have been served with summons under the provisions of a statute. Smith v. Finance Co. of America, 207 N.C. 367, 177 S.E. 183 (1934).

Formal Compliance Not Required. — Formal compliance with the statutory requirements for domesticating foreign corporations and the appointment of process agents is not required in order to entitle such corporations to the benefit of the statute of limitations; it is sufficient if such corporations doing business within the State have been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments in personam against them. State ex rel. Anderson-Oliver v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

For other case applying former statute, see Housing Auth. v. Brown, 244 N.C. 592, 94 S.E.2d 582 (1956).

Cited in Abney Mills v. Tri-State Motor Transit Co., 268 N.C. 313, 150 S.E.2d 585 (1966); Shew v. Royce Chem. Co., 5 N.C. App. 444, 168 S.E.2d 701 (1969).

§ 55-144. Suits against foreign corporations transacting business in the State without authorization. — Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served. (1901, c. 5; Rev., s. 1243; C. S., s. 1137; G. S., s. 55-38; 1955, c. 1143; c. 1371, s. 1.)

Cross Reference. — See note to § 55-145.

Editor's Note. — The cases in the note below bearing dates earlier than 1958 were decided under former § 55-38, which governed service of process on foreign corporations under the law in effect prior to July 1, 1957.

For note on jurisdiction over foreign corporations, see 35 N.C.L. Rev 546 (1957).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971). For case law survey on conflict of laws, see 43 N.C.L. Rev. 895 (1965).

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965). For note on jurisdiction over foreign corporations not qualified to transact business in North Carolina, see 44 N.C.L. Rev. 449 (1966).

Constitutionality. — The former statute, similar to this section and § 55-143, was held constitutional. Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956).

This section and § 55-146 apply exclusively to foreign corporations. Whether analogous statutes applicable to nonresident unincorporated associations should be enacted is for legislative determination. Melton v. Hill, 251 N.C. 134, 110 S.E.2d 875 (1959).

Doing Business in State Is Acceptance of Statute. — Where foreign corporations come into the State to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are regarded as conditions on which they are allowed to do business within the State, and their doing business here thereafter is an acceptance by them of the statutory method and a recognition of its validity to confer jurisdiction on our courts by service thereunder. State ex rel. Anderson-Oliver v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

Section Preserves Rule as to Substituted Service on Undomesticated Foreign Corporations. — The rule as to substituted service on foreign corporations which transact business in this State without domesticating is preserved by this section. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Such Corporation May Not Be Sued on Transitory Foreign Cause of Action. — A foreign corporation which has done business in the State without complying with the law may not be brought into court on a transitory foreign cause of action. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

This Section Gives No Jurisdiction of Such Causes of Action. — This section provides no jurisdiction in this State for foreign transitory causes of action. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

The provisions of this section are not available for transitory foreign causes of action. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Thus, There Cannot Be Substituted Service on Such Corporation in Action on Foreign Tort. — If a foreign corporation, not domesticated in North Carolina, were transacting business in this State, it could not be brought into court in this State under this section by service of process upon the Secretary of State in an action based on a tort occurring in Virginia. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

No statute in this State authorizes service upon the Secretary of State in an action against an undomesticated foreign corporation doing business in this State for a tort committed outside this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

While defendant was doing business in this State during the time its agent was here managing a domestic carrier, the cause of action did not arise out of business so transacted in this State, and therefore service of process under this section by service on the Secretary of State was a nullity. Abney Mills v. Tri-State Motor Transit Co., 268 N.C. 313, 150 S.E.2d 585 (1966).

Cause of Action Must Arise in This State for Substituted Service. — An action based upon substituted service on the Secretary of State may be maintained against an undomesticated foreign corporation only on causes arising within the State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

But Service Is Not Authorized in Every Case Where Cause of Action Arose in This State. — This section does not authorize service of summons upon the Secretary of State in all cases where the cause of action arose in this State. Abney Mills v. Tri-State Motor Transit Co., 268 N.C. 313, 150 S.E.2d 585 (1966).

And This Section Limits Such Service to Causes of Action from Business Transacted in State. — This section expressly limits substituted service upon the Secretary of State where the foreign corporation has not domesticated, to suits upon a cause of action arising out of business transacted in this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

This section applies only when the cause of action against a foreign corporation arises out of business conducted by it in this State, and therefore, when a transitory cause of action arises in another state, this section can have no application. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

For the service of process upon the Secretary of State to be valid and binding upon defendant, two things must exist, by reason of the express provisions of this section: (1) Defendant must have transacted business in this State, and (2) the cause of action here must have arisen out of such business. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Cause of Action Arising Out of Business Conducted in State Is Not Transitory. — Where the defendant was conducting business in this State with the plaintiff and other residents of this State and maintained an office in

this State for that purpose and where a substantial portion of plaintiff's cause of action arose out of such business, the cause of action is not a transitory one arising in another state but is local in nature. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Mere Fact of Personal Service Insufficient to Create Jurisdiction. — The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

There are three conditions precedent to valid service under this section, namely: (1) The foreign corporation must transact business in this State; (2) the foreign corporation must transact business in this State without first procuring a certificate of authority from the Secretary of State; and (3) there must be a cause of action arising out of such business. Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968).

This section requires more "contacts" in North Carolina than § 55-145, which provides for service on foreign corporations even though not transacting business in this State. Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958).

This section concerns "foreign corporations transacting business in the State" and, therefore, necessarily seems to be more restrictive in its application than § 55-145, the latter section dealing with "foreign corporations not transacting business" in the State. The foreign corporation must have more contacts with the forum state in order to come within the statutory limits of this section. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966); Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968); Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968).

More contacts with the forum State are required in order to come within the limits of this section than are required under § 55-145. Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968).

Effect of Change from "Doing Business" to "Transacting Business". — Prior to 1955, the statute comparable to the present section required that a foreign corporation be "doing business" in this State, and most of the decisions of the North Carolina Supreme Court are under this earlier statute. However, it is generally considered that changing the statute from "doing business" to "transacting business" only had the effect of liberalizing it. Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958); Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

The present North Carolina statute was enacted after the landmark decision in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), wherein the old jurisdictional tests of "consent," "presence," and "doing business" were discarded and a qualitative test of "minimum contacts" was established for determining the constitutional limits on a state court's jurisdictional reach. North Carolina's previous statute had used the phrase "doing business," and in July 1957 this was replaced with the present § 55-144 and its "transacting business" phraseology. In Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965), this present language was held to be more liberal than the previous "doing business." Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

The meaning of the expression "doing business in this State," as used in former § 55-38, is also accurate as to the meaning of "shall transact business in this State," as used in this section. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

What Constitutes Doing Business. — The expression "doing business in this State," as used in a former statute of similar import, means engaging in, carrying on or exercising, in this State, some of the things, or some of the functions, for which the corporation was created. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950); Troy Lumber Co. v. State Sewing Mach. Corp., 233 N.C. 407, 64 S.E.2d 415 (1951); Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956); Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958); Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

The phrase "doing business in this State" is not susceptible of an all embracing definition, and each case must be decided upon the particular facts therein appearing, the general criteria being that a foreign corporation is doing business in this State if it transacts in this State the business it was created and authorized to do, through representatives in this State, and thus is present in this State through the person of its representatives. Parris v. H.G. Fischer & Co., 219 N.C. 292, 13 S.E.2d 540 (1941).

Where a corporation is engaging in, carrying on, and exercising in this State some of the functions for which it was created, which are of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction and laws of the State, the statute providing for substituted service on the Secretary of State is applicable. Troy Lumber Co. v. State Sewing Mach. Corp., 233 N.C. 407, 64 S.E.2d 415 (1951).

Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

The business done by the corporation in this State must be of such nature and character as to warrant the inference that the corporation has

subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Transacting business within the State is defined as the transaction within the State of some substantial part of a party's ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and must be of such a character as will give rise to some form of legal obligations. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

In Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965), "transacting business" was construed as activities in North Carolina which are " 'substantial,' 'continuous and systematic,' and 'regular,' as distinquished from 'casual,' 'single' or 'isolated acts.' " Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Presence in the State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Same — Within the State. — A foreign corporation cannot be held to be doing business in a state, and therefore subject to its laws, unless it shall be found as a fact that such corporation has entered the state in which it is alleged to be doing business and there transacted, by its officers, agents or other persons authorized to act for it, the business in which it is authorized to engage by the state under whose laws it was created and organized. The presence within the state of such officers, agents or other persons, engaged in the transaction of the corporation's business with citizens of the state, is generally held as determinative of the question as to whether the corporation is doing business in the state. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950), citing Commercial Inv. Trust, Inc. v. Gaines, 193 N.C. 233, 136 S.E. 609 (1927).

In determining the question whether a foreign corporation is doing business within a state, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts, in accordance with statutory provisions for such service, it has been generally held that the foreign corporation must have entered the state and must have been within the state during the time such business was transacted. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Same — Question of Due Process under United States Constitution. — Whether a foreign corporation is doing business in North Carolina, so as to subject it to the jurisdiction of the State's courts, is essentially a question of due process of law under the United States Constitution, Amendment 14, which must be decided in accord with the decisions of the United States Supreme Court. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Whether defendant, on the day the alleged liability for damages was incurred, was engaged in business activities within the State, and thus was validly served with process under the statute, is a question of due process of law under the Constitution of the United States, which must be determined in harmony with the decisions of the Supreme Court of the United States. Harrison v. Corley, 226 N.C. 184, 37 S.E.2d 489 (1946). See Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Same — Invocation of Benefits of Law of Forum. — A relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum. United States v. Atlantic Contractors, Inc., 231 F. Supp. 356 (E.D.N.C. 1964).

Same — Continuity of Conduct. — The court has been careful not to bring within the purview of the statute sporadic activities of a foreign corporation which are not directly in performance of its charter functions, or which are not of such a character as to indicate a course of business which might be expected to recur as opportunity offered; but the nature of the activities themselves, their magnitude, the multiplicity of contracts, the possibility that incidents may occur and liabilities be created — especially where the entrance into the State is in the ordinary prosecution of the business which the corporation is chartered to carry on and is carrying on, and which definitely regards the State as a theater for future transactions of a like sort as often as occasion might arise — these are important considerations in determining whether a corporation is, in a given instance, doing business in the State. On a single visitation to the State the matter in hand may explode into a multitude of transactions of far-reaching importance. State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 225 N.C. 198, 34 S.E.2d 78 (1945).

While the phrase "doing business in this State" connotes some degree of continuity, and an isolated instance is insufficient to support service of process, evidence that defendant nonresident corporation maintained dealer-representatives in this State, and that in the particular instance in suit the corporation was doing business in this State through its dealer-representative, is sufficient to support service of

process, since the fact that defendant employed dealer-representatives for the purpose of selling its products and carrying on its business, presumably in a similar manner, implies a sufficient continuity of conduct within the purview of the statute. Parris v. H.G. Fischer & Co., 219 N.C. 292, 13 S.E.2d 540 (1941).

Where a foreign corporation has been continuously and systematically for several years doing business in North Carolina and exercising in this State some of the functions for which it was created, and has such substantial contacts within the State that the maintenance of a suit in personam does not offend traditional notions of fair play and substantial justice, it is proper to refuse to quash service of process. Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965).

Same — Mere Incidental Services. — Mere incidental services not substantially of the character of the business carried on by a foreign corporation are not of the nature to subject it to the control and regulation of the state law or to invoke state law for its protection. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950); Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958).

Same — Taking Orders and Delivering Goods in State. — A foreign corporation which merely takes orders in this State to be transmitted to its home office for acceptance and shipment of its goods into this State by common carrier is not doing business here within the meaning of the former statute similar to this section and § 55-143, but if it transports its goods to this State in its own trucks and thus completes the transaction by making deliveries here, it performs here one of its essential purposes and is doing business here within the purview of the statute. Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956).

Same — Occasional Visits and Communications. — Occasional visits by an out-of-state car dealer to the regional office of the Chrysler Corporation in North Carolina, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Same — Foreign Publishing Company Shipping Magazines into State. — A foreign publishing company which delivers to a common carrier in another state magazines for shipment to a wholesale dealer in this State for resale in this State by the dealer, with provision for credit to the dealer for unsold magazines, and which employs sales promotion representatives who make occasional visits in this State, is held not doing business in this State for the purpose of service of process by service upon the Secretary of State. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Same — Employment of Soliciting Agent. — Where nonresident defendant corporation employed a soliciting agent who took orders and forwarded them to the home office in another state, it was held that the contract in suit was entered into in the state where the home office was situated and that the evidence failed to show that defendant was doing business in this State for the purpose of service of process on it by service on the Secretary of State. Plott v. Michael, 214 N.C. 665, 200 S.E. 429 (1939).

While the salesmen did some promotional work, and attempted to create goodwill for their company, and perhaps on occasions rendered engineering service or advice to customers, their principal and significant duties consisted of soliciting orders for acceptance at the home office and this did not constitute transacting business. Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Same — Single-Item Sales Contract Following Engineering Consultant Services. — The facts amount to two intermittent acts: (1) the contract to supply engineering consultant services to a furniture manufacturer. The work was not shown to have been performed within the State of North Carolina; performance in that contract was completed at least a year prior to the events involved in the case at bar; and the action here in suit did not arise out of that consultant contract. (2) The negotiation of the single-item sales contract involved in the case at bar. These activities fall outside this section. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Same — Insurance Business. — A foreign company acquiring membership of persons in North Carolina for life insurance, without soliciting agents to whom policies are issued, upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here in contemplation of the statute, and valid service of summons may be had on such corporation upon compliance with the provisions of the statute in respect thereto. Lunceford v. Commercial Travelers Mut. Accident Ass'n of America, 190 N.C. 314, 129 S.E. 805 (1925).

It cannot be held that the issuance of one or more policies of fire insurance, by a corporation created and existing under the laws of another state, and not authorized to do business in this State, insuring citizens of this State against loss or damage by fire to property situate in this State, the contracts for such policies having been made, and the premiums having been paid in the

state in which the foreign corporation has its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this State, constitutes "doing business" in this State of North Carolina within the meaning of these words in the statute. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Same — Foreign Corporation with Licensees in State. — A foreign corporation which received substantial royalties from 14 of 23 licensees located in this State and which adopted a program of sending auditors into the State to examine the books and records of its licensees was engaged in the transaction of business in North Carolina. Throwing Corp. of America v. Deering Milliken Research Corp., 302 F. Supp. 487 (M.D.N.C. 1969).

Same — Foreign Banking Corporation. — A foreign banking corporation which sends its agents here for the purpose of investigating and looking after properties in its capacity as trustee, does business in the State, "doing business in this State" meaning engaging in, carrying on or exercising in this State some of the functions for which the corporation was created. Ruark v. Virginia Trust Co., 206 N.C. 564, 174 S.E. 441 (1934).

Same — Ownership or Control of Subsidiary Doing Business in State. — Generally, it has been held or recognized that the mere ownership or control by a foreign corporation through a majority stock ownership of the stock of another corporation which is doing business within a state, either resident or domesticated, does not, in and of itself, constitute doing business within the state by the foreign corporation for the service of process so as to subject it to the state's jurisdiction, where the foreign corporation is not created for the very purpose of holding such stock and the two corporations remain distinct entities. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Same — Transacting Business of Domestic Subsidiary in State. — Where a foreign corporation acquires and holds controlling stock interest in a domestic corporation, and comes into the state where the domestic corporation is created and doing business, and there itself by its officer or officers transacts business of the domestic corporation and manages and controls its internal affairs, then such foreign corporation is doing business within the domestic state and is subject to the jurisdiction of its courts. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Same — Appraisal Business. — Where defendant was in the appraisal business and was soliciting and performing appraisal work in North Carolina, it was thus transacting and performing in this State the business for which it was created. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Same — Lessor of Airports. — Where defendant foreign corporation leased airports to individual defendant and by terms of agreement lessor was to furnish planes, parts, repairs, etc., to provide insurance for airports to be operated in name of corporate defendant, with right to demand that lessee devote full time to business, and to furnish forms for keeping records, it was held that corporation was doing business in this State so as to subject it to jurisdiction of courts and that process served on it under the statute was valid. Harrison v. Corley, 226 N.C. 184, 37 S.E.2d 489 (1946).

Same — Vessel Discharging Cargo at N.C. Port. — Where a vessel of defendant foreign corporation, a regular carrier of freight in the coastwise trade, entered the port of Wilmington and discharged a substantial part of its valuable cargo in the regular course of business, and was there damaged by striking a bridge and remained some months in said port, undergoing repairs and having considerable business dealings with local residents, the service of process upon the Secretary of State was valid and sufficient to bring defendant into court. State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 225 N.C. 198, 34 S.E.2d 78 (1945).

Same — Corporation Not Doing Business in State. — Findings that a foreign corporation, engaged in the business of manufacturing certain goods and selling them direct to retail distributors in this State, maintained a sales representative here to aid in promotion of sales to dealer representatives and facilitate sales directly to customers in company with dealer representatives, and an agent, to investigate complaints by purchasers who is without authority to compromise or adjust them, its established procedure being for the customer to return defective merchandise directly to the corporation, and also an agent here to facilitate the collection of delinquent or slow accounts owed by dealer representatives, without evidence that such agent had authority to collect or receive money on behalf of the corporation were held insufficient to support the conclusion that it was doing business in this State for the purpose of service of summons under a formal statute of similar import. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950).

Same — Question of Fact. — No satisfactory general definition can be made of the phrase "doing business" as found in our statutes, and, generally speaking, each case must be determined on its own facts. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. State Hwy. & Pub. Works Comm'n v. Dia-

mond S.S. Transp. Corp., 225 N.C. 198, 34 S.E.2d 78 (1945).

The question as to doing business is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. In the last analysis, the question is one of due process of law under the Constitution of the United States. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926); Harrison v. Corley, 226 N.C. 184, 37 S.E.2d 489 (1946).

It is to be distinctly understood that no all-embracing rule as to what is the meaning of "shall transact business in this State" has been formulated. This question must be determined largely according to the facts of each individual case rather than by the application of fixed, definite, and precise rules. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

The validity of service of summons under this section, as well as the satisfaction of due process, must be largely determined by a factual evaluation of the nature and extent of the business of the defendant. Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Whether the type of activity conducted within the State is adequate to satisfy the "transacting business" requirements depends upon the facts of the particular case. United States v. Atlantic Contractors, Inc., 231 F. Supp. 356 (E.D.N.C. 1964).

The question of whether a company is transacting business within the State cannot be answered by applying a mechanical formula or rule of thumb, but only by ascertaining what is fair and reasonable and just in the circumstances. United States v. Atlantic Contractors, Inc., 231 F. Supp. 356 (E.D.N.C. 1964).

Findings of fact should be made so that it could be determined whether or not activities by the defendant in this State were "substantial," "continuous and systematic," and "regular," as distinguished from "casual," "single" or "isolated acts," and that defendant by such activities was transacting business in this State under the relevant rules of law and within the intent and meaning of this section. Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965).

Same — Subject to Review. — Whether a corporation is "doing business" in this State is an inference of law and of fact to be drawn from the specific facts found, and is subject to review on appeal. Radio Station WMFR, Inc. v. Eitel-McCullough, Inc., 232 N.C. 287, 59 S.E.2d 779 (1950).

When Service on Secretary of State Is Sufficient. — If the defendant does not contend that it has a process agent in North Carolina, service on the Secretary of State is sufficient to bring the defendant into court. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

The federal court in a diversity action is bound by the jurisdictional limits placed on the North Carolina courts by the State legislature. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Same — When Finding by Trial Court Conclusive. — Where there is evidence to show that a foreign corporation was doing business in this State at the time the summons in the action was served on the Secretary of State, but there is also ample evidence to the contrary, a finding by the trial court that the corporation was not so doing business is conclusive and not subject to review of the Supreme Court. Brown v. Tennessee Coal, Iron & R.R., 208 N.C. 50, 178 S.E. 858 (1935).

Discontinuance of Business. — The statute authorizes service of process on the Secretary of State, in an action by a resident of this State against a foreign corporation after the business once carried on by defendant has been discontinued. State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 225 N.C. 198, 34 S.E.2d 78 (1945).

The provisions for service of summons under the statute are a condition on which a foreign corporation is allowed to do business, and are accepted by it when it enters the State and engages in business without domesticating or appointing a process agent. It cannot, by the simple expedient of closing shop and departing the jurisdiction, withdraw such assent so as to defeat a suit on a cause of action which arose while it was engaged in business. Harrison v. Corley, 226 N.C. 184, 37 S.E.2d 489 (1946).

Cited in Shew v. Royce Chem. Co., 5 N.C. App. 444, 168 S.E.2d 701 (1969); Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970); Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970); Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State. — (a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

(1) Out of any contract made in this State or to be performed in this State; or

(2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or

(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or

(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

(b) Whenever a foreign parent corporation is subject to liability for any obligations of a subsidiary corporation that is subject to suit in this State, the parent corporation is itself so subject in any action to enforce the said liability. In any such action against a foreign corporation, service may be made on any person who could be served in an action against such subsidiary corporation.

(c) Any foreign corporation subject to suit under this section may, even though it is not transacting business in this State, appoint and maintain a registered agent, which agent may be either an individual resident in this State, or a domestic corporation, or a foreign corporation authorized to transact business in this State. Such appointment shall take place by filing in the office of the Secretary of State a statement setting forth the name and address of the corporation and the address of its principal office, and the name and address in this State of the registered agent. The registered agent appointed by a foreign corporation pursuant to this section shall be an agent of the corporation upon whom any process, notice, or demand in any cause of action arising under this section may be served. In any case where a foreign corporation is subject to suit under this section and has failed to appoint and maintain a registered agent upon whom process might be served, or whenever such registered agent cannot with reasonable diligence be found at the address given, then the Secretary of State shall be an agent of such corporation upon whom any process in any such cause of action may be served. (1955, c. 1143; c. 1371, s. 1; 1973, c. 469, s. 43.)

Editor's Note. — The 1973 amendment deleted "by a resident of this State or by a person having a usual place of business in this State" following "suit in this State" in the introductory paragraph in subsection (a).

For case law survey on conflict of laws, see 43 N.C.L. Rev. 895 (1965).

For note on jurisdiction over foreign corporations not qualified to transact business in North Carolina, see 44 N.C.L. Rev. 449 (1966).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For note on personal jurisdiction over foreign corporations based upon making a contract in North Carolina, see 49 N.C.L. Rev. 838 (1971).

For comment on jurisdiction over foreign corporations not transacting business in North Carolina, see 2 Wake Forest Intra. L. Rev. 1 (1966).

The cases in the note below which were decided prior to 1958 were decided under Session Laws 1955, c. 1143, formerly codified as § 55-38.1, which was the same as this section.

Constitutionality of Subsection (a)(1). — A number of states have statutes similar to subsection (a)(1) of this section. These statutes generally provide that where the cause of action arises out of a contract with a foreign corporation, made in the forum state or to be performed in whole or in part in such state, an action in personam may be maintained in the forum state, upon substituted service of process. In no instance has such statute been declared unconstitutional. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).

Subsecion (a)(3) Unconstitutional upon Certain Facts. — Subsection (a)(3) of former § 55-38.1, identical to subsection (a)(3) of this section, was unconstitutional as applied to an action for libel against a foreign publishing corporation which delivered magazines to a common carrier for shipment to a wholesale dealer in this State for resale by the dealer, and which employed

sales promotion representatives who made only occasional visits in this State, since such corporation had no contacts, ties or relations within this State so as to make it amenable to service of process here for the purpose of a judgment in personam. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Subsection (a)(3) of former § 55-38.1, which was identical to subsection (a)(3) of this section, was invalid insofar as it attempted to subject a New York corporation to the jurisdiction of North Carolina for a single sale of goods consummated in New York "with the reasonable expectation that those goods are to be used in [North Carolina] and are so used and consumed." Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

The Supreme Court of North Carolina has only ruled that subsection (a)(3) of this section was invalid on the basis of the facts presented. It has not held that under a different set of facts the statute could not be constitutionally applied. Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958).

Constitutionality of Subsection (a)(3) Involves Due Process Question. — The constitutionality of subsection (a)(3) of this section involves a question of due process of law, to be determined in accordance with the decisions of the Supreme Court of the United States, and in this connection International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945) is decisive. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Subsection (a)(3) Is Not Violative of Any Provision of the North Carolina Constitution. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Form of Substituted Service Must Give Reasonable Assurance of Notice. — The form of substituted service adopted by the forum state must give reasonable assurance that the notice to defendant will be actual. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

As Does Form in This State. — The form of substituted service adopted by this State gives reasonable assurance that a defendant would be given actual notice. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

The assignee of the proceeds of a construction contract "to be performed in this State," an Alabama bank, was not subject to the courts' jurisdiction under the contract, where the assignee was not a party to the contract and had incurred no duties or liabilities thereunder. Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970).

First Amendment Considerations Are Relevant to Jurisdictional Question. — New York Times Co. v. Conner, 365 F.2d 567 (5th Cir. 1966), does not stand for the proposition that, because of the constitutional protection of the dissemination of ideas, a publisher may never be sued for libel in a state other than that of publication. Rather, Conner indicates that First Amendment considerations are a factor relevant to a determination of the jurisdictional question; and the discussion of that factor in Conner must be viewed in its factual context. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

But First Amendment Considerations Are Minimized. — In a libel action against a national magazine publisher, the First Amendment was not totally disregarded in the context of the jurisdictional question under this section, but the consideration given it was minimized. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

In the jurisdictional context, the nonresident defendant publisher has the protection of the rights guaranteed to it by the due process clause of the Fourteenth Amendment, and to interject the First Amendment, with its full impact, into the discussion at this point would unnecessarily confuse an already complex issue. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Hazards to publishers from libel actions have recently been much mitigated by the development of substantive principles under the First Amendment. It is a legitimate question whether this will not sufficiently protect communications media without superimposing a necessarily vague First Amendment standard upon the application of long-arm statutes and thereby possibly creating undue hardship for a plaintiff. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

The jurisdiction created by this section pertains only to local actions and has no application to any cause of action arising outside the State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963); Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

This section has been construed to apply only as to "local actions," i.e., causes of action which arise in this State. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

But Applies to Foreign Corporations Not Transacting Business in State. — This section governs jurisdiction over foreign corporations not transacting business in this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Foreign corporations are by this section made subject to local suits by residents of this State in some situations where they have engaged in specified activity giving rise to a cause of action

locally, even though they are not so "transacting business" as to be required to obtain a certificate of authority. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963); Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

By its terms, this section applies to foreign corporations not transacting business in North Carolina and so seems to be intended to take advantage of the liberal constitutional limits provided by the decision in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945). Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Subsection (a) of this section is applicable to foreign corporations which are not transacting business in North Carolina but who come within the purview of any one of the four specific and well-delineated areas listed therein. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).

And Authorizes Personal Judgment. — Where a cause of action stated in a complaint or a cross action arises out of a transaction which falls within the terms of this section and service of process is had under § 55-146, the defendant is brought within the jurisdiction of the court for purposes of an in personam judgment. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

Upon a finding that an action grows out of a contract to be performed within the State of North Carolina, in personam jurisdiction of the corporate defendant is sustained. Throwing Corp. of America v. Deering Milliken Research Corp., 302 F. Supp. 487 (M.D.N.C. 1969).

The federal court in a diversity action is bound by the jurisdictional limits placed on the North Carolina courts by the State legislature. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Criteria for Subjection of Corporation to Suit. — It is evident that the criteria by which the boundary line is marked between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968).

Mere Fact of Personal Service Insufficient to Subject Foreign Corporation to Jurisdiction. — The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Defendant Must Have Purposely Availed Itself of Privilege of Conducting Activities. — It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of and are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And Use of State Laws. — Where foreign corporation obviously uses, benefits from, or can easily use the laws of North Carolina, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Such as by Entering into Contract Made and Performed in This State. — By entering into a contract made in this State and to be performed in part in this State, a defendant foreign corporation avails itself of the privilege of conducting its business in this State thus invoking the benefits and protection of its laws. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Contact Is Crux of Jurisdictional Investigation. — While the forum state's impact upon the defendant's business is a relevant factor which cannot be overlooked, far greater weight should be given to the contact that the defendant's business has with the markets of the forum state. The latter is the crux of the jurisdictional investigation. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Substantial Contacts Make Exercise of Jurisdiction Just. — Direct, substantial and uninterrupted contacts by a foreign corporation with this State make it reasonable and just for the court to exercise its jurisdiction over such foreign corporation as authorized by this section. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

When the activities of the foreign corporation in the forum state have not only been continuous and systematic, but also give rise to the liabilities sued on, the forum state does not violate due process by taking jurisdiction of the suit instituted by a resident of such state, even though no consent to be sued or authorization to an agent to accept service of process has been given. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

If Traditional Notions of Fair Play Are Not Offended. — Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the terri-

tory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

The essential requirements of "minimum contacts" for obtaining jurisdiction under this section are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Minimum contacts exist if foreign company's activity is regular, or systematic, or continuous. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Reducing Physical Contacts Does Not Bar Suit as Matter of Law. — Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market, to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Question of Minimum Contacts Is Determined by Applying Fact Situation to Law. — The question of whether there are, in fact, sufficient minimum contacts with a territorial entity by a defendant must be determined by applying the fact situation before the court to the law as it has been set forth by the legislative and judicial authorities. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Minimum Contacts Held to Exist. — Where the defendant's business was a continuing one and a substantial portion of the plaintiff's alleged cause of action arose out of substantial contacts within the State, the minimum contacts necessary to the jurisdiction of the North Carolina courts exist. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Minimum Contacts Held Not to Exist. — Occasional visits by an out-of-state car dealer to the regional office of the Chrysler Corporation in North Carolina, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Where Other Contacts Support Right of State to Require Answer. — Where the solicited circulation of a corporation's publications account for a relatively significant portion of the corporation's revenue, notions of fair play and substantial justice support the right of the State to require the corporation to answer nonfrivolous claims arising out of its contacts with the State, even though it has managed to reduce its physical presence in the State to a minimum. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Section 55-144 requires more "contacts" in North Carolina than this section. Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958).

More contacts with the forum State are required in order to come within the limits of § 55-144 than are required under this section. Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968).

Section 55-144 concerns "foreign corporations transacting business in the State" and, therefore, necessarily seems to be more restrictive in its application than this section, the latter section dealing with "foreign corporations not transacting business" in the State. The foreign corporation must have more contacts with the forum State in order to come within the statutory limits of § 55-144. Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968); Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968).

Cause of Action Arising outside of State Cannot Be Basis for Jurisdiction. — Where the cause of action arises outside of North Carolina, jurisdiction cannot be obtained under subsection (a) of this section. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

But Failure to Provide for Service on Foreign Corporations Does Not Deny Due Process. — It is essential to determine the extent to which the legislature of the forum state has given authority to its courts to entertain litigation against foreign corporations. Provisions for making foreign corporations subject to service in the forum state is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Sufficiency of Contacts and Manner of Service Present Question of Due Process. — Whether a foreign corporation has sufficient contacts within the State to subject it to service of process in an action in personam, and whether the manner of service is a reasonable method of notification to it of the action, present a question of due process which must be decided in accordance with the decisions of the Supreme Court

of the United States upon the facts of each particular case upon the basis of what is fair and reasonable and just under the circumstances. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

Requirements of Due Process. — Due process requires only that, in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968); Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

A State court may acquire in personam jurisdiction over a nonresident defendant under principles established by the United States Supreme Court where the nonresident defendant has "minimum contacts" with the State such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945); McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 233 (1957). The decision reached by the Supreme Court in the International Shoe case marked a substantial departure from the prior standards of "consent," "doing business" and "presence" which were used to measure the permissible extent of judicial power over corporations. The high-water mark was reached in the McGee case, where the United States Supreme Court, in a unanimous decision, held that the tests laid down in International Shoe had been met even though there was but a single transaction which gave rise to the suit. Goldman v. Parkland of Dallas, Inc., 1 N.C. App. 400, 173 S.E.2d 15 (1970).

The applicability of subsection (a)(1) of this section is consistent with the federal requirements of due process. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Where this section is applicable, the assumption of in personam jurisdiction of a defendant by the North Carolina court, pursuant to subsection (a) of this section, would not offend the due process clause of the Constitution of the United States. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

The assumption of in personam jurisdiction by a North Carolina court, pursuant to subsection (a)(1) of this section, does not offend the due process clause of the Constitution of the United States if the defendant has sufficient "minimum contacts" with the State. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

The legislature of this State, by the express words of this section authorizing such service on a foreign corporation when the contract was made in this State, sought to give to its courts the power to assert jurisdiction over nonresident defendants to the full extent permitted by the due process requirement. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Where defendant had agents residing in and working in North Carolina and shipped large quantities of its appliances into North Carolina with the reasonable expectation that they would be used in the homes of the people of this State and its sales contracts were accepted outside North Carolina, manifestly, therefore, upon the undisputed facts, the cause of action arises out of activities described in subsection (a)(3) of this section. The minimum contacts requirement was satisfied so that the due process clause was not offended by this subsection. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Where a contract is executed by plaintiff in North Carolina, accepted by defendant in another state, and is to be performed in North Carolina, subsection (a)(1) of this section is satisfied and the assumption of jurisdiction does not offend the due process clause of the Constitution of the United States. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Where the foreign defendant was aware, or certainly should have been aware, that unless it fulfilled its contractual obligation, its activity in obtaining the release of the funds from this State would substantially affect the rights of creditors within North Carolina and the right of resident plaintiff to avoid liability for payment of the North Carolina debts of the foreign defendant's customer as imposed by the lien laws of this State, the exercise of jurisdiction under these circumstances appropriate under the statute do not violate the due process clause of the federal Constitution. Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970).

To sustain jurisdiction in this State, even if the tort was committed in North Carolina, while the only acts of negligence on the part of the defendant are alleged to have been committed in South Carolina, would be offensive to the due process clause of the U.S. Constitution. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Where a real estate corporation never had an office or agent in North Carolina, it has never advertised or solicited business here, and the cause of action did not result from a sale by the corporation to someone then in North Carolina, nor could the corporation expect to benefit from

or use the laws of North Carolina to enforce any obligations, this would not establish the minimum contacts required to insure due process. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Presence in this State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but have also given rise to the liabilities sued on, even though no consent to be sued or authorization to accept service has been given. Babson v. Clairol, Inc., 256 N.C. 227, 123 S.E.2d 508 (1962); Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Substantial contacts with the State are required to bring a corporation within subsection (a) of this section. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).

However minimal the burden of defending in a foreign tribunal, a defendant foreign corporation may not be called upon to do so unless he has had the "minimal contacts" with that state that are prerequisite to its exercise of power over him. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

If there is only one contact with North Carolina and such contact does not involve a contract to be performed here, there is no jurisdiction. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Cause of Action Must Arise in State Out of One of Delineated Activities. — This section confers jurisdiction over any cause of action arising out of any one of four specific and well-delineated activities. If one of these four activities is present but the cause of action arises elsewhere, or if none of the four activities is present although others may be present, there is no jurisdictional grant. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

One Subdivision of Subsection (a) as Sole Basis for Jurisdiction. — There is some authority in this State for the proposition that any one of the subdivisions of subsection (a) of this section is valid as the sole basis for granting jurisdiction. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Subsection (a)(1) Is Limited to Situations Where Foreign Defendant Is Party to Contract. — The operation of subsection (a)(1) of this section is limited to situations where the foreign defendant against whom a cause of action is asserted is a party to the contract forming the basis of jurisdiction. Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Contract Substantially Connected with State Is Sufficient. — It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Contract Made or to Be Performed in State Is Sufficiently Substantial Contact. — Subsection (a)(1) of this section confers jurisdiction upon this State's courts when the contract is made or to be performed in North Carolina; therefore, where it is found that the contract was made in North Carolina or was to be performed in North Carolina, a sufficiently substantial contact to confer jurisdiction on the North Carolina courts has been established. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).

A single contract, where it is made or to be performed, in North Carolina, is sufficient to subject the nonresident corporation to suit in North Carolina under subsection (a)(1) of this section. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).

If a contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

A contract made in this State is one which is executed in this State, i.e., where the "final act necessary to make it a binding obligation was done" in this State. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

For a contract to be made in this State, it must be executed in North Carolina, that is, the final act necessary to make it a binding obligation must be done in the forum state. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15 (1970).

But Contract Is Made Elsewhere When Final Act Is Done Out of State. — There was sufficient evidence to support the finding of the court below that the final act of executing a sales contract was the signature by the seller in Wisconsin, and thus the contract was to be considered made in Wisconsin. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Where Contract Affords No Basis for Jurisdiction Issue Limited to "Performance within This State". — Where there was no evidence presented and no finding made that any contract forming the basis of the litigation was made in North Carolina, the inquiry is limited to the issue of "performance within this State." Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Subsection (a)(1) Only Applies to Contracts to Be Performed Here to Substantial Degree. — States which have sought to bring within the jurisdiction of their courts foreign corporations which contract with residents of the State, whether the whole or any part of the contract is to be performed in the forum state, have drafted their "long arm" statutes to read "to be performed in whole or in part" in the State. North Carolina has not chosen to use

this broader language in its statute, and so subsection (a)(1) of this section must be construed as relating only to those contracts that are to be performed to a substantial degree within the forum state. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

This was a sales contract for a machine with delivery f.o.b. the seller's plant in Wisconsin. Almost the entire performance of the contract was to occur at the seller's manufacturing plant, the buyers to accept delivery there and pay all shipping costs to their North Carolina business site. The seller was to provide one technician for one day at the buyers' plant to advise appellants on how they were to install the machine. After the buyers had completed the installation, seller's technician was to return to North Carolina and inspect the installation and supervise the initial production run on the machine. The substantial portion of the overall contract performance therefore occurred at appellee's manufacturing plant in Wisconsin, and subsection (a)(1) did not apply. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Initial contact between the parties occurred when a representative of plaintiff visited defendant's office in Chicago to discuss the manufacture of certain molds for plastic cigar tips. Defendant per plaintiff's request submitted a quotation to plaintiff in Durham. Plaintiff then submitted a purchase order to defendant containing certain specified terms not included in the quotation. This was accompanied by an acknowledgment copy of the purchase order, which copy defendant was required to execute and return to plaintiff. Thereafter, defendant shipped the mold f.o.b. Chicago to plaintiff in Durham. It was held that the contract was neither made nor to be performed in North Carolina so as to acquire jurisdiction under subsection (a)(1) of this section. Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F. Supp. 368 (M.D.N.C. 1967), aff'd, 391 F.2d 266 (4th Cir. 1968).

Where the sole performance called for under the contract was the payment of funds by the foreign defendant bank to a foreign contractor's creditors and all of the creditors were located in North Carolina; they were to be paid in North Carolina; and the debts arose out of work performed in North Carolina, the conclusion is that the cause of action alleged by plaintiff arises out of a contract to be performed in North Carolina within the meaning of subsection (a)(1). Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Performance in State Authorizes Service of Process. — Service of process upon a foreign corporation is proper under the terms of this section if the contract is to be performed in this State. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

If Defendant Incurs No Obligation to Plaintiff, There Is No Jurisdiction. — Where, under the terms of a contract, the foreign bank defendant incurred no obligation to plaintiff and had no duties to perform, that contract affords no basis for jurisdiction. Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Casual Presence of Agent. — The casual presence of the corporate agent or even his conduct of single or isolated activity in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

An agent through whom the corporation may be served with process is one who exercises some control over and discretionary power in respect to the corporate functions of the company. He is one who stands in the shoes of the corporation in relation to the matters of the corporation committed to his care. He must represent it in a general or limited capacity. He is the alter ego of the corporation. Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957).

A mere salesman or broker who takes orders and sends them to a foreign corporation for acceptance, or a distributor who buys and takes title to the chattels, is not a managing or local agent and does not result in the corporation doing business in this State. Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957).

Where title to machines passed from foreign corporation to North Carolina distributor on cash purchases or C.O.D. order with draft attached and he was in full control of the ways and means of reselling them, he was not an agent of the corporation for service of process. Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957).

Effect of Entry of Corporation's Agent into State. — If a corporation had insufficient contact or relations with North Carolina to warrant the assertion of jurisdiction over it, the entry of its agent on an isolated occasion to discuss the claim could not supply the necessary tie to give the State power. Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

An agent was acting in behalf of defendant in this State in negotiating a contract with plaintiff, and it was reasonable to infer that plaintiff's letter to defendant, in response to the advertisement in the local paper, was referred to the agent by defendant. The agent wrote plaintiff on defendant's stationery and arranged a meeting. When plaintiff's signature to the contract was obtained, defendant accepted it and thereby accepted the benefits of the agent's activities and ratified them. Defendant, as its initial step in performing the contract, sent a representative to this State to assist in procuring a location for plaintiff's "Cibo House." It was held that it did not lie in the mouth of defendant

to say that it had no contacts with this State. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Mere Fact of Manufacture Insufficient for Service of Process. — The mere fact that a foreign corporation was the manufacturer of an implement which caused injury to a resident of this State because of alleged defect or absence of safety device, is alone an insufficient predicate for service of process upon such corporation under subsection (a), subdivisions (3) and (4), the implement having been purchased by a resident of this State from an independent contractor and distributor of another state. Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961).

A foreign corporation selling home appliances to wholesalers in North Carolina is subject to service of process under subsection (a)(3) of this section in an action by a resident of this State to recover for personal injury allegedly resulting from a defective appliance manufactured by the foreign corporation, notwithstanding that title to appliances sold by the corporation in this State passes to the wholesalers at the point of shipment outside of this State and notwithstanding that the foreign corporation maintains no agents or employees here except agents for the solicitation of orders which are subject to approval by the home office, and such service subjects the foreign corporation to a judgment in personam. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959).

Subsection (a)(3) Is Inapplicable Where Machine Sold Never Enters State. — Subsection (a)(3) of this section was not applicable to an action for breach of a sales contract by a seller in Wisconsin, where the machine sold to North Carolina buyers under the contract had never entered North Carolina nor been used there. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Expectation That Corporation's Product Will Be Used or Consumed in State. — If a foreign corporation has never had any interest in North Carolina or contacts here, even if it can reasonably be expected that its product will be used or consumed here, to grant jurisdiction for that reason would be unconstitutional. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Facts Insufficient to Bring Action within Subsection (a)(3). — Where the parties were both commercial concerns dealing on equal footing at arm's length, and the defendant had never solicited, advertised, or transacted business in North Carolina, and its only contact with this State was the contract in suit, which was made and substantially performed in another state, it was held that to subject the defendant to the in personam jurisdiction of the courts in North Carolina under subsection (a)(3) of this section would violate due process. Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F. Supp. 368 (M.D.N.C. 1967), aff'd, 391 F.2d 266 (4th Cir. 1968).

Tortious Act Is Sufficient for Jurisdiction. — The mere fact that a tortious act was committed within the State by the defendant was sufficient under the statute to render the defendant amenable to the jurisdiction of the North Carolina courts, and a finding that the defendant was "doing business" within the State was mere surplusage and not necessary for the purposes of the determination. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

The commission of a single tort is sufficient under this section to grant jurisdiction. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Where the allegations of the complaint and the crucial findings of fact made by the court below disclose that the plaintiff's cause of action arose out of a defendant's tortious conduct committed in this State, this suffices under this section to render a foreign corporation amenable to the jurisdiction of this State. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

But Defendant Must Have Committed Some Act in State. — The language with respect to "repeated activity or single acts" indicates that the defendant must have committed some act in this State, whether it be one of misfeasance or nonfeasance. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

No case has been found which has established North Carolina as the situs of the cause of action without some act by the defendant which gave rise to the tort having occurred in this State. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Since it is defendant's conduct which is the focus of the language in subdivision (4) of subsection (a), not the result of that conduct. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Where the last event necessary to render the actor liable occurred in North Carolina, the cause of action is one arising in this State, and subsection (a) is applicable. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

The place of a wrong is in the state where there takes place the last event which is necessary to render the actor liable for an alleged tort. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (E.D.N.C. 1973).

Occurrence of Damages Is Not an Activity or Act. — Even assuming as correct the contention that the occurrence of harm constitutes the last event of tortious conduct where actual damage is an essential element of a tort so as to establish the situs of the tort, the occurrence of damages cannot be construed to be an activity or act by the defendant as set forth in subdivision (4) of subsection (a). Munchak Corp. v. Riko

Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Necessary Showing under Subsection (a)(4). — When seeking to acquire personal jurisdiction under subdivision (4) of subsection (a), a plaintiff must show that: (1) The cause of action arose in North Carolina; and (2) the defendant committed one or more acts which gave rise to the cause of action in this State. Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Plea Insufficient to Bring Action within Subsection (a)(4). — In an action for breach of a sales contract, the buyers sought to bring their action within subsection (a)(4) of this section by alleging that the seller never intended to perform the contract, but planned to deceive the buyers and cause them to act to their detriment. This plea was insufficient to bring the action within subsection (a)(4). The theme of the action was contract and not tort. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Publication of Libel by Reading Magazine Is Sufficient under Subsection (a)(4). — Assuming that a magazine article was libelous, there would have been a publication of the libel each time it was read in this State, and therefore a tortious act would have been committed in this State, which would be sufficient to grant the North Carolina courts jurisdiction by virtue of subsection (a)(4). Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

Tortious Acts Committed in State Sufficient to Support Service on Secretary of State. — In an action against a nonresident corporation for wrongfully taking plaintiff's property by duress and threats of arrest without legal process and for invasion of privacy and public humiliation findings of fact that the tortious acts were committed in this State were sufficient to support adjudication that service of process on it by service on the Secretary of State was valid. Painter v. Home Fin. Co., 245 N.C. 576, 96 S.E.2d 731 (1957).

Size of Claim Is Pertinent. — When claims are small or moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum, thus placing the foreign corporation beyond the reach of the claimant. Whether this is the situation in a given case is pertinent. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

As Is Presence of Witnesses and Evidence. — Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And Inconvenience to Corporation. — An estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And Whether State's Courts Are Open to Suits by Foreign Corporation. — Consideration should be given to the question whether the courts of the forum state are open to the foreign corporation to enforce obligations of residents of such state created by the activities and contacts of the corporation. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

As They Are in This State. — The courts of the State have been and now are open to a foreign corporation for protection of its activities and to enforce the valid obligations which a resident or residents of this State have assumed by reason of defendant's contacts and activities. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

A nonresident has access to the courts of this State and can sue a foreign corporation. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Consideration should be also given to any legitimate interest the State has in protecting its residents with respect to the activities and contacts of the foreign corporation. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

This State has a legitimate interest in the establishment and operation of enterprises and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the State for that purpose. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Burden of Suing Away from Home Need Not Always Fall on Plaintiff. — There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a nonresident. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

The statutes relating to foreign corporations have no application to individuals. Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957).

Applied in Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964); Bowdach v. Frontierland, Inc., 347 F. Supp. 237 (W.D.N.C. 1972).

Cited in Abney Mills v. Tri-State Motor Transit Co., 268 N.C. 313, 150 S.E.2d 585 (1966); Shew v. Royce Chem. Co., 5 N.C. App. 444, 168 S.E.2d 701 (1969); McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971); Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Spartan Leasing, Inc. v. Brown, 19 N.C. App. 295, 198 S.E.2d 583 (1973).

§ 55-146. Service on foreign corporations by service on Secretary of State. — (a) Service on the Secretary of State, when he is agent of a foreign corporation as provided in this Chapter, of any process, notice or demand shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. Service of process on the foreign corporation shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered mail with return receipt requested addressed to such corporation at its principal office as it appears in the records of the Secretary of State or, if there is no address of the corporation on file with the Secretary of State, then to said corporation at its office as shown in the official registry of the state of its incorporation. The Secretary of State may require the plaintiff or his attorney to furnish such address. A copy of the complaint or order of the clerk extending the time for filing the complaint must be mailed to the corporation with the copy of the summons. When a copy of the complaint is not mailed with the summons, the Secretary of State shall mail a copy of the complaint when it is served on him in the same manner as the copy of summons is required to be mailed.

(b) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of such registered mail, or upon the return of such registered mail showing refusal thereof by such foreign corporation, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(c) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such foreign corporation to accept delivery of the registered mail provided for in subsection (a) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign corporation refusing to accept delivery of such registered mail shall be charged with knowledge of the contents of any process, notice or demand contained therein.

(d) Whenever service of process is made upon the Secretary of State as herein provided the defendant foreign corporation shall have 30 days from the date when the defendant receives or refuses to accept the registered mail containing the copy of the complaint sent as in this section provided in which to appear and answer the complaint in the action or proceeding so instituted. Entries on the defendant's return receipt or the refused registered mail shall be sufficient evidence of such date. If the date of acceptance or refusal to accept the registered mail cannot be determined from the entries on the return receipt or from notations of the postal authorities on the envelope, then the date when the defendant accepted or refused to accept the registered mail shall be deemed to be the date that the return receipt or the registered mail was received back by the Secretary of State.

(e) The court in which the action is pending shall order such additional time as may be necessary to afford the defendant reasonable opportunity to answer the complaint and defend the action.

(f) The Secretary of State shall keep a summarized record of all processes, notices, and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(g) Nothing herein contained shall limit or affect the right to serve any process, notice or demand to be served upon a corporation in any other manner

now or hereafter permitted by law. (1901, c. 5; Rev., s. 1243; C. S., s. 1137; G. S., s. 55-38; 1955, c. 1143; c. 1371, s. 1.)

Editor's Note. — For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

This section and § 55-144 apply exclusively to foreign corporations. Whether analogous statutes, applicable to nonresident unincorporated associations, should be enacted, is for legislative determination. Melton v. Hill, 251 N.C. 134, 110 S.E.2d 875 (1959).

Service on the Secretary of State is sufficient to bring into court a foreign corporation if it does not have a process agent and is doing business in this State. Babson v. Clairol, Inc., 256 N.C. 227, 123 S.E.2d 508 (1962); Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965).

If the defendant does not contend that it has a process agent in North Carolina, service on the Secretary of State is sufficient to bring the defendant into court. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Such Service Authorizes in Personam Judgment. — Where a cause of action stated in a complaint arises out of a transaction which falls within the terms of § 55-145 and service of process is had under this section, the defendant is brought within the jurisdiction of the court for purposes of an in personam judgment. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

The form of substituted service adopted by this State gives reasonable assurance that a defendant would be given actual notice. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Stipulation Held to Concede Service Reasonably Assures Notice. — Where the parties stipulated that "the mechanics of service and return set forth in subsections (a) and (b) of § 55-146 of the General Statutes of North Carolina were in all respects complied with," it was held that it was conceded that this section gives reasonable assurance that the notice to defendant will be actual, and in this case was actual. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Applied in United States v. Tug Parris Island, 215 F. Supp. 149 (E.D.N.C. 1963);Throwing Corp. of America v. Deering Milliken Research Corp., 302 F. Supp. 487 (M.D.N.C. 1969).

Cited in Dow Chem. Co. v. Melton Corp., 281 F.2d 292 (4th Cir. 1960); Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961); Abney Mills v. Tri-State Motor Transit Co., 265 N.C. 61, 143 S.E.2d 235 (1965); Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966); Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968); Koppers Co. v. Kaiser Aluminum & Chem. Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970); Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970); Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970).

§ 55-146.1. Alternative jurisdiction over and service of process on foreign corporations. — In addition to the provisions set out in this Chapter, foreign corporations may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3; 1973, c. 469, s. 44.)

Editor's Note. — The 1973 amendment substituted "provisions" for "procedure" near the beginning of the section.

The Rules of Civil Procedure (§ 1A-1) and the jurisdiction statute (§ 1-75.1 et seq.) which accompanies them seek to secure for the courts of North Carolina the full extent of jurisdiction constitutionally allowable to them, and accordingly there is duplication of some of the "long arm" statutes already in force in this State with regard to corporations and insurers. It is the purpose of this section and §§ 55A-68.1 and 58-153.2 to allow service of process and the obtaining of jurisdiction under either procedure.

§ 55-147. Amendment to charter of foreign corporation. — Whenever the charter of a foreign corporation authorized to transact business in this State is amended, such foreign corporation shall, within 30 days after such amendment becomes effective, file in the office of the Secretary of State a copy of such amendment duly authenticated by the proper officer of the state or country under the laws of which it is incorporated; but the filing thereof shall not of itself amend its certificate of authority. (1955, c. 1371, s. 1.)

§ 55-148. Merger of foreign corporation authorized to transact business in this State. — Whenever a foreign corporation authorized to transact business in this State shall be a party to a statutory merger permitted by the laws of the state or country under which it is incorporated, and such corporation shall be the surviving corporation, it shall, within 30 days after such merger becomes effective, file with the Secretary of State a copy of the articles of merger duly authenticated by the proper officer of the state or country under the laws of which such statutory merger was effected. It shall not be necessary for such corporation to procure either a new or amended certificate of authority to transact business in this State unless the name of such corporation be changed thereby or unless the corporation desires to pursue in this State other or additional purposes than those which it is then authorized to pursue in this State. (1955, c. 1371, s. 1.)

Cited in East Carolina Lumber Co. v. West, 247 N.C. 699, 102 S.E.2d 248 (1958).

§ 55-149. Amended certificate of authority. — (a) A foreign corporation authorized to transact business in this State shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in this State other or additional purposes than those set forth in its prior application for a certificate of authority, by making application therefor to the Secretary of State.

(b) The requirements in respect to the form, the manner of its execution, the filing of the application and the conformed copy thereof with the Secretary of State, the issuance of an amended certificate of authority and the effect thereof, shall be the same as in the case of an original application for a certificate of authority. The contents of such application need not be the same as in the case of an original application for a certificate of authority provided the application sets forth information as to the changes proposed. (1955, c. 1371, s. 1.)

§ 55-150. Withdrawal of foreign corporation. — (a) A foreign corporation authorized to transact business in this State may withdraw from this State upon procuring from the Secretary of State a certificate of withdrawal.

(b) In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the Secretary of State an application for withdrawal, together with a conformed copy thereof, which shall set forth:

(1) The name and post-office address of the principal office of the corporation and the state or country under the laws of which it is incorporated.

(2) That the corporation is not transacting business in this State.

(3) That the corporation surrenders its authority to transact business in this State.

(4) That the corporation either continues its registered agent in this State or revokes his authority to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the corporation was authorized to transact business in this State may thereafter be made on such corporation by service thereof on the Secretary of State.

(5) If required by the Secretary of Revenue, such additional information as may be necessary or appropriate in order to determine and assess any unpaid taxes and fees payable under the laws of this State.

(c) The application for withdrawal shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application, or, if the corporation is

in the hands of a receiver or trustee, shall be executed on behalf of the corporation by such receiver or trustee and verified by him.

(d) If the Secretary of State finds that such application conforms to law, he shall, when notified by the Secretary of Revenue that such corporation has met the requirements with respect to reports and taxes required by the revenue laws of this State:

(1) Endorse on each of such documents the word "filed," and the hour, day, month and year of the filing thereof.
(2) File the application in his office.
(3) Issue a certificate of withdrawal to which he shall affix the conformed copy.

(e) The certificate of withdrawal, together with the conformed copy of the application for withdrawal affixed thereto by the Secretary of State, shall be returned to the corporation or its representative. Upon the issuance of such certificate of withdrawal, the authority of the corporation to transact business in this State shall cease. (1955, c. 1371, s. 1; 1973, c. 476, s. 193.)

Editor's Note. — The 1973 amendment substituted "Secretary of Revenue" for "Commissioner of Revenue."

§ 55-151. Revocation of certificate of authority. — (a) The certificate of authority of a foreign corporation to transact business in this State may be revoked by the Secretary of State upon the conditions prescribed in this section when:

(1) The corporation has failed for a period of 30 days to establish and maintain a registered office as required by G.S. 55-141; or
(2) The corporation has failed for a period of 30 days to appoint and maintain a registered agent in this State as required by G.S. 55-141; or
(3) The corporation has failed for a period of 30 days after change of its registered office or registered agent to file in the office of the Secretary of State a statement of such change pursuant to G.S. 55-142; or
(4) The corporation has failed to file in the office of the Secretary of State any amendment to its charter or any articles of merger within the time prescribed by G.S. 55-147 and 55-148; or
(5) A willful misrepresentation has been made of any material matter in any application, report, affidavit, or other document submitted by such corporation pursuant to this Chapter; or
(6) The corporation has, without justification, refused to comply with a court order made pursuant to G.S. 55-38; or
(7) The corporation is exceeding the authority conferred upon it by this Chapter.

(b) On the happening of any of the events set out in subsection (a) of this section, the Secretary of State shall give not less than 20 days' written notice to the corporation that he intends to revoke the certificate of authority of such corporation for one of the said causes, specifying the same. Such notice shall be given by mail duly addressed to the corporation at its registered office in this State and at its principal office outside the State, as shown by the records in the office of the Secretary of State. If, before the expiration of the time stated in the notice, the corporation establishes to the satisfaction of the Secretary of State the fact that the stated cause for the revocation of its certificate of authority did not exist as of the time the notice was mailed or, if it did exist at said time, has been cured, then the Secretary of State shall take no further action. Otherwise, on the expiration of the time stated in the notice, he shall revoke the certificate of authority.

(c) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1371, s. 1.)

§ 55-152. Issuance of certificate of revocation. — (a) To revoke any such certificate of authority, the Secretary of State shall:

(1) Issue a certificate of revocation in triplicate.

(2) File one of such certificates in his office.

(3) Mail one of such certificates to such corporation at its registered office in this State and one to the corporation at its principal office in the state or country under the laws of which it is incorporated, as shown by the records in the office of the Secretary of State.

(b) Upon the issuance of such certificate of revocation, the authority of the corporation to transact business in this State shall cease. (1955, c. 1371, s. 1.)

§ 55-153. Application of this Chapter to foreign corporations heretofore domesticated in this State. — (a) Subject to the provisions of subsection (d) of this section, foreign corporations which have been duly domesticated in this State at the time this Chapter takes effect shall be entitled to all the rights and privileges applicable to foreign corporations procuring authority to transact business in this State under this Chapter, and from the time this Chapter takes effect such corporations shall be subject to all the limitations, restrictions, liabilities, and duties prescribed herein for foreign corporations procuring under this Chapter authority to transact business in this State.

(b) Foreign corporations heretofore domesticated in this State which have not designated a principal office are required on and after July 1, 1957 to designate a registered office and appoint a registered agent in the manner, as near as may be, provided in G.S. 55-142.

(c) If any foreign corporation has, prior to the effective date of this Chapter, filed with the Secretary of State a statement designating a principal office within this State and agent in charge thereof and has continued to maintain the same, it shall not be required to, but it may, designate a new registered office and agent in the manner, as near as may be, provided in G.S. 55-142.

(d) If there is no office and agent registered in the office of the Secretary of State, then service of process may be made on the Secretary of State, as provided in G.S. 55-146 when there is no registered agent, until such time as a registered office is designated and a registered agent appointed.

(e) No foreign corporation which has been domesticated under the provisions of prior acts before July 1, 1957, shall hereafter have greater immunity from local jurisdiction than foreign corporations hereafter procuring a certificate of authority to transact business in this State and, to this end, every such domesticated foreign corporation, by continuing as a domesticated corporation in this State for a period of 90 days after July 1, 1957, shall be deemed to have expressly appointed the Secretary of State as its agent to receive service of process as fully as if it had made an application for a certificate of authority pursuant to the requirements of G.S. 55-138. (1955, c. 1371, s. 1; 1957, c. 979, ss. 18, 19.)

§ 55-154. Transacting business without certificate of authority. — (a) No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to trial; nor shall any action or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any cause of action arising out of the transaction of business by such corporation in this State until:

(1) A certificate of authority shall have been obtained by such corporation or by a foreign corporation which has acquired substantially all of its assets, or

(2) Substantially all of its assets have been acquired by a domestic corporation or one or more individuals.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

(b) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

(c) A foreign corporation failing to obtain permission to transact business in this State as required by this Chapter or by prior acts then applicable shall be liable to the State for the years or parts thereof during which it transacted business in this State without such permission in an amount equal to all fees and taxes which would have been imposed by law upon such corporation had it duly applied for and received such permission plus interest and all penalties imposed by law for failure to pay such fees and taxes, plus five hundred dollars ($500.00) and costs. The Attorney General shall bring actions to recover all amounts due the State under the provisions of this section.

(d) The Secretary of State is hereby directed to require that every foreign corporation transacting business in this State comply with the provisions of this Chapter. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign corporations now transacting business in this State which may have failed to comply with the provisions of this Chapter. (1901, c. 2, s. 57; 1903, c. 76; Rev., s. 1194; 1915, c. 263; C. S., s. 1181; 1935, c. 44; 1937, c. 343; 1939, c. 57; G. S., ss. 55-118, 55-120; 1953, c. 1152; 1955, c. 1371, s. 1.)

Editor's Note. — The cases dated prior to 1958 annotated below appeared under former § 55-118, which provided a penalty for noncompliance with the domestication statute in effect prior to July 1, 1957.

Constitutionality. — There is nothing in the United States or State Constitution which prohibits the State, in the exercise of its police power, from making the transaction of business by a foreign corporation prior to procuring a license an indictable offense. State v. Agey, 171 N.C. 831, 88 S.E. 726 (1916).

The only restriction of the Constitution is that the license tax must not interfere with interstate commerce or be otherwise invalid. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Contracts Not Avoided by Noncompliance. — The contracts of a foreign corporation doing business in this State without compliance with the statute as to domestication are not avoided; the penalty alone is enforceable by action as the statute prescribes. Miller v. Howell, 184 N.C. 119, 113 S.E. 621 (1922). See G. Ober & Sons Co. v. Katzenstein, 160 N.C. 439, 76 S.E. 476 (1912).

Action by State for Penalty. — See Blackwell's Durham Tobacco Co. v. American Tobacco Co., 144 N.C. 352, 57 S.E. 5 (1907); G. Ober & Sons Co. v. Katzenstein, 160 N.C. 439, 76 S.E. 476 (1912).

Attorney General as Party to Declaratory Judgment Action. — In a proceeding for a declaratory judgment against the Attorney General and the Secretary of State relative to the application of the registration provisions of former statute, upon which this section was based in part, to plaintiff, a foreign corporation, the Attorney General was not a real party defendant, but, being charged with the enforcement of the statute, he should be retained as a nominal defendant along with the Secretary of State where the constitutionality of the statute was being challenged. NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957).

Applied in State ex rel. Glamorgan Pipe & Foundry Co. v. Benfield, 266 N.C. 342, 145 S.E.2d 912 (1966).

Stated in Westarc Leasing Corp. v. Capital Sign Serv., Inc., 268 N.C. 601, 151 S.E.2d 204 (1966).

ARTICLE 11.

Fees and Taxes.

§ 55-155. Fees. — (a) In addition to any taxes prescribed by G.S. 55-156, the Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

(1) For filing an application to reserve or register a corporate name and for filing an application to renew such a registration (G.S. 55-12(f) and (h)), ... $ 5.00
(2) For filing a notice of transfer of a reserved corporate name (G.S. 55-12(g)), ... 5.00
(3) For filing articles of incorporation (G.S. 55-7), ... 5.00
(4) For filing an application of a foreign corporation for a certificate of authority to transact business in this State and issuing a certificate of authority (G.S. 55-138), ... 5.00
(5) For filing a statement of classification of shares (G.S. 55-42(e)), 5.00
(6) For filing a statement of the change of a registered office or registered agent, or both, of a domestic or foreign corporation (G.S. 55-14, 55-142, 55-153), ... 3.00
(7) For filing a notice of resignation of a registered agent (G.S. 55-14(d)), ... 1.00
(8) For filing a notice of resignation of a nonresident director under G.S. 55-33(a), ... 1.00
(9) For filing a certificate of reduction of capital (G.S. 55-48), ... 5.00
(10) For filing articles of amendment (G.S. 55-103), ... 5.00
(11) For filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to transact business in this State (G.S. 55-147), ... 5.00
(12) For filing a restated charter (G.S. 55-105), ... 5.00
(13) For filing an application of a foreign corporation for an amended certificate of authority to transact business in this State and issuing an amended certificate of authority (G.S. 55-149), ... 5.00
(14) For filing articles of merger or consolidation (G.S. 55-109), .. 5.00
(15) Repealed by Session Laws 1969, c. 751, s. 45.
(16) For filing a copy of articles of merger of a foreign corporation holding a certificate of authority to transact business in this State (G.S. 55-148), ... 5.00
(17) For filing a statement setting forth the name and address in this State of the registered agent of a foreign corporation not transacting business in this State (G.S. 55-145), ... 5.00
(18) For receiving any service of process as statutory agent either of a corporation or of a director of a corporation (G.S. 55-15(b), 55-33(d), 55-146), ... 1.00
which amount may be recovered from the adverse party as taxable costs by the party to the action or proceeding causing such service to be made if such party prevails in the action or proceeding.
(19) For issuing a certificate of revocation of authority of a foreign corporation (G.S. 55-152), ... 5.00
(20) Repealed by Session Laws 1969, c. 751, s. 45.
(21) For filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal (G.S. 55-150), ... 5.00
(22) For filing articles of voluntary dissolution by directors (G.S. 55-116), ... 5.00
(23) For filing articles of voluntary dissolution by written consent of shareholders (G.S. 55-117), ... 5.00

(24) For filing articles of voluntary dissolution by action of directors and stockholders (G.S. 55-118), ... $ 5.00
(25) For filing a statement of revocation of dissolution (G.S. 55-120), 2.00
(26) For filing a certificate of completed liquidation (G.S. 55-121), 2.00
(27) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation (G.S. 55-4(c)):
For the first page thereof, ... 1.00
For each additional page, ... .40
For affixing his certificate and official seal thereto, ... 2.00
(28) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation:
For each page, ... .20
For affixing his certificate and official seal thereto, ... 2.00
(29) For filing any other document not herein specifically provided for, ... 5.00

(b) The filing fees hereinbefore prescribed do not include copies or certified copies and the fees for such copies are those prescribed by subdivisions (27) and (28) of subsection (a) of this section.

(c) For recording and copying any corporate document or paper required by this Chapter to be recorded in his office, the register of deeds shall collect such amounts as are prescribed by G.S. 161-10 or other applicable laws. (1957, c. 1180; 1967, c. 823, s. 20; 1969, c. 751, ss. 43, 45; c. 797, s. 4.)

Cross Reference. — See Editor's note to § 53-5.

§ 55-156. Taxes. — (a) In addition to any fees prescribed by G.S. 55-155, on filing any of the following certificates or papers relative to corporations in the office of the Secretary of State, the following taxes shall be collected by the Secretary of State, and remitted to the State Treasurer for the use of the State:

(1) Articles of incorporation:
For each $1,000 of the total amount of capital stock authorized, $ .40
but in no case less than 40.00
nor more than 1,000
(2) Articles of amendment which include an authorization to increase capital stock:
For each $1,000 of the total increase authorized, ... .40
but in no case less than 40.00
nor more than 1,000
(3) Articles of amendment which do not include an authorization to increase capital stock, ... 40.00
(4) Articles of dissolution, ... 5.00
(5) Application by foreign corporation for certificate of authority to transact business in this State:
For each $1,000 of its authorized capital stock, ... .40
but in no case less than 40.00
nor more than 500.00
(6) Articles of merger or consolidation which increase the authorized capital stock which the surviving or new corporation, domestic or foreign, will have authority to issue above the aggregate authorized capital stock which the constituent domestic corporations and constituent foreign corporations authorized to transact business in this State had authority to issue:
For each $1,000 of the total amount of such increase ..... .40
but in no case less than 40.00
nor more than 1,000

(7) Articles of merger or consolidation which do not increase the authorized capital stock which the surviving or new corporation, domestic or foreign, will have authority to issue above the aggregate authorized capital stock which the constituent domestic corporations and constituent foreign corporations authorized to transact business in this State had authority to issue, ... $ 40.00

(b) For the purpose of computing taxes under this section, shares of no par value shall be treated as if they were of one dollar ($1.00) par value. (1957, c. 1180; 1969, c. 751, s. 42; c. 797, s. 5.)

Article 12.

Curative Provisions.

§ 55-157. Curative act; amendments prior to 1901. — All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An Act to Revise the Corporation Law of North Carolina," being Chapter 2, Public Laws of 1901, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of Chapter 380 of the Public Laws of 1893, or in accordance with the provisions of Chapter 2 of the Public Laws of 1901, but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of Chapter 2 of the Public Laws of 1901. (1905, c. 316; Rev., s. 1248; C. S., s. 1134; G. S., s. 55-35; 1955, c. 1371, s. 2.)

§ 55-158. Certain corporate conveyances validated. — All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1971, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal. (1939, c. 23; 1949, c. 436; G. S., s. 55-41; 1955, c. 1371, s. 2; 1957, c. 500, s. 2; 1971, c. 60.)

Quoted in Investors Corp. v. Field Fin. Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

§ 55-159. Certain deeds executed by banks validated. — All deeds heretofore executed by banks and attested by the cashier, assistant cashier, secretary or assistant secretary thereof, which deeds are otherwise regular and valid, are hereby validated. (1943, c. 219, s. 1½; G. S., s. 55-41.1; 1955, c. 1371, s. 2.)

§ 55-160. Certain conveyances of corporations now dissolved validated. — All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1939, executed in its corporate name and signed by either its president, vice-president or secretary, and sealed with the common seal of the corporation, where said corporation has been dissolved for at least seven years, and said deed or conveyance has been on record for at least seven years, shall be good and valid, notwithstanding the failure of one of such officers to sign such instrument. (1949, c. 825; G. S., s. 55-41.2; 1955, c. 1371, s. 2.)

§ 55-161. Conveyances by corporations owned by the United States government. — The Home Owners Loan Corporation and any corporation, the majority of whose stock is owned by the United States government, may convey lands, and/or other property which is transferable by deed which is duly

executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution under seal of the board of directors of said corporation authorizing the said officer, manager or agent to execute, sign, seal and attest deeds, conveyances and/or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority.

All deeds, conveyances or other instruments which have been executed prior to March 15, 1951, in the manner prescribed above, if otherwise sufficient, shall be valid, and shall have the effect to pass the title to the real and/or personal property described therein. (1941, c. 294; 1951, c. 395; G. S., s. 55-42; 1955, c. 1371, s. 2.)

§ 55-162. Validation of amendments to corporate charters extending corporate existence. — In every case where a private corporation, chartered under the general laws of the State of North Carolina, has continued to act and do business as a corporation after the expiration of its period of existence as theretofore fixed in its charter, and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if such amendment had been made within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 1; G. S., s. 55-164.1; 1955, c. 1371, s. 2.)

§ 55-163. Limitation of actions attacking validity of corporate action on grounds amendment not filed during corporate existence. — No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after the ratification of this Article in which either the continued existence of such corporation or the validity of any of the contracts, acts, deeds, rights, privileges, powers, franchises and titles of such corporation is attacked or otherwise questioned on the grounds that such amendment was not filed within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 2; G. S., s. 55-164.2; 1955, c. 1371, s. 2.)

§ 55-164. Clarification of intent of preceding section. — In no event shall the limitation provided in G.S. 55-163 bar any action, proceeding, defense or counterclaim based upon grounds other than those mentioned in G.S. 55-163, unless the grounds set out in G.S. 55-163 are an essential part thereof. (1947, c. 504, s. 3; G. S., s. 55-164.3; 1955, c. 1371, s. 2.)

§ 55-164.1. New corporations organized to succeed to rights in corporate charter forfeited. — Whenever the charter of a corporation created under the laws of the State of North Carolina has, on account of failure to make any report or return or to pay any tax or fee for such length of time as to lose its charter, and where thereafter, under the laws of the State of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this State, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the newer corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring

or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation has never expired by reason of its failure to make the reports hereinbefore referred to. (1959, c. 1316, s. 28½; 1973, c. 469, s. 45.)

Editor's Note. — The 1973 amendment substituted "Whenever the charter of" for "Wherever" at the beginning of the first paragraph and substituted, in that paragraph, "any report or return or to pay any tax or fee" for "reports to the different State authorities."

Article 13.

Miscellaneous Provisions.

§ 55-165. Interrogatories by Secretary of State. — The Secretary of State may propound to any corporation, domestic or foreign which he has reason to believe is subject to the provisions of this Chapter, and to any officer or director thereof, such written interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation is subject to the provisions of this Chapter or has complied with all the provisions of this Chapter applicable to it. Such interrogatories shall be answered within 30 days after the mailing therefor, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual they shall be answered by him, and if directed to a corporation they shall be answered by the president, vice-president, secretary or assistant secretary thereof. The Secretary of State need not file any document to which such interrogatories relate until such interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this Chapter. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this Chapter, requiring or permitting action by the Attorney General. (1955, c. 1371, s. 1.)

Cited in Good Will Distribs. (Northern), Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959).

§ 55-166. Penalties imposed upon corporations, officers and directors for failure to answer interrogatories. — (a) Each corporation, domestic or foreign, that fails or refuses to answer truthfully and fully within the time prescribed by this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter, shall be deemed to be guilty of a misdemeanor.

(b) Each officer and director of a corporation, domestic or foreign, who fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter, or who signs any articles, statement, report, application or other document filed with the Secretary of State which is known to such officer or director to be false in any material respect, shall be guilty of a misdemeanor. (1955, c. 1371, s. 1.)

§ 55-167. Information disclosed by interrogatories. — Interrogatories propounded by the Secretary of State and the answers thereto shall not be open to public inspection nor shall the Secretary of State disclose any facts or information obtained therefrom except insofar as his official duty may require the same to be made public or in the event such interrogatories or the answers

thereto are required for evidence in any criminal proceedings or in any other action or proceedings by this State. (1955, c. 1371, s. 1.)

§ 55-168. Powers of Secretary of State. — The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this Chapter efficiently and to perform the duties therein imposed upon him. (1955, c. 1371, s. 1.)

§ 55-169. Certificates and certified copies to be received in evidence. — All certificates issued by the Secretary of State in accordance with the provisions of this Chapter, and all copies of documents filed in his office in accordance with the provisions of this Chapter when certified by him, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. (1955, c. 1371, s. 1.)

Cross Reference. — See § 55-8.

§ 55-170. Forms of documents required to be filed in office of Secretary of State. — Any document required to be filed in the office of the Secretary of State shall be made in such form, if any, as may be prescribed by the Secretary of State pursuant to the provisions of this Chapter. (1955, c. 1371, s. 1.)

§ 55-171. Photostatic copies of documents acceptable for filing or recording. — When any document is required or permitted to be filed or recorded by this Chapter, a photostatic or other photographic copy of such document may be filed or recorded in lieu of the original instrument. Such filing or recording shall have the same force and effect as if the original instrument had been so filed or recorded. (1955, c. 1371, s. 1.)

§ 55-172. Waiver of notice. — Whenever any notice is required to be given to any shareholder or director of a corporation under the provisions of this Chapter or under the provisions of the charter or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice. (1955, c. 1371, s. 1.)

§ 55-173. Notice to director or shareholder outside the United States. — Any requirement of this Chapter or of the charter or bylaws, with respect to the giving or sending of any notice or communication to any shareholder or director as such whose address as it appears upon the records of the corporation is outside of the United States, shall be dispensed with, and no action taken shall be affected or invalidated by the failure to give or send any such notice or communication, insofar as compliance with any such requirement is at the time prohibited by, or dependent upon, the obtaining of a license or consent under, any act of Congress or any rules, regulations, proclamations, or executive orders purported to be issued under authority of any such act. (1955, c. 1371, s. 1.)

§ 55-174. Reserve power. — The General Assembly reserves the power to amend or repeal the charter of any corporation hereafter or heretofore formed and to amend or repeal this Chapter or any part thereof, and the rights of any corporation or of any shareholder, director or officer in any corporation are subject to this reservation. This Chapter, including this reservation, is a part of the charter contract between the shareholders. The power so reserved includes the power to authorize charter amendments which are to be effectuated pursuant to consent by the shareholders in the manner permitted by this Chapter, as now enacted or as subsequently amended. (1901, c. 2, s. 7; Rev., s. 1136; C. S., s. 1135; G. S., s. 55-36; 1955, c. 1371, s. 1.)

§ 55-175. Cross references. — Whenever in this Chapter, as enacted or as hereafter amended, whether by enactment of additional provisions or otherwise, reference is made to a section of this Chapter or of any other Chapter of the statutes of this State, such reference shall, unless otherwise provided, extend to and include any amendment of the section so referred to or any section hereafter enacted in lieu of the section so referred to. (1955, c. 1371, s. 1.)

Chapter 55A.

Nonprofit Corporation Act.

Article 1.

General Provisions.

Sec.
55A-1. Title.
55A-2. Definitions.
55A-3. Applicability of Chapter.

Article 2.

Execution and Filing of Certain Corporate Documents.

55A-4. Execution of corporate documents for filing; filing, recording and effectiveness.

Article 3.

Formation, Name and Registered Office.

55A-5. Purposes.
55A-6. Incorporators.
55A-7. Articles of incorporation.
55A-8. Corporate existence; filing of articles of incorporation; effect.
55A-9. Organization meeting of directors.
55A-10. Corporate name.
55A-11. Registered office and registered agent.
55A-12. Change of registered office or registered agent.
55A-13. Service of process on corporation.
55A-14. Bylaws.

Article 4.

Powers and Management.

55A-15. General powers.
55A-16. Special powers; public parks and drives and certain recreational corporations.
55A-17. Defense of ultra vires.
55A-18. Loans to directors and officers prohibited.
55A-19. Board of directors.
55A-20. Number, election and term of directors.
55A-21. Vacancies.
55A-22. Quorum of directors.
55A-23. Committees.
55A-24. Place and notice of directors' meetings.
55A-24.1. Informal or irregular action by directors or committees; attendance by telephone.
55A-25. Officers.
55A-26. Removal of officers.
55A-27. Books and records.
55A-27.1. Form of records.
55A-28. Shares of stock and dividends prohibited.

Article 5.

Members.

55A-29. Members.

Sec.
55A-30. Meetings of members.
55A-31. Notice of members' meetings.
55A-32. Voting.
55A-33. Quorum.

Article 6.

Fundamental Changes.

55A-34. Right to amend charter.
55A-35. Procedure to amend charter.
55A-36. Articles of amendment.
55A-37. Effect of certificate of amendment.
55A-37.1. Restated charter.
55A-38. Procedure for merger.
55A-39. Procedure for consolidation.
55A-40. Approval of merger or consolidation.
55A-41. Articles of merger or consolidation.
55A-42. Effect of merger or consolidation.
55A-42.1. Merger or consolidation of domestic and foreign corporations.
55A-43. Sale, lease, exchange, or mortgage of assets.

Article 7.

Dissolution and Liquidation.

55A-44. Voluntary dissolution.
55A-44.1. Extension of duration after expiration.
55A-45. Distribution of assets.
55A-46. Plan of distribution.
55A-47. Revocation of voluntary dissolution proceedings.
55A-48. Articles of dissolution.
55A-49. Effect of filing of articles of dissolution; certificate of dissolution.
55A-50. Involuntary dissolution in action by Attorney General.
55A-51. Duties of Attorney General with respect to actions for involuntary dissolution.
55A-52. Venue and service of process.
55A-53. Power of court to liquidate assets and affairs of corporation.
55A-54. Procedure in liquidation of corporation by court.
55A-55. Discontinuance of liquidation action.
55A-56. Duties of officials as to decrees and orders concerning dissolution.
55A-57. Disposition of amounts due certain creditors, members, and other persons.

Article 8.

Foreign Corporations.

55A-58. Right to conduct affairs.
55A-59. Powers of foreign corporation.
55A-60. Corporate name of foreign corporation.
55A-61. Application for certificate of authority.

Sec.
55A-62. Filing of application and certificate of authority.
55A-63. Effect of certificate of authority.
55A-64. Registered office and registered agent of foreign corporation.
55A-65. Change of registered office or registered agent of foreign corporation.
55A-66. Suits against foreign corporations authorized to conduct affairs in this State.
55A-67. Suits against foreign corporations conducting affairs in the State without authorization.
55A-68. Service on foreign corporation by service on Secretary of State.
55A-68.1. Alternative jurisdiction over and service of process on foreign corporations.
55A-69. Amendment to charter of foreign corporation.
55A-70. Merger of foreign corporation authorized to conduct affairs in this State.
55A-71. Amended certificate of authority.
55A-72. Withdrawal of foreign corporation.
55A-73. Revocation of certificate of authority.
55A-74. Issuance of certificate of revocation.
55A-75. Application of this Chapter to foreign corporations heretofore domesticated in this State.
55A-76. Conducting affairs without certificate of authority.

Article 9.

Fees and Taxes.

Sec.
55A-77. Fees.
55A-78. Taxes.

Article 10.

Miscellaneous Provisions.

55A-79. Interrogatories by Secretary of State.
55A-80. Penalties imposed upon corporations, officers and directors for failure to answer interrogatories.
55A-81. Powers of Secretary of State.
55A-82. Certificates and certified copies to be received in evidence.
55A-83. Forms of documents required to be filed in office of Secretary of State.
55A-84. Photostatic copies of documents acceptable for filing or recording.
55A-85. Waiver of notice.
55A-86. Action by members without a meeting.
55A-87. Reserve power.
55A-88. Certain religious, etc., associations deemed incorporated.
55A-89. Cross references.

Article 11.

Curative Provisions.

55A-89.1. Validation of amendments to corporate charters extending corporate existence; limitation of actions; intent.

Cross Reference. — As to jurisdiction of the superior court division over proceedings under this Chapter, see § 7A-249.

ARTICLE 1.

General Provisions.

§ 55A-1. Title. — This Chapter shall be known and may be cited as the Nonprofit Corporation Act. (1955, c. 1230.)

Editor's Note. — Session Laws 1955, c. 1230, inserting this Chapter, repealed all provisions relating to nonprofit corporations in Chapter 55 of the General Statutes, except as the provisions apply to hospital service corporations regulated by Chapter 57 of the General Statutes.

Cited in Adams v. Flora Macdonald College, 247 N.C. 648, 101 S.E.2d 809 (1958); Coats v. Sampson County Mem. Hosp., 264 N.C. 332, 141 S.E.2d 490 (1965); Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968); Fuquay-Varina Tobacco Bd. of Trade v. Hardin, 316 F. Supp. 366 (E.D.N.C. 1970).

§ 55A-2. Definitions. — As used in this Chapter, unless the context otherwise requires, the term:

(1) "Board of directors" means the group of persons vested by the corporation with the management of its affairs whether or not such group is designated as directors in the charter.

(2) "Bylaws" means rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.

(3) "Charter" includes the original articles of incorporation and all amendments thereto including articles of merger.

(4) "Corporation" or "domestic corporation" means a nonprofit corporation subject to the provisions of this Chapter, except a foreign corporation.

(5) "Foreign corporation" means a nonprofit corporation organized under laws other than the laws of this State.

(6) "Insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its affairs.

(7) "Member" means one having membership rights in a corporation in accordance with the provisions of its charter or bylaws.

(8) "Nonprofit corporation" means a corporation intended to have no income or intended to have income none of which is distributable to its members, directors, or officers, and includes all marketing associations without capital stock formed under Chapter 54 of the General Statutes or under any act or acts replaced thereby. (1955, c. 1230; 1959, c. 1161, s. 4.)

§ 55A-3. Applicability of Chapter. — (a) The provisions of this Chapter relating to domestic corporations shall apply to:

(1) All corporations hereafter organized under this Chapter.

(2) All nonprofit corporations heretofore organized under any act hereby repealed, except nonprofit corporations having capital stock.

(3) All nonprofit corporations without capital stock heretofore or hereafter organized under any other act, unless there is some other specific statutory provision particularly applicable to such corporations or inconsistent with some provisions of this Chapter, in which case that other provision prevails. Nothing herein shall apply to hospital and medical service corporations as defined in Chapter 57 of the General Statutes which were incorporated prior to July 1, 1957, or repeal or modify the provisions of G.S. 54-138.

(b) The provisions of this Chapter relating to foreign corporations shall apply to all such corporations conducting affairs in this State for purposes for which a corporation might be organized under this Chapter. (1955, c. 1230; 1967, c. 659.)

ARTICLE 2.

Execution and Filing of Certain Corporate Documents.

§ 55A-4. Execution of corporate documents for filing; filing, recording and effectiveness. — (a) Whenever the provisions of this Chapter require any document relating to a corporation to be executed and filed in accordance with this section, unless otherwise specifically stated in this Chapter:

(1) There shall be an original executed document and also one conformed copy.

(2) The said original document shall, if required to be executed by the corporation, be signed by the president or a vice-president and also by the secretary or an assistant secretary, with or without the corporate seal. If required to be executed by designated individuals each of them shall sign.

(3) Except where the provisions of this Chapter specifically require acknowledgment, the said original document shall be verified by each of the individuals signing, whether in a representative capacity or otherwise, by a statement under oath, made before and certified by an official who is authorized under the laws of this State to take acknowledgments, declaring that he signed the said document, that the statements therein are true, and, in the case of an individual who signed in a representative capacity, declaring the capacity in which he signed and that he was authorized so to sign.

(4) The conformed copy may either extend its conformation with the original document through all the verifications (or acknowledgments, as the case may be) or may in lieu of such extension contain the legend, after the name of the signers, substantially as follows:

"Original duly verified (acknowledged) by all signers."

(5) The original document so signed and verified (or acknowledged, as the case may be), together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word "filed" and the hour, day, month, and year of the filing thereof, and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certifed to the corporation or its representative.

(6) The copy, certified as aforesaid, shall be promptly delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the corporation or its representative.

(b) Any such document required to be filed shall be completely effective when endorsed by the Secretary of State as provided in subsection (a)(5) above and the transaction to be effectuated thereby shall thereupon be deemed to be completely consummated as if all the required recording had been perfected, provided, however, that in lieu of the time of such endorsement by the Secretary of State, such document may fix an hour, day, month and year not more than 20 days subsequent to the endorsement of the Secretary of State and the transaction shall be deemed to be completely consummated at the time fixed by such document as if all the required recording had been perfected. Unless otherwise provided in this Chapter with respect to some specific document, failure to deliver it for recording in the office of the register of deeds shall only subject the corporation to a penalty of one hundred dollars ($100.00) to be collected by the Secretary of State.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office or, if such be the request, to make or cause to be made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1955, c. 1230; 1967, c. 13, s. 2; c. 823, s. 21.)

Cross Reference. — See Editor's note to § 53-5.

ARTICLE 3.

Formation, Name and Registered Office.

§ 55A-5. Purposes. — Nonprofit corporations may be organized under this Chapter for any lawful purposes. Where by law special provisions are made for the organization of designated classes of nonprofit corporations, such corporations shall be formed under those provisions and not hereunder. (1955, c. 1230.)

§ 55A-6. Incorporators. — One or more natural persons, whether or not residents of this State, of the age of 18 years or more may act as incorporators of a corporation by signing and acknowledging articles of incorporation, which shall be filed according to G.S. 55A-4. The acknowledgment shall be before an officer duly authorized under the laws of this State to take the proof or acknowledgment of deeds. (1955, c. 1230; 1969, c. 875, s. 1; 1971, c. 1231, s. 1.)

§ 55A-7. Articles of incorporation. — (a) The articles of incorporation shall set forth:

(1) The name of the corporation.

(2) The period of duration, which may be perpetual.

(3) The purpose or purposes for which the corporation is organized.

(4) If the corporation is to have no members, a statement to that effect.

(5) If the corporation is to have one or more classes of members, any provision which the incorporators elect to set forth in the articles of incorporation designating the class or classes of members and stating the qualifications and rights of the members of each class.

(6) If the directors or any of them are not to be elected or appointed by one or more classes of members, a statement of the manner in which such directors shall be elected or appointed, in which case provision may be made for their election by other designated associations, corporations or individuals or by any combination of the votes of such persons. In lieu thereof, the charter may provide that the method of election of directors be left to the bylaws.

(7) Any provisions, not inconsistent with law, which the incorporators elect to set forth in the charter (including, if desired, provisions with respect to the relative rights or interests of the members as among themselves or in the property of the corporation, the manner of termination of membership in the corporation, the rights, upon such termination, of the corporation, the terminated member and the remaining members, the transferability or nontransferability of memberships, and the distribution of assets on liquidation or for subordinating and subjecting the corporation to the authority of any head or national association, lodge, order, beneficial association, fraternal or beneficial society, foundation, federation or other nonprofit corporation, society, organization or association).

(8) The address, including county and city or town, and street and number, if any, of its initial registered office, which shall be in this State, and the name of its initial registered agent at such address.

(9) The number of persons constituting the initial board of directors, by whatever name called, and the names and addresses, including street and number, if any, of the persons who are to serve as the initial board.

(10) The name and address, including street and number, if any, of each incorporator.

(b) It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this Chapter. (1955, c. 1230; 1957, c. 979, s. 11; 1959, c. 1161, s. 5.)

§ 55A-8. Corporate existence; filing of articles of incorporation; effect. — The time when corporate existence begins is determined by the provisions of G.S. 55A-4, and a copy of the articles certified by the Secretary of State shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Chapter, except as against this State in a proceeding to annul or revoke the articles of incorporation. (1955, c. 1230; 1967, c. 13, s. 4.)

§ 55A-9. Organization meeting of directors. — After the filing of the articles of incorporation in the office of the Secretary of State an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of a majority of the directors, for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least three days notice thereof by mail to each director so named, which notice shall state the time and place of the meeting, unless notice is waived as hereinafter provided. Any action permitted to be taken at the organizational meeting may be taken without a meeting of the board of directors and shall be deemed board action if it complies with the requirements of G.S. 55A-86. (1955, c. 1230; 1969, c. 875, s. 2.)

§ 55A-10. Corporate name. — (a) The corporate name shall not contain any word or phrase likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(b) The corporate name shall not, subject to the provisions of G.S. 55A-60, be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or of any foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, or a corporate name the exclusive right to which is at the time reserved or registered by some other person in the manner prescribed in this section or G.S. 55-12.

(c) The exclusive right to a corporate name not prohibited by this section may be reserved for a period of 90 days by:

(1) Any person intending to organize a corporation under this Chapter,
(2) Any domestic corporation intending to change its name,
(3) Any foreign corporation intending to make application for a certificate of authority to conduct affairs in this State,
(4) Any foreign corporation authorized to conduct affairs in this State and intending to change its name, or
(5) Any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to conduct affairs in this State.

The same name shall not be reserved for two or more consecutive 90-day periods by the same applicant or for the use and benefit of the same applicant; nor shall such consecutive reservations be made of names so similar as to fall within the prohibition of this section.

(d) Any person or corporation acquiring the good will of a domestic corporation or of a foreign corporation authorized to conduct affairs in this State may, on furnishing the Secretary of State satisfactory evidence of such acquisition, reserve the exclusive right to the corporate name of the said corporation for a period of 10 years.

(e) The reservation of name, pursuant to subsections (c) and (d) of this section, shall be made by filing with the Secretary of State a verified application therefor stating the name and address of the applicant, and the Secretary of State shall, upon tender of the fee hereinafter prescribed, reserve the name exclusively for

the applicant unless he finds that the name is not available under the provisions of this section.

(f) The exclusive right to a specified corporate name reserved hereunder, may, on tender of the fee hereinafter prescribed, be transferred to any other person or corporation by filing in the office of the Secretary of State a notice of such transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

(g) Any foreign corporation not conducting affairs in this State may register its corporate name, if not prohibited by this section, by filing with the Secretary of State a verified application therefor setting forth the name and address of the principal office of the corporation, the jurisdiction in which it is incorporated, the date of its incorporation, a statement that it is organized and conducting affairs in good standing under the laws of the jurisdiction in which it is incorporated, and a brief statement of the business in which it is engaged; and the Secretary of State shall, upon tender of the fee prescribed by G.S. 55A-77(a), register the name exclusively for the use of such foreign corporation, unless he finds that the name is not available under the provisions of this section. Such registration shall be effective for a period of one year, and it may be renewed from year to year, not to exceed 10 years, by filing with the Secretary of State a verified renewal application setting forth the same facts required to be set forth in the original application for registration. Any renewal application filed after the expiration of the registration shall be treated as a new application for registration.

(h) The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing held not less than five days after written notice has been sent by registered mail to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation or registration was false when such application was filed or has thereafter become false.

(i) The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State. (1955, c. 1230; 1969, c. 875, s. 3.)

§ 55A-11. Registered office and registered agent. — (a) Each corporation shall have and continuously maintain in this State:

(1) A registered office which may be, but need not be, the same as its principal office.

(2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office, or a domestic corporation, whether for profit or not for profit, or a foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, having an office identical with such registered office.

(b) A corporation formed prior to July 1, 1957, which has not designated a principal office is required on and after July 1, 1957, to designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55A-12; other corporations formed prior to July 1, 1957, shall not be required to, but may, designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55A-12. (1955, c. 1230; 1957, c. 979, s. 20.)

§ 55A-12. Change of registered office or registered agent. — (a) A corporation may change its registered office or its registered agent, or both. To effectuate such change, a statement shall be executed by the corporation and filed, in accordance with the provisions of G.S. 55A-4 setting forth:

(1) The name of the corporation.

(2) The address, including county and city or town, and street and number, if any, of its then registered office.
(3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any, to which the registered office is to be changed.
(4) The name of its then registered agent.
(5) If its registered agent be changed, the name of its successor registered agent.
(6) That the address of its registered office and the address of the office of its registered agent, as changed, will be identical.
(7) That such change was authorized by resolution duly adopted by its board of directors.

(b) If the change in the registered office is to another county, a copy of such statement certified by the Secretary of State shall be recorded both in the old county and in the new county, and there shall also be recorded in the new county, in the manner prescribed by G.S. 55A-4, a similarly certified copy of the corporation's charter.

(c) If the statement purporting to effectuate such changes is not recorded in all the offices wherein recording is required by this section, persons asserting claims against the corporation may treat as the registered agent or registered office of the corporation either the one newly designated in the statement or the preexisting one.

(d) Any registered agent of a corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the Secretary of State, who shall forthwith mail a copy thereof to the corporation at its registered office, or, in the case of a foreign corporation, to the address of the principal office of the corporation in the state or country under the laws of which it is incorporated. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State.

(e) In lieu of the procedure set out in subsection (a) above, the location of the registered office of a domestic corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of the corporations recited in the certificate. Such certificate shall be filed in duplicate in the office of the Secretary of State who shall then furnish a certified copy of the same, showing the date of such filing, and shall return the copy so certified to the registered agent, and the copy, certified as aforesaid, shall, within 60 days after the receipt by the registered agent, be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the registered agent. The fee to be charged by the Secretary of State for the filing of such certificate shall be three dollars ($3.00) for each corporation listed in said certificate, the total not to exceed two hundred dollars ($200.00). (1955, c. 1230; 1957, c. 979, ss. 12, 13; 1973, c. 314, ss. 1, 2.)

Editor's Note. — The 1973 amendment substituted "not recorded in all" for "recorded in some" near the beginning of subsection (c) and added subsection (e).

§ 55A-13. Service of process on corporation. — (a) Service upon the registered agent appointed by a corporation of any process, notice or demand required or permitted by law to be served upon the corporation shall be binding upon the corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(d) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law. (1955, c. 1230.)

§ 55A-14. Bylaws. — The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend, or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless otherwise provided in the charter or the bylaws. The initial bylaws adopted by the directors or any bylaws adopted by the members may contain any provisions, not inconsistent with law or the charter, with respect to: voting rights and the manner of conducting votes on any matter, the relative rights or interests of the members as among themselves or in the property of the corporation, the manner of termination of membership in the corporation, the rights, upon such termination, of the corporation, the terminated member and the remaining members, and the transferability or nontransferability of memberships. Any bylaws lawfully adopted may contain any additional provisions, not inconsistent with law or the charter, for the regulation and management of the affairs of the corporation, including any provision for penalties for violation of its rules. (1955, c. 1230.)

ARTICLE 4.

Powers and Management.

§ 55A-15. General powers. — (a) Every corporation shall have power:

(1) To have perpetual succession by its corporate name unless a limited period of duration is stated in its charter.

(2) To sue and be sued, complain and defend, in its corporate name.

(3) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.

(4) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.

(5) To make and alter bylaws, not inconsistent with its charter or with the laws of this State, for the administration and regulation of the affairs of the corporation.

(6) If the charter so provides, to make donations for the public welfare or for religious, charitable, scientific or educational purposes; and in time of war to make donations in aid of war activities.

(7) If the charter so provides, to lend money to its employees other than its officers and directors and otherwise to assist its employees, officers, and directors.

(8) Subject to any restrictions in the charter, to indemnify any director or officer or former director or officer of the corporation or any person who may have served at its request as a director or officer of another corporation, whether for profit or not for profit, against expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of being or having been such director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty; but such indemnification shall not be deemed exclusive of any other rights to which such director or officer may be entitled, under any bylaw, agreement, vote of board of directors or members, or otherwise.

(9) To cease its corporate activities and surrender its corporate franchise.

(b) In connection with carrying out the purposes stated in its charter, and subject to any limitation prescribed by this Chapter or in its charter, every corporation shall also have power:

(1) To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

(2) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.

(3) To acquire, by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, domestic or foreign business corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.

(4) To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income.

(5) To procure for its benefit insurance on the life or physical or mental ability of any employee, including any officer, or, in case of a religious, educational, or charitable corporation, any sponsor, contributor, student or former student, whose death or disability might cause financial loss to the corporation, and to this end the corporation has an insurable interest in the lives of each of such persons.

(6) To lend money for its corporate purposes, invest its funds from time to time, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(7) To conduct its affairs, carry on its operations, and have offices and exercise the powers granted by this Chapter anywhere in the world.

(8) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

(c) The foregoing powers shall be limited as follows for any corporation organized under this Chapter which shall be classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws, unless any such corporation shall, by its articles of incorporation or amendment thereto, specifically state that it does not intend to be so limited:

(1) Each such corporation shall make distributions of such amounts, for each taxable year, at such time and in such manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

(2) No such corporation shall engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

(3) No such corporation shall retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

(4) No such corporation shall make any investments in such manner as to subject it to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

(5) No such corporation shall make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws. (1955, c. 1230; 1957, c. 783, s. 7; 1969, c. 875, s. 4; 1971, c. 1136, s. 1.)

§ 55A-16. Special powers; public parks and drives and certain recreational corporations. — Any corporation heretofore or hereafter formed for the purpose of creating and maintaining public parks and drives shall have full power and authority to lay out, manage, and control parks and drives within the State, under such rules and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and subject to such conditions as may be determined upon by such city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under such rules, laws, and regulations as the corporation may adopt through its board of directors, and it shall have power and authority to make and adopt all such laws and regulations as it may determine upon for the reasonable management of such parks and drives. The terms "public parks and drives" as used in this section shall be construed so as to include playgrounds, recreational centers, and other recreational activities and facilities which may be provided and established under the sponsorship of any county, city, town, township, or school district in North Carolina and constructed or established with the assistance of the government of the United States or any agency thereof. (1955, c. 1230; 1973, c. 695, s. 9.)

Editor's Note. — The 1973 amendment deleted the former fifth sentence, which provided: "All property owned by it and appropriated exclusively for public parks and drives shall not be subject to taxation."

Exclusion of Negroes from Golf Course Operated by Nonprofit Corporation. — A city cannot own and operate a golf course for the public and exclude Negro citizens from the privileges thereof on account of their color. Nor can Negroes be excluded from a golf course owned by the city and leased to a nonprofit corporation which was organized solely for the purpose of taking the lease and

maintaining and operating the course as a public golf course. Simkins v. City of Greensboro, 149 F. Supp. 562 (M.D.N.C. 1957).

§ 55A-17. Defense of ultra vires. — No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

(1) In any action by a member or a director against the corporation to enjoin the doing of any act or the transfer of real or personal property by or to the corporation, but in any such action the plaintiff shall sustain the burden of proof that he has not at any time thereto assented to the act or transfer in question and that in bringing the action he is not acting in collusion with officials of the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the action and if deemed equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as loss or damage sustained.

(2) In an action by the corporation or by its receiver, trustee or other legal representative, or by its members in a representative suit, against the incumbent or former officers or directors of the corporation.

(3) In an action by the Attorney General, to dissolve the corporation, or in an action by the Attorney General to enjoin the corporation from the transaction of unauthorized business, or in a proceeding by the Secretary of State to revoke a certificate of authority of a foreign corporation, pursuant to G.S. 55A-73. (1955, c. 1230.)

§ 55A-18. Loans to directors and officers prohibited. — No loans shall be made by a corporation to its directors or officers. The directors of a corporation who vote for or assent to the making of a loan to a director or officer of the corporation, and any officer or officers participating in the making of such loan, shall be jointly and severally liable to the corporation for the amount of such loan until the repayment thereof. (1955, c. 1230.)

§ 55A-19. Board of directors. — The affairs of a corporation shall be managed by a board of directors. Directors need not be residents of this State or members of the corporation unless the charter or the bylaws so require. The charter or the bylaws may prescribe other qualifications for directors. (1955, c. 1230.)

§ 55A-20. Number, election and term of directors. — (a) The number constituting the board of directors of a corporation shall be not less than three. The number constituting the initial board of directors shall be fixed by the articles of incorporation. In the absence of a provision in the articles of incorporation, the charter, or the bylaws fixing the number of directors, the number shall be the same as that fixed in the articles of incorporation for the initial board of directors, subject to the provisions of this section. The articles of incorporation, the charter, or the bylaws may provide for a maximum and minimum number of directors, and, if so, shall designate the manner in which such number shall from time to time be determined. If the fixing of a maximum

and minimum number of directors is authorized and the corporation has members entitled to vote for directors, the articles of incorporation, the charter, or the bylaws may provide that any directorships not filled by the members shall be treated as vacancies to be filled by and in the discretion of the board of directors.

(b) The number of directors may be increased or decreased from time to time only by amendment to the bylaws, unless the charter provides that a change in the number of directors shall be made only by amendment of the charter. No decrease in number shall have the effect of shortening the term of any incumbent director.

(c) The first board of directors shall consist of those named in the articles of incorporation. Thereafter, if the corporation has members entitled to vote for directors, directors shall be elected by the members entitled to vote at the first annual meeting and at each subsequent annual meeting of the members. Such election may be by mail if the bylaws so provide. If the corporation does not have members or members entitled to vote for directors, directors shall be elected or appointed in the manner and for the terms as provided in the bylaws. In the absence of a provision fixing the term of office, the term of office of a director shall be one year.

(d) Directors may be divided into classes and the terms of office of the several classes need not be uniform. Each director shall hold office for the term for which he is elected or appointed and until his successor shall have been elected or appointed and qualified.

(e) Election of directors by the members shall be by ballot unless the charter or the bylaws otherwise provide.

(f) A director may be removed from office pursuant to any procedure therefor set forth in a charter provision, including one adopted by amendment after he was elected or appointed as director. (1955, c. 1230; 1973, c. 192, ss. 1, 2.)

Editor's Note. — The 1973 amendment rewrote subsection (a) and inserted "entitled to vote for directors" in the second sentence and "for directors" in the fourth sentence of subsection (c).

§ 55A-21. Vacancies. — Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors unless the charter or the bylaws provide that a vacancy or directorship so created shall be filled in some manner, in which case such provision shall control. A director elected or appointed, as the case may be, to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office. (1955, c. 1230.)

§ 55A-22. Quorum of directors. — A majority of the number of directors fixed by the charter or bylaws shall constitute a quorum for the transaction of business unless otherwise provided in the charter or the bylaws; but in no event shall a quorum consist of less than one third of the number of directors so fixed or stated. If the number of directors of a nonprofit corporation without members falls below the number necessary for a quorum, the remaining directors, however reduced in number, shall have authority to fill all vacancies in the board of directors. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by this Chapter, the charter, or the bylaws. (1955, c. 1230.)

§ 55A-23. Committees. — (a) Unless otherwise provided in the charter or bylaws, the board of directors, by resolution adopted by a majority of the number of directors then in office may designate one or more committees each

of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the charter or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation, except that no such committee shall have authority as to the following matters:

(1) The dissolution, merger or consolidation of the corporation; the amendment of the charter of the corporation; or the sale, lease or exchange of all or substantially all of the property of the corporation.

(2) The designation of any such committee or the filling of vacancies in the board of directors or in any such committee.

(3) The amendment or repeal of the bylaws, or the adoption of new bylaws.

(4) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.

(b) Other committees not having and exercising the authority of the board of directors in the management of the corporation may be designated by a resolution adopted by a majority of the directors present at a meeting at which a quorum is present.

(c) Any committee, or any member thereof may be discharged or removed by action of a majority of the board of directors pursuant to the provisions of G.S. 55A-22 or 55A-86. The designation of any committee and the delegation thereto of authority shall not operate to relieve the board of directors or any member thereof, of any responsibility or liability imposed upon it or him by law. (1955, c. 1230; 1969, c. 875, s. 5.)

§ 55A-24. Place and notice of directors' meetings. — (a) Meetings of the board of directors, regular or special, may be held either within or without this State, and upon such notice as the bylaws may prescribe.

(b) Unless the bylaws otherwise provide, special meetings of the board of directors may be called by the president or by any two directors.

(c) Attendance of a director at any meeting shall constitute a waiver of notice of such meeting except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

(d) Unless the bylaws otherwise provide, neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or written waiver of notice of such meeting. (1955, c. 1230.)

§ 55A-24.1. Informal or irregular action by directors or committees; attendance by telephone. — (a) Action taken by a majority of the directors or members of a committee without a meeting is nevertheless board or committee action if written consent to the action in question is signed by all the directors or members of the committee, as the case may be, and filed with the minutes of the proceedings of the board or committee, whether done before or after the action so taken.

(b) If a meeting of directors otherwise valid is held without proper call or notice, action taken at such meeting otherwise valid is deemed ratified by a director who did not attend unless promptly after having knowledge of the action taken and of the impropriety in question he files with the secretary or assistant secretary of the corporation his written objection to the holding of the meeting or to any specific action so taken.

(c) Unless otherwise provided in the charter or bylaws, any one or more directors or members of a committee may participate in a meeting of the board or committee by means of a conference telephone or similar communications device which allows all persons participating in the meeting to hear each other and such participation in a meeting shall be deemed presence in person at such meeting. (1973, c. 314, s. 3.)

§ 55A-25. Officers. — (a) The officers of a corporation shall consist of a president, one or more vice-presidents, a secretary, a treasurer and such other officers and assistant officers as may be deemed necessary, each of whom shall be elected or appointed at such time and in such manner, and for such terms not exceeding three years, as may be prescribed in the charter or the bylaws. In the absence of any such provision, all officers shall be elected or appointed annually by the board of directors. If the bylaws so provide, any two or more offices may be held by the same person, except the offices of president and secretary.

(b) The charter or the bylaws may provide that any one or more officers of the corporation shall be ex officio members of the board of directors.

(c) The officers of a corporation may be designated by such additional titles as may be provided in the charter or the bylaws. (1955, c. 1230.)

§ 55A-26. Removal of officers. — Any officer elected or appointed may be removed by the persons authorized to elect or appoint such officer whenever in their judgment the best interests of the corporation will be served thereby. The removal of an officer shall be without prejudice to the contract rights, if any, of the officer so removed. Election or appointment of an officer or agent shall not of itself create contract rights. (1955, c. 1230.)

§ 55A-27. Books and records. — Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors, and committees having any of the authority of the board of directors. It shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote and may keep all other books, records, and minutes without this State. All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time. (1955, c. 1230.)

§ 55A-27.1. Form of records. — Any records maintained by a corporation in the regular course of its business, including its books of account and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated readout or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been. (1969, c. 875, s. 6.)

Purpose of Section Is to Give Approval to Use in Evidence of Corporate Computer Records. — This section was designed to give broad legislative approval to the use in evidence of corporate computer records. However, in declaring such computer records admissible in evidence it does not deal with the special problems of reliability created by the use of computers. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

And It Authorizes Their Admission under Safeguards. — This section authorizes the admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

But Does Not Preclude Judicial Development of Standards for Admission. — This section does not, and was not designed to, preclude judicial development of workable standards for the admission of computerized business records generally. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Conditions under Which Printouts Are Admissible. — Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) The computerized entries were made in the regular course of business, (2) the entries were made at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computer-

ized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Computer printout evidence may be refuted to the same extent as business records made in books of account. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Testimony as to contents of computer printout was inadmissible under the best evidence rule. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Computer printout referred to in oral testimony was inadmissible where no foundation was laid for its admission and the printout itself was not offered in evidence. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 55A-28. Shares of stock and dividends prohibited. — A corporation shall not have or issue shares of stock. No dividend shall be paid and no part of the income of a corporation shall be distributed to its members, directors or officers. A corporation may pay compensation in a reasonable amount to its members, directors or officers for services rendered, may confer benefits upon its members in conformity with its purposes, and may make distributions upon dissolution or final liquidation as permitted by this Chapter. (1955, c. 1230.)

Article 5.

Members.

§ 55A-29. Members. — (a) A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes and the qualifications and rights of the members of each class shall be set forth in the charter or in the initial bylaws adopted by the directors or in any bylaws adopted by the members. A corporation may issue certificates evidencing membership therein which may be transferable or nontransferable, as stated in the charter or bylaws.

(b) Unless the charter or bylaws contain provisions which adequately safeguard the property rights of expelled members, upon expulsion of a member who would be entitled to a distributive share of the corporation's assets upon its liquidation the corporation shall pay to the expelled member an amount equal to what the expelled member would receive if the corporation's assets were liquidated at the time of the expulsion. If the parties cannot agree upon this amount, each shall appoint an appraiser and those two appraisers shall appoint a third appraiser. The three appraisers shall, by majority action, after notice and hearing to both parties, determine the value of the expelled member's distributive share and the corporation shall immediately pay the amount thereof to the expelled member. If either party by registered letter addressed to the correct address of the other party requests in writing the appointment of appraisers and names the appraiser whom he appoints and indicates the amount which he believes to be the value of the expelled member's share, upon failure of the other party to appoint an appraiser within 30 days from receipt of, or refusal to receive the registered letter, the amount so indicated shall be the value of the share of the expelled members. (1955, c. 1230.)

§ 55A-30. Meetings of members. — (a) Meetings of members may be held at such place, either within or without this State, as may be provided in the bylaws. In the absence of any such provision all meetings shall be held at the registered office of the corporation in this State.

(b) An annual meeting of the members shall be held at such time as may be provided in the bylaws. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation.

(c) Special meetings of the members may be called by the president or by the board of directors. Special meetings of the members may also be called by such other officers or persons or number or proportion of members as may be provided in the charter or the bylaws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, a special meeting of members may be called by members having one twentieth of the votes entitled to be cast at such meeting. (1955, c. 1230.)

§ 55A-31. Notice of members' meetings. — Unless the charter or bylaws otherwise provide, written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the president, or the secretary, or the officers or persons calling the meeting, to each member entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the member at his address as it appears on the records of the corporation, with postage thereon prepaid. (1955, c. 1230.)

§ 55A-32. Voting. — (a) The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the charter. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

(b) A member may vote in person or, unless the charter or the bylaws otherwise provide may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail.

(c) The charter or the bylaws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his vote and to give one candidate a number of votes equal to his vote multiplied by the number of directors to be elected, or by distributing such votes on the same principle among any number of such candidates. (1955, c. 1230.)

§ 55A-33. Quorum. — The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members holding one tenth of the votes entitled to be cast represented in person or by proxy shall constitute a quorum. The vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members, unless a greater proportion is required by this Chapter, the charter or the bylaws. (1955, c. 1230.)

ARTICLE 6.

Fundamental Changes.

§ 55A-34. Right to amend charter. — A corporation may amend its charter from time to time in any and as many respects as may be desired, so long as its charter as amended contains only such provisions as are lawful under this Chapter. (1955, c. 1230.)

§ 55A-35. Procedure to amend charter. — (a) Amendments to the charter shall be made in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution setting forth the proposed amendment, and, except as otherwise provided in this paragraph, directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

(2) Where there are no members, or no members having voting rights, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(b) Any number of amendments may be submitted and voted upon at any one meeting. (1955, c. 1230.)

§ 55A-36. Articles of amendment. — The articles of amendment shall be executed by the corporation and filed as provided in G.S. 55A-4, and shall set forth:

(1) The name of the corporation.

(2) The amendment so adopted.

(3) Where there are members having voting rights a statement setting forth the date of the meeting of members at which the amendment was adopted, that a quorum was present at such meeting, and that such amendment received at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

(4) Where there are no members, or no members having voting rights, a statement of such fact, the date of the meeting of the board of directors at which the amendment was adopted, and a statement of the fact that such amendment received the vote of a majority of the directors in office. (1955, c. 1230.)

§ 55A-37. Effect of certificate of amendment. — No amendment shall affect any existing cause of action in favor of or against such corporation, or its officers or directors, or any pending action to which such corporation, or its officers or directors, shall be a party, or the existing rights of persons other than members; and, in the event the corporate name shall be changed by amendment, no action brought by or against such corporation under its former name shall abate for that reason. (1955, c. 1230.)

§ 55A-37.1. Restated charter. — (a) At any time after its charter has been amended, a corporation may by action of its board of directors, without necessity of vote of the members, cause to be prepared a document entitled "Restated Charter," which shall integrate into one document its original articles of incorporation (or articles of consolidation) and all amendments thereto, including those affected by articles of merger or consolidation, except that: In lieu of the address of the initial registered office and the name of the initial registered agent, the restated charter shall state the address of the then registered office and the name of its then registered agent.

(b) The restated charter shall also set forth that it purports merely to restate but not to change the provisions of the original articles of incorporation as supplemented and amended and that there is no discrepancy, other than as expressly permitted by this section, between the said provisions and the provisions of the restated charter.

(c) The restated charter shall be executed by the corporation and be filed as provided in G.S. 55A-4.

(d) A copy of the restated charter certified by the Secretary of State shall be presumed, until otherwise shown, to be the full and true charter of the corporation as in effect on the date when so certified.

(e) A corporation may also integrate its articles of incorporation and all amendments thereto by the procedure provided in this Chapter for amending the charter. (1965, c. 762.)

§ 55A-38. Procedure for merger. — (a) Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this Chapter.

(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of merger setting forth:

(1) The names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation.

(2) The name which the surviving corporation is to have, which name may be that of any of the corporations involved in the merger or any other available name permitted by this Chapter.

(3) The terms and conditions of the proposed merger.

(4) A statement of any changes in the charter of the surviving corporation to be effected by such merger.

(5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1955, c. 1230.)

§ 55A-39. Procedure for consolidation. — (a) Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this Chapter.

(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

(1) The names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation. The name of the new corporation may be that of any of the corporations involved in the consolidation or any other available name permitted by this Chapter.

(2) The terms and conditions of the proposed consolidation.

(3) With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this Chapter, except the names and addresses of the incorporators.

(4) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1955, c. 1230.)

§ 55A-40. Approval of merger or consolidation. — (a) A plan of merger or consolidation shall be adopted in the following manner:

(1) Where the members of any merging or consolidating corporation have voting rights, the board of directors of such corporation shall adopt a resolution approving the proposed plan, and, except as otherwise provided in this paragraph, directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed plan or a summary thereof shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. The proposed plan shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at each such meeting.

(2) Where any merging or consolidating corporation has no members, or no members having voting rights, a plan of merger or consolidation shall

be adopted at a meeting of the board of directors of such corporation upon receiving the vote of a majority of the directors in office.

(b) After such approval, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (1955, c. 1230.)

§ 55A-41. Articles of merger or consolidation. — (a) Upon such approval, articles of merger or articles of consolidation shall be executed by each corporation and filed as provided in G.S. 55A-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent corporations have their registered offices.

(b) The articles of merger or consolidation shall set forth:

(1) The plan of merger or the plan of consolidation.

(2) Where the members of any merging or consolidating corporation have voting rights, then as to each such corporation, a statement setting forth the date of the meeting of members at which the plan was adopted, that a quorum was present at such meeting, and that such plan received at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

(3) Where any merging or consolidating corporation has no members, or no members having voting rights, then as to each such corporation a statement of such fact, the date of the meeting of the board of directors at which the plan was adopted and a statement of the fact that such plan received the vote of a majority of the directors in office.

(c) The time when the merger or consolidation is effected is determined by the provisions of G.S. 55A-4. (1955, c. 1230; 1967, c. 823, s. 22.)

Cross Reference. — See Editor's note to § 53-5.

§ 55A-42. Effect of merger or consolidation. — When such merger or consolidation has been effected:

(1) The several corporations, parties to the plan of merger or consolidation, shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.

(2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.

(3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Chapter.

(4) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The

provisions of this subdivision are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.

(5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities, obligations, and penalties of each of the corporations so merged or consolidated; and any claim existing or action or proceeding, civil or criminal, pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place; and any judgments rendered against any of the merged or consolidated corporations may be enforced against the surviving or new corporation. Neither the rights of creditors nor any liens upon the property of any merged or consolidated corporations shall be impaired by such merger or consolidation.

(6) In the case of a merger, the charter of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its charter are stated in the plan of merger. In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new corporation. (1955, c. 1230; 1967, c. 950, s. 2.)

When Separate Existence of Consolidating Corporations Terminated. — If a consolidation agreement is valid, upon the filing thereof in the office of the Secretary of State the separate existence of each of the consolidating corporations is terminated. Adams v. Flora Macdonald College, 251 N.C. 617, 111 S.E.2d 859 (1960).

§ 55A-42.1. Merger or consolidation of domestic and foreign corporations. — (a) One or more foreign corporations and one or more domestic corporations may be merged or consolidated into a corporation of this State or of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized.

(b) Each domestic corporation shall comply with the provisions of this Chapter with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new corporation, as the case may be, is a corporation of any state other than this State, it shall comply with the provisions of this Chapter with respect to foreign corporations if it is to transact business in this State; and if after the merger or consolidation it transacts no business in this State the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State arising out of any act or omission of such constituent corporation prior to the merger or consolidation, and process therein may be served as provided in G.S. 55A-68.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be a corporation of this State. If the surviving or new corporation is to be a corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise. (1973, c. 314, s. 4.)

§ 55A-43. Sale, lease, exchange, or mortgage of assets. — A sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge or other disposition and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of the corporation shall be given to each member entitled to vote at such meeting, within the time and in the manner provided by this Chapter for the giving of notice of meetings of members. At such meeting the members may authorize such sale, lease, exchange, mortgage, pledge or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the vote of at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting. After such authorization by a vote of members, the board of directors, nevertheless, may, if so empowered by such authorization of the members, abandon such sale, lease, exchange, mortgage, pledge or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by members.

(2) Where there are no members, or no members having voting rights, a sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office. (1955, c. 1230.)

ARTICLE 7.

Dissolution and Liquidation.

§ 55A-44. Voluntary dissolution. — (a) A corporation may dissolve and wind up its affairs in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation, shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. A resolution to dissolve the corporation shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy.

(2) Where there are no members, or no members having voting rights, the dissolution of the corporation shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

(b) Upon the adoption of such resolution by the members, or by the board of directors where there are no members or no members having voting rights, the corporation shall cease to conduct its affairs except insofar as may be necessary for the winding up thereof, shall immediately cause a notice of the proposed dissolution to be mailed to each known creditor of the corporation, and shall proceed to collect its assets and apply and distribute them as provided in this

Chapter. The corporation may follow the same procedure upon the expiration of any period of duration to which it is limited by its charter. (1955, c. 1230; 1973, c. 314, s. 5.)

Editor's Note. — The 1973 amendment added the second sentence of subsection (b).

§ 55A-44.1. Extension of duration after expiration. — (a) If a corporation has continued to conduct its business after the expiration of its charter, it may at any time amend its charter so as to extend or perpetuate its period of existence. Expiration of a charter does not of itself create any vested right on the part of any member or creditor to prevent such charter amendment.

(b) No acts or contracts of a corporation during the period within which it could have extended its existence as permitted in this section, whether or not it has taken action so to extend its existence, shall be in any degree invalidated by the expiration of the charter. (1973, c. 314, s. 6.)

§ 55A-45. Distribution of assets. — The assets of a corporation in the process of dissolution shall be applied and distributed as follows:

(1) All liabilities and obligations of the corporation shall be paid, satisfied and discharged, or adequate provision shall be made therefor;

(2) Assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred or conveyed in accordance with such requirements;

(3) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this Chapter;

(4) Other assets, if any, shall be distributed in accordance with the provisions of the charter or the bylaws to the extent that the charter or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others;

(5) Any remaining assets may be distributed to such persons, societies, organizations or domestic or foreign corporations, whether for profit or not for profit, as may be specified in a plan of distribution adopted as provided in this Chapter. (1955, c. 1230.)

§ 55A-46. Plan of distribution. — A plan providing for the distribution of assets, not inconsistent with the provisions of this Chapter, may be adopted by a corporation in the process of dissolution and shall be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which this Chapter requires a plan of distribution, in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending a plan of distribution and directing the submission thereof to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed plan of distribution or a summary thereof shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. Such plan of distribution shall be adopted upon receiving at

least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

(2) Where there are no members, or no members having voting rights, a plan of distribution shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office. (1955, c. 1230.)

§ 55A-47. Revocation of voluntary dissolution proceedings. — (a) A corporation may, at any time prior to the issuance of a certificate of dissolution by the Secretary of State, revoke the action theretofore taken to dissolve the corporation, in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked, and directing that the question of such revocation be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice stating that the purpose, or one of the purposes of such meeting is to consider the advisability of revoking the voluntary dissolution proceedings shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. A resolution to revoke the voluntary dissolution proceedings shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

(2) Where there are no members having voting rights, a resolution to revoke the voluntary dissolution proceedings shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(b) Upon the adoption of such resolution by the members, or by the board of directors where there are no members or no members having voting rights, the corporation may thereupon again conduct its affairs. (1955, c. 1230.)

§ 55A-48. Articles of dissolution. — If the voluntary dissolution proceedings have not been revoked, then when all debts, liabilities and obligations of the corporation shall have been paid and discharged, or adequate provision shall have been made therefor, and all of the remaining property and assets of the corporation shall have been transferred, conveyed or distributed in accordance with the provisions of this Chapter, articles of dissolution shall be executed and filed in accordance with the provisions of G.S. 55A-4, setting forth:

(1) The name of the corporation.

(2) Where there are members having voting rights, a statement setting forth the date of the meeting of members at which the resolution to dissolve was adopted, that a quorum was present at such meeting, and that such resolution received at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

(3) Where there are no members, or no members having voting rights, a statement of such fact, the date of the meeting of the board of directors at which the resolution to dissolve was adopted and a statement of the fact that such resolution received the vote of a majority of the directors in office.

(4) That all debts, obligations, and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor.

(5) That all the remaining property and assets of the corporation have been transferred, conveyed or distributed in accordance with the provisions of this Chapter.

(6) That there are no suits pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any

judgment, order or decree which may be entered against it in any pending suit.

(7) Where the corporation was dissolved upon the expiration of its charter, a statement of such fact, in lieu of the statement required by subdivision (2) or subdivision (3) above. (1955, c. 1230; 1973, c. 314, s. 7.)

Editor's Note. — The 1973 amendment added subdivision (7).

§ 55A-49. Effect of filing of articles of dissolution; certificate of dissolution. — After the filing of articles of dissolution in the office of the Secretary of State he shall issue a certificate of dissolution and cause the same to be delivered to the corporation. Upon issuance of such certificate, the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by members, directors and officers as provided in this Chapter. (1955, c. 1230.)

§ 55A-50. Involuntary dissolution in action by Attorney General. — A corporation may be dissolved involuntarily by a decree of the superior court in an action brought by the Attorney General in the name of the State when it is established that:

(1) The corporation procured its charter through fraud; or

(2) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, continued to exceed or abuse the authority conferred upon it by law, to the injury of the public, or of its members, creditors, or debtors; or

(3) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days to appoint and maintain a registered agent in this State, as required by G.S. 55A-11; or

(4) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days after change of its registered office or registered agent to file in the office of the Secretary of State a statement of such change, as required by G.S. 55A-12; or

(5) The corporation has without justification refused to comply with a final court order for the production of its books, records, or other documents as required to be kept by G.S. 55A-27. (1955, c. 1230.)

Cited in Starbuck v. Town of Havelock, 252 N.C. 176, 113 S.E.2d 278 (1960); YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

§ 55A-51. Duties of Attorney General with respect to actions for involuntary dissolution. — Whenever the Attorney General has reason to believe that any corporation has given cause for dissolution as provided in G.S. 55A-50 and the case involves the public interest, it is the duty of the Attorney General to bring an action under that section. If the cause for dissolution does not involve the public interest, the Attorney General has a duty to bring an action if satisfactory security is given to indemnify the State against the costs and expenses to be incurred thereby. (1955, c. 1230.)

§ 55A-52. Venue and service of process. — Every action by the Attorney General for the involuntary dissolution of a corporation shall be commenced in the superior court of the county in which the registered office of the corporation is situated. Summons shall issue and be served as in other civil actions. (1955, c. 1230.)

§ 55A-53. Power of court to liquidate assets and affairs of corporation. — (a) The superior court shall have power to liquidate the assets and affairs of a corporation:

(1) In an action by a member or director when it is made to appear:

a. That the directors are deadlocked in the management of the corporate affairs and that irreparable injury to the corporation or the public is being suffered or is threatened by reason thereof, and either that the members are unable to break the deadlock or there are no members having voting rights; or

b. That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or

c. That the corporate assets are being misapplied or wasted; or

d. That the corporation is unable to carry out its purposes.

(2) In an action by a creditor:

a. When the claim of the creditor has been reduced to judgment and an execution thereon has been returned unsatisfied; or

b. When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent.

(3) Upon application by a corporation to have its voluntary dissolution continued under the supervision of the court.

(4) When an action has been filed by the Attorney General to dissolve a corporation and it is established that liquidation of its affairs should precede the entry of a decree of dissolution.

(b) A court that has undertaken the liquidation of the assets and affairs of a corporation under subsection (a) of this section may at any time enter a decree dissolving the corporation, and shall upon application of any interested party enter an order directing liquidation completed.

(c) Actions under this section shall be brought in the county in which the registered office or the principal office of the corporation is situated.

(d) Summons shall issue and be served on the corporation as in other civil actions, and it shall not be necessary to make directors or members parties to any such action unless relief is sought against them personally.

(e) The superior court shall have power to liquidate the assets and affairs of a corporation in an action brought by the Attorney General under G.S. 55A-51. (1955, c. 1230.)

§ 55A-54. Procedure in liquidation of corporation by court. — In an action to liquidate the assets and affairs of a corporation, the court shall appoint receivers and the receivers so appointed shall have such powers and duties as are provided in Article 38, Chapter 1 of the General Statutes of North Carolina. (1955, c. 1230.)

§ 55A-55. Discontinuance of liquidation action. — The liquidation of the assets and affairs of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the court shall dismiss the action and direct the redelivery to the corporation of all its remaining property and assets, and shall decree cancellation of any prior dissolution. (1955, c. 1230.)

§ 55A-56. Duties of officials as to decrees and orders concerning dissolution. — A court decree effecting or canceling a dissolution of a corporation or a court order declaring liquidation completed shall contain a direction to the clerk of that court promptly to file one certified copy of such decree or order with the Secretary of State and also to file a certified copy thereof with the register of deeds of the county wherein the corporation has its registered office. The fees for the preparation, certificates, and filing of such

decree or order shall be taxed as a part of the costs in the action. (1955, c. 1230; 1967, c. 823, s. 23.)

Cross Reference. — See Editor's note to § 53-5.

§ 55A-57. Disposition of amounts due certain creditors, members, and other persons. — (a) Except as provided in subsection (b) of this section upon liquidation of a corporation, the portion of the assets distributable to a creditor or member who is unknown or cannot be found shall be reduced to cash and deposited with the clerk of the superior court of the county of the registered office of the corporation to be held three months for the persons entitled thereto, as and when satisfactory evidence of his right to the same is furnished. After the clerk has held the unclaimed cash for the aforesaid period of three months, he shall pay such assets to the University of North Carolina, to be held without liability for profit or interest until a just claim therefor shall be perferred by the parties entitled thereto.

(b) In proceedings to liquidate the assets and affairs of a corporation, any asset held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution or liquidation, shall be returned, transferred or conveyed in accordance with such requirements. If the donor or designated transferee cannot be found, then such asset shall be disposed of as provided in subsection (c) of this section.

(c) In case of assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution or liquidation, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or liquidating corporation, pursuant to a plan of distribution adopted as provided in this Chapter, or where no plan of distribution has been adopted, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or liquidating corporation as the court may direct. (1955, c. 1230.)

Article 8.

Foreign Corporations.

§ 55A-58. Right to conduct affairs. — (a) A foreign corporation shall procure a certificate of authority from the Secretary of State before it shall conduct affairs in this State. No foreign corporation shall be entitled to procure a certificate of authority under this Chapter to conduct in this State any affairs which a corporation organized under this Chapter is not permitted to conduct. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this State.

(b) Without excluding other activities which may not constitute conducting affairs in this State, a foreign corporation shall not be considered to be conducting affairs in this State, for the purpose of this Chapter by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.
(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions.
(4) Making or investing in loans with or without security provided no related office or agency is maintained in this State.
(5) Taking security for or collecting debts due to it or enforcing any rights in property securing the same. (1955, c. 1230.)

§ 55A-59. Powers of foreign corporation. — (a) A foreign corporation which shall have received a certificate of authority under this Chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this Chapter, enjoy the same, but not greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this Chapter otherwise provided, shall be subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character.

(b) A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death. (1955, c. 1230.)

§ 55A-60. Corporate name of foreign corporation. — (a) No certificate of authority shall be issued to a foreign corporation whose name contains any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(b) The corporate name shall not be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or any foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, or a name the exclusive right to which is, at the time, reserved or registered in the manner prescribed in G.S. 55A-10, except that the Secretary of State may in his discretion issue a certificate of authority to a foreign corporation which has a corporate name the same as or similar to that of some other domestic corporation or foreign corporation authorized to transact business or conduct affairs in this State:

(1) If the Secretary of State finds, upon proof by affidavit or otherwise, that such corporations are not engaged in the conduct of the same or similar affairs and that the public is not likely to be confused or deceived, and if, upon requirement by the Secretary of State in his discretion, such foreign corporation agrees in its application for certificate of authority to add to its corporate name in this State words indicating the state or country under the laws of which it is incorporated; or
(2) If the foreign corporation agrees in its application for certificate of authority to conduct affairs in this State only under an assumed name that would be available for its use in this State, in which event such corporation shall thereafter comply with all of the provisions of law, including the provisions of G.S. 66-68 through 66-71, relating to doing business under an assumed name and such assumed name shall be deemed to be the name of such foreign corporation in this State and shall be entitled to the same protections under this Chapter as if it were the name of such foreign corporation.

(c) Whenever a foreign corporation which is authorized to conduct affairs in this State shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of such corporation shall not be deemed to permit the use in its affairs in this

State of the new name nor shall any new certificate of authority be granted to it under the new name. (1955, c. 1230; 1969, c. 875, s. 7.)

§ 55A-61. Application for certificate of authority. — (a) A foreign corporation, in order to procure a certificate of authority to conduct affairs in this State, shall make application therefor to the Secretary of State, which application shall set forth:

(1) The name of the corporation and the state or country under the laws of which it is incorporated;

(2) If the corporation agrees under G.S. 55A-60(b) to add to its corporate name in this State words indicating its jurisdiction of incorporation or agrees to conduct affairs under an assumed name, then the name of the corporation with the words so added or the assumed name;

(3) The date of incorporation and the period of duration of the corporation;

(4) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated;

(5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the corporation in this State, and the name of its proposed registered agent in this State at such address;

(6) The purposes of the corporation which it proposes to pursue in conducting its affairs in this State;

(7) The names and respective addresses of the directors and officers of the corporation;

(8) A statement that, in consideration of the issuance of a certificate of authority to conduct affairs in this State, the corporation appoints the Secretary of State of North Carolina as its agent to receive service of process, notice, or demand whenever the corporation fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office.

(b) Such application shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application. (1955, c. 1230; 1957, c. 979, s. 14; 1969, c. 875, s. 8.)

§ 55A-62. Filing of application and certificate of authority. — (a) The application of the corporation for a certificate of authority and one conformed copy thereof shall be delivered to the Secretary of State, together with one copy of its articles of incorporation and all amendments thereto, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

(b) If the Secretary of State finds that the application conforms to law he shall, when all taxes and fees have been tendered as in this Chapter prescribed:

(1) Endorse on each of such documents the word "filed" and the hour, day, month, and year of the filing thereof.

(2) File in his office the application and the copy of the articles of incorporation and amendments thereto.

(3) Issue a certificate of authority to conduct affairs in this State to which he shall affix the conformed copy of the application.

(4) Send to the corporation or its representative the certificate of authority, together with the conformed copy of the application affixed thereto. (1955, c. 1230.)

§ 55A-63. Effect of certificate of authority. — Upon the issuance of a certificate of authority by the Secretary of State, the corporation shall be authorized to conduct affairs in this State for those purposes set forth in its

application, subject, however, to the right of this State to suspend or to revoke such authority. (1955, c. 1230.)

§ 55A-64. Registered office and registered agent of foreign corporation. — Each foreign corporation authorized to conduct affairs in this State shall establish and continuously maintain in this State:

(1) A registered office which may be, but need not be, the same as its principal office.

(2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office, or a domestic corporation, whether for profit or not for profit, or a foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, having an office identical with such registered office. (1955, c. 1230.)

§ 55A-65. Change of registered office or registered agent of foreign corporation. — (a) A foreign corporation authorized to conduct affairs in this State may change its registered office or change its registered agent, or both, upon filing in the office of the Secretary of State a statement setting forth:

(1) The name of the corporation.

(2) The address, including county and city or town, and street and number, if any, of its then registered office.

(3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any, to which the registered office is to be changed.

(4) The name of its then registered agent.

(5) If its registered agent be changed, the name of its successor registered agent.

(6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(b) Such statements shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing the statement.

(c) If the Secretary of State finds that such statement conforms to the provisions of this Chapter, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective. (1955, c. 1230; 1957, c. 979, ss. 15, 16.)

§ 55A-66. Suits against foreign corporations authorized to conduct affairs in this State. — (a) The registered agent appointed by a foreign corporation authorized to conduct affairs in this State shall be an agent of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

(b) Whenever a foreign corporation authorized to conduct affairs in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any process, notice or demand may be served.

(c) Service on any such agent may be made in a suit upon any cause of action, whether or not arising in this State or arising out of affairs conducted in this State, and whether or not the cause of action runs in favor of a resident of this State. (1955, c. 1230.)

§ 55A-67. Suits against foreign corporations conducting affairs in the State without authorization. — Whenever a foreign corporation shall conduct affairs in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been

withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such affairs may be served. (1955, c. 1230.)

§ 55A-68. Service on foreign corporation by service on Secretary of State. — Service of any process, notice or demand on a foreign corporation by service on the Secretary of State shall be made as provided in G.S. 55-146 and the provisions of that section shall apply to nonprofit corporations. (1955, c. 1230.)

§ 55A-68.1. Alternative jurisdiction over and service of process on foreign corporations. — In addition to the provisions set out in this Chapter, foreign corporations may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3; 1973, c. 314, s. 8.)

Editor's Note. — The 1973 amendment substituted "provisions" for "procedures" near the beginning of the section.

§ 55A-69. Amendment to charter of foreign corporation. — Whenever the charter of a foreign corporation authorized to conduct affairs in this State is amended, such foreign corporation shall, within 30 days after such amendment becomes effective, file in the office of the Secretary of State a copy of such amendment duly authenticated by the proper officer of the state or country under the laws of which it is incorporated; but the filing thereof shall not of itself amend its certificate of authority. (1955, c. 1230.)

§ 55A-70. Merger of foreign corporation authorized to conduct affairs in this State. — Whenever a foreign corporation authorized to conduct affairs in this State shall be a party to a statutory merger permitted by the laws of the state or country under which it is incorporated, and such corporation shall be the surviving corporation, it shall, within 30 days after such merger becomes effective, file with the Secretary of State a copy of the articles of merger duly authenticated by the proper officer of the state or country under the laws of which such statutory merger was effected. It shall not be necessary for such corporation to procure either a new or amended certificate of authority to conduct affairs in this State unless the name of such corporation be changed thereby or unless the corporation desires to pursue in this State other or additional purposes than those which it is then authorized to pursue in this State. (1955, c. 1230.)

§ 55A-71. Amended certificate of authority. — (a) A foreign corporation authorized to conduct affairs in this State shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in this State other or additional purposes than those set forth in its prior application for a certificate of authority, by making application therefor to the Secretary of State.

(b) The requirements in respect to the form, the manner of its execution, the filing of the application and the conformed copy thereof, with the Secretary of State, the issuance of an amended certificate of authority and the effect thereof, shall be the same as in the case of an original application for a certificate of authority. The contents of such application need not be the same as in the case of an original application for a certificate of authority provided the application sets forth information as to the changes proposed. (1955, c. 1230.)

§ 55A-72. Withdrawal of foreign corporation. — (a) A foreign corporation authorized to conduct affairs in this State may withdraw from this State upon procuring from the Secretary of State a certificate of withdrawal.

(b) In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the Secretary of State an application for withdrawal, together with a conformed copy thereof, which shall set forth:

(1) The name and post-office address of the principal office of the corporation and the state or country under the laws of which it is incorporated.

(2) That the corporation is not conducting affairs in this State.

(3) That the corporation surrenders its authority to conduct affairs in this State.

(4) That the corporation either continues its registered agent or revokes the authority of its registered agent in this State to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of affairs conducted in this State, during the time the corporation was authorized to conduct affairs in this State may thereafter be made on such corporation by service thereof on the Secretary of State.

(5) If required by the Secretary of Revenue, such additional information as may be necessary or appropriate in order to determine and assess any unpaid taxes and fees payable under the laws of this State.

(c) The application for withdrawal shall be on forms prescribed by the Secretary of State and shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application, or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by such receiver or trustee and verified by him.

(d) If the Secretary of State finds that such application conforms to law, he shall when notified by the Secretary of Revenue that such corporation has met the requirements with respect to reports and taxes required by the revenue laws of this State:

(1) Endorse on each of such documents the word "filed," and the hour, day, month, and year of the filing thereof.

(2) File the application in his office.

(3) Issue a certificate of withdrawal to which he shall affix the conformed copy.

(e) The certificate of withdrawal, together with the conformed copy of the application for withdrawal affixed thereto by the Secretary of State, shall be returned to the corporation or its representative. Upon the issuance of such certificate of withdrawal, the authority of the corporation to conduct affairs in this State shall cease. (1955, c. 1230; 1973, c. 476, s. 193.)

Editor's Note. — The 1973 amendment substituted "Secretary of Revenue" for "Commissioner of Revenue."

§ 55A-73. Revocation of certificate of authority. — (a) The certificate of authority of a foreign corporation to conduct affairs in this State may be revoked by the Secretary of State upon the conditions prescribed in this section when:

(1) The corporation has failed for a period of 30 days to establish and maintain a registered office as required by G.S. 55A-64; or

(2) The corporation has failed for a period of 30 days to appoint and maintain a registered agent in this State as required by G.S. 55A-64; or

(3) The corporation has failed for a period of 30 days after change of its registered office or registered agent to file in the office of the Secretary of State a statement of such change pursuant to G.S. 55A-65; or

(4) The corporation has failed to file in the office of the Secretary of State any amendment to its charter or any article of merger within the time prescribed by G.S. 55A-69 and 55A-70; or

(5) A willful misrepresentation has been made of any material matter in any application, report, affidavit, or other document submitted by such corporation pursuant to this Chapter; or

(6) The corporation has, without justification, refused to comply with a court order directing it to produce for inspection its books and records; or

(7) The corporation is exceeding the authority conferred upon it by this Chapter.

(b) On the happening of any of the events set out in subsection (a) of this section, the Secretary of State shall give not less than 20 days' written notice to the corporation that he intends to revoke the certificate of authority of such corporation for one of said causes, specifying the same. Such notice shall be given by mail duly addressed to the corporation at its registered office in this State and at its principal office outside the State, as shown by the records in the office of the Secretary of State. If, before the expiration of the time stated in the notice, the corporation establishes to the satisfaction of the Secretary of State the fact that the stated cause for the revocation of its certificate of authority did not exist as of the time the notice was mailed or, if it did exist at said time, has been cured, then the Secretary of State shall take no further action. Otherwise, on the expiration of the time stated in the notice, he shall revoke the certificate of authority.

(c) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1230.)

§ 55A-74. Issuance of certificate of revocation. — (a) To revoke any such certificate of authority, the Secretary of State shall:

(1) Issue a certificate of revocation in triplicate.

(2) File one of such certificates in his office.

(3) Mail one of such certificates to such corporation at its registered office in this State and one to the corporation at its principal office in the state or country under the laws of which it is incorporated, as shown by the records in the office of the Secretary of State.

(b) Upon the issuance of such certificate of revocation, the authority of the corporation to conduct affairs in this State shall cease. (1955, c. 1230.)

§ 55A-75. Application of this Chapter to foreign corporations heretofore domesticated in this State. — (a) Subject to the provisions of subsection (d) of this section, foreign corporations which have been duly domesticated in this State at the time this Chapter takes effect shall be entitled to all the rights and privileges applicable to foreign corporations procuring authority to conduct affairs in this State under this Chapter, and from the time this Chapter takes effect such corporations shall be subject to all the limitations, restrictions, liabilities, and duties prescribed herein for foreign corporations procuring under this Chapter authority to conduct affairs in this State.

(b) Foreign corporations heretofore domesticated in this State which have not designated a principal office are required on and after July 1, 1957, to designate a registered office and appoint a registered agent in the manner, as near as may be, provided in G.S. 55A-65.

(c) If any foreign corporation has, prior to July 1, 1957, filed with the Secretary of State a statement designating a principal office within this State and agent in charge thereof, and has continued to maintain the same, it shall not be required to, but it may, designate a new registered office and agent in the manner, as near as may be, provided in G.S. 55A-65.

(d) If there is no office and agent registered in the office of the Secretary of State then service of process may be made on the Secretary of State, as provided

in G.S. 55A-68 when there is no registered agent, until such time as a registered office is designated and a registered agent appointed.

(e) No foreign corporation which has been domesticated under the provisions of prior acts before July 1, 1957, shall hereafter have greater immunity from local jurisdiction than foreign corporations hereafter procuring a certificate of authority to conduct affairs in this State and, to this end, every such domesticated foreign corporation, by continuing as a domesticated corporation in this State, for a period of 90 days after July 1, 1957, shall be deemed to have expressly appointed the Secretary of State as its agent to receive service of process as fully as if it had made an application for a certificate of authority pursuant to the requirements of G.S. 55A-61. (1955, c. 1230; 1957, c. 979, ss. 21, 22.)

§ 55A-76. Conducting affairs without certificate of authority. — (a) No foreign corporation conducting affairs in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to the trial; nor shall any action or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any cause of action arising out of the conduct of affairs by such corporation in this State until

(1) A certificate of authority shall have been obtained by such corporation or by a foreign corporation which has acquired substantially all of its assets, or

(2) Substantially all of its assets have been acquired by a domestic corporation or one or more individuals.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

(b) The failure of a foreign corporation to obtain a certificate of authority to conduct affairs in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

(c) A foreign corporation failing to obtain permission to conduct affairs in this State as required by this Chapter or by prior acts then applicable shall be liable to the State for the years or parts thereof during which it conducted affairs in this State without such permission in an amount equal to all fees and taxes which would have been imposed by law upon such corporation had it duly applied for and received such permission plus interest and all penalties imposed by law for failure to pay such fees and taxes, plus five hundred dollars ($500.00) and costs. The Attorney General shall bring actions to recover all amounts due the State under the provisions of this section.

(d) The Secretary of State is hereby directed to require that every foreign corporation conducting affairs in this State comply with the provisions of this Chapter. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign corporations now conducting affairs in this State which may have failed to comply with the provisions of this Chapter. (1955, c. 1230.)

ARTICLE 9.

Fees and Taxes.

§ 55A-77. Fees. — (a) The Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

(1) For filing articles of incorporation (G.S. 55A-7), ... $5.00

(2) For filing an application of a foreign corporation for a certificate of authority to conduct affairs in this State and issuing a certificate of authority (G.S. 55A-61), ... 5.00
(3) For filing an application of a foreign corporation for an amended certificate of authority to conduct affairs in this State and issuing an amended certificate of authority (G.S. 55A-71), . . . 5.00
(4) For filing articles of amendment (G.S. 55A-36), ... 5.00
(5) For filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to conduct affairs in this State (G.S. 55A-69), ... 5.00
(6) For filing articles of merger or consolidation (G.S. 55A-41), . . 5.00
(7) For filing a copy of articles of merger of a foreign corporation holding a certificate of authority to conduct affairs in this State (G.S. 55A-70), ... 5.00
(8) For receiving any service of process as statutory agent of a corporation (G.S. 55A-13, 55A-68, 55A-75), ... 1.00
which amount may be recovered from the adverse party as taxable costs by the party to the action or proceeding causing such service to be made if such party prevails in the action or proceeding.
(9) For filing a notice of resignation of a registered agent (G.S. 55A-12(d), ... 1.00
(10) For filing a statement of the change of registered office or registered agent of a domestic or foreign corporation (G.S. 55A-65, 55A-75, 55A-12), ... 3.00
(11) For filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal (G.S. 55A-72), ... 5.00
(12) Issuance of a certificate of revocation of authority (G.S. 55A-74), ... 5.00
(13) For filing articles of dissolution (G.S. 55A-48), ... 5.00
(14) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation (G.S. 55A-4(c)):
for the first page thereof, ... 1.00
for each additional page, ...40
for affixing his certificate and official seal thereto, ... 2.00
(15) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation:
for each page, ...20
for affixing his certificate and official seal thereto, ... 2.00
(16) For filing an application to reserve or register a corporate name and for filing an application to renew such a registration (G.S. 55A-10(e) and (f)), ... 5.00
(17) For filing any other document not herein specifically provided for, ... 5.00

(b) The filing fees hereinbefore prescribed do not include copies or certified copies and the fees for such copies are those prescribed by subdivisions (14) and (15) of subsection (a) of this section.

(c) For recording and copying any corporate document or paper required by this Chapter to be recorded in his office, the register of deeds shall collect such amounts as are prescribed by G.S. 161-10 or other applicable laws. (1957, c. 1179; 1967, c. 823, s. 24; 1969, c. 875, s. 10.)

Cross Reference. — See Editor's note to § 53-5.

§ 55A-78. Taxes. — (a) On filing articles of incorporation in the office of the Secretary of State, a tax in the amount of fifteen dollars ($15.00) shall be collected by the Secretary of State, and remitted to the State Treasurer for the use of the State.

(b) On filing in the office of the Secretary of State an application of a foreign corporation for a certificate of authority to conduct affairs in this State, a tax in the amount of forty dollars ($40.00) shall be collected by the Secretary of State and remitted to the State Treasurer for the use of the State. (1957, c. 1179.)

Article 10.

Miscellaneous Provisions.

§ 55A-79. Interrogatories by Secretary of State. — The Secretary of State may propound to any corporation, domestic or foreign, subject to the provisions of this Chapter, and to any officer or director thereof, such written interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation has complied with all the provisions of this Chapter applicable to such corporation. Such interrogatories shall be answered within 30 days after the mailing thereof, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual they shall be answered by him, and if directed to a corporation they shall be answered by the president, vice-president, secretary or assistant secretary thereof. The Secretary of State need not file any document to which such interrogatories relate until such interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this Chapter. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this Chapter, requiring or permitting action by the Attorney General. (1955, c. 1230.)

§ 55A-80. Penalties imposed upon corporations, officers and directors for failure to answer interrogatories. — (a) Each corporation, foreign or domestic, that fails or refuses to answer truthfully and fully within the time prescribed by this Chapter interrogatories propounded by the Secretary of State, in accordance with the provisions of this Chapter, shall be deemed to be guilty of a misdemeanor.

(b) Each officer and director of a corporation, domestic or foreign who fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter, or who signs any articles, statement, report, application or other document filed with the Secretary of State which is known to such officer or director to be false in any material respect, shall be guilty of a misdemeanor. (1955, c. 1230.)

§ 55A-81. Powers of Secretary of State. — The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this Chapter efficiently and to perform the duties therein imposed upon him. (1955, c. 1230.)

§ 55A-82. Certificates and certified copies to be received in evidence. — All certificates issued by the Secretary of State in accordance with the provisions of this Chapter, and all copies of documents filed in his office in accordance with the provisions of this Chapter when certified by him, shall be taken and received

in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. (1955, c. 1230.)

§ 55A-83. Forms of documents required to be filed in office of Secretary of State. — Any document required to be filed in the office of the Secretary of State shall be made in such form, if any, as may be prescribed by the Secretary of State pursuant to the provisions of this Chapter. (1955, c. 1230.)

§ 55A-84. Photostatic copies of documents acceptable for filing or recording. — When any document is required or permitted to be filed or recorded by this Chapter, a photostatic or other photographic copy of such document may be filed or recorded in lieu of the original instrument. Such filing or recording shall have the same force and effect as if the original instrument had been so filed or recorded. (1955, c. 1230.)

§ 55A-85. Waiver of notice. — Whenever any notice is required to be given to any member or director of a corporation under the provisions of this Chapter or under the provisions of the charter or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice. (1955, c. 1230.)

§ 55A-86. Action by members without a meeting. — Any action required by this Chapter to be taken at a meeting of the members or of the board of directors, or of a committee of directors, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the members entitled to vote with respect to the subject matter thereof, or by a majority of the directors, or by a majority of the members of the committee of directors, as the case may be, and filed with the secretary of the corporation as part of the corporate records, whether done before or after the action so taken; provided, however, that this shall not apply whenever the charter or the bylaws of the corporation specifically require that such action be by a unanimous vote. (1955, c. 1230; 1963, c. 786; 1969, c. 875, s. 9.)

§ 55A-87. Reserve power. — The General Assembly reserves the power to amend or repeal the charter of any corporation hereafter or heretofore formed and to amend or repeal this Chapter or any part thereof, the rights of any corporation or any member, director or officer in any corporation are subject to this reservation. This Chapter, including this reservation, is a part of the charter contract between members. The power so reserved includes the power to authorize charter amendments which are to be effectuated pursuant to consent by the members in the manner permitted by this Chapter, as now enacted or as subsequently amended. No amendment or repeal of this Chapter or any part thereof shall impair any liability previously incurred. (1955, c. 1230.)

§ 55A-88. Certain religious, etc., associations deemed incorporated. — In all cases where a religious, educational or charitable association has been formed prior to January 1, 1894, and has since said date been acting as a corporation, exercising the powers and performing the duties of religious, educational or charitable corporations as prescribed by the laws of this State, then such association shall be conclusively presumed to have been duly and regularly organized and existing as a corporation under the laws of this State on January 1, 1894, and all of its acts as a corporation from and after said date, if otherwise valid, are hereby declared to be valid corporate acts. (1955, c. 1230.)

Applied in Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

§ 55A-89. Cross references. — Whenever in this Chapter, as enacted or as hereafter amended, whether by enactment of additional provisions or otherwise, reference is made to a section of this Chapter or of any other Chapter of the statutes of this State, such reference shall, unless otherwise provided, extend to and include any amendment of the section so referred to or any section hereafter enacted in lieu of the section so referred to. (1955, c. 1230.)

ARTICLE 11.

Curative Provisions.

§ 55A-89.1. Validation of amendments to corporate charters extending corporate existence; limitation of actions; intent. — (a) In every case where a corporation chartered under either the general or private laws of the State of North Carolina, has continued or shall continue to act and conduct affairs as a corporation after the expiration of its period of existence as theretofore fixed in its charter and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if such amendment had been made within the period of such corporation's existence as theretofore fixed in its charter.

(b) No action or proceeding shall be brought or defense or counterclaim pleaded later than July 1, 1958, in which either the continued existence of such corporation or the validaty of any of the contracts, acts, deeds, rights, privileges, powers, franchises and titles of such corporation is attacked or otherwise questioned on the grounds that such amendment was not filed within the period of such corporation's existence as theretofore fixed in its charter.

(c) In no event shall the limitation provided in subsection (b) of this section bar any action, proceeding, defense or counterclaim based upon grounds other than those mentioned in subsection (b), unless the grounds set out in subsection (b) are an essential part thereof. (1957, c. 509.)

Chapter 55B.

Professional Corporation Act.

Sec.
55B-1. Title.
55B-2. Definitions.
55B-3. Business Corporation Act applicable.
55B-4. Formation of corporation.
55B-5. Corporate name.
55B-6. Capital stock.
55B-7. Death or disqualification of a stockholder or employee.
55B-8. Rendition of professional services.
55B-9. Professional relationship and liability.
55B-10. Registration with licensing board.
55B-11. Renewal of certificate of registration.
55B-12. Application of regulations of licensing boards.
55B-13. Suspension or revocation of certificate of registration.
55B-14. Types of professional services.
55B-15. Applicability of Chapter.

§ 55B-1. Title. — This Chapter may be cited as "The Professional Corporation Act." (1969, c. 718, s. 1.)

§ 55B-2. Definitions. — As used in this Chapter, the following words shall, unless the context requires otherwise, have the following meanings:

(1) "Disqualified person" means a licensed person who for any reason becomes legally disqualified to render the same professional services which are or were being rendered by the professional corporation of which such person is an officer, director, shareholder or employee.

(2) "Licensee" means any natural person who is duly licensed by the appropriate licensing board to render the same professional services which will be rendered by the professional corporation of which he is, or intends to become, an officer, director, shareholder or employee.

(3) "Licensing board" means a board which is charged with the licensing and regulating of the profession or practice in this State in which the professional corporation is organized to engage.

(4) The term "licensing board," as the same applies to attorneys at law, shall mean the Council of the North Carolina State Bar, and it shall include the North Carolina State Board of Law Examiners only to the extent that the North Carolina Board of Law Examiners is authorized to issue licenses for the practice of law under the supervision of the Council of the North Carolina State Bar.

(5) "Professional corporation" means a corporation which is engaged in rendering the professional services as herein specified and defined pursuant to a certificate of registration issued by the licensing board regulating the profession or practice, and which has as its shareholders only individuals who themselves are duly licensed to render the same professional service as the corporation, and which designates itself as may be required by this statute, and which is organized under the provisions of this Chapter and of Chapter 55, the Business Corporation Act.

(6) The term "professional service" means any type of personal or professional service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license from a licensing board as herein defined, and pursuant to the following provisions of the General Statutes: Chapter 83, "Architects"; Chapter 84, "Attorneys at Law"; Chapter 93, "Public Accountants"; and Article 1, "Practice of Medicine," Article 2, "Dentistry," Article 6, "Optometry," Article 7, "Osteopathy," Article 8, "Chiropractic," Article 11, "Veterinaries," Article 12, "Podiatrists," of Chapter 90; Article 18A, "Practicing Psychologist," of Chapter 90; Chapter 89, "Engineering and Land Surveying"; Chapter 89A, "Landscape Architects." (1969, c. 718, s. 2; 1971, c. 196, s. 1.)

Editor's Note. — Article 7 of Chapter 90, referred to in subdivision (6) of this section, was repealed by Session Laws 1967, c. 691, s. 59.

North Carolina Licensing Board Must License Foreign Professional. — See opinion of Attorney General to Mr. Joseph G. Maddrey, Corporation Attorney, Office of Secretary of State, 40 N.C.A.G. 46 (1970).

§ 55B-3. Business Corporation Act applicable. — The Business Corporation Act shall be applicable to such professional corporations, including their organization, and professional corporations shall enjoy the powers and privileges and shall be subject to the duties, restrictions and liabilities of other corporations, except insofar as the same may be limited or enlarged by this Chapter. If any provision of this Chapter conflicts with the provisions of the Business Corporation Act, the provisions of this Chapter shall prevail. (1969, c. 718, s. 3.)

§ 55B-4. Formation of corporation. — A professional corporation under this Chapter may be formed pursuant to the provisions of Chapter 55, the Business Corporation Act, with the following limitations:

(1) At least one incorporator shall be a "licensee" as hereinabove defined in G.S. 55B-2(2).

(2) All of the shares of stock of the corporation shall be owned and held by a licensee, or licensees, as hereinabove defined in G.S. 55B-2(2).

(3) At least one director and one officer shall be a "licensee" as hereinabove defined in G.S. 55B-2(2).

(4) The articles of incorporation, in addition to the requirements of Chapter 55, shall designate the personal services to be rendered by the professional corporation and shall be accompanied by a certification by the appropriate licensing board that each of the owners of shares of stock is duly licensed to render such professional services. (1969, c. 718, s. 4.)

Editor's Note. — For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

North Carolina Licensing Board Must License Foreign Professional. — See opinion of Attorney General to Mr. Joseph G. Maddrey, Corporation Attorney, Office of Secretary of State, 40 N.C.A.G. 46 (1970).

§ 55B-5. Corporate name. — The corporate name used by professional corporations under this Chapter, except as limited by the licensing acts of the respective professions, shall be governed by the provisions of Chapter 55, the Business Corporation Act; provided that professional corporations may use the words "Professional Association" or "P.A." in lieu of the corporate designations specified in Chapter 55; and provided further that licensing boards by regulations may make further corporate name requirements or limitations for the respective professions, but such regulations may not prohibit the continued use of any corporate name duly adopted in conformity with the General Statutes and with the pertinent licensing board regulations in effect at the date of such adoption. (1969, c. 718, s. 5.)

§ 55B-6. Capital stock. — A professional corporation may issue shares of its capital stock only to a licensee as hereinabove defined, and such shareholders may voluntarily transfer such shares of stock issued to him only to another such licensee. No share or shares of any stock of such corporation shall be transferred upon the books of the corporation unless and until the corporation has received a certification of the appropriate licensing board that the transferee of such shares is a licensee as here defined. Any share of stock of such corporation issued or transferred in violation of this section shall be null and void. No

shareholder of a professional corporation shall enter into a voting trust agreement or any other type of agreement vesting in another person the authority to exercise the voting power of any or all of his stock. (1969, c. 718, s. 6.)

§ 55B-7. Death or disqualification of a stockholder or employee. — (a) If any officer, shareholder, agent or employee of a corporation organized under this Chapter who is a licensee becomes legally disqualified to render professional services within this State, he shall sever all employment with, and financial interest in, such corporation forthwith. A corporation's failure to comply with this provision shall constitute grounds for the forfeiture of its certificate of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the Secretary of State, the Secretary of State shall forthwith certify that fact to the Attorney General for appropriate action to dissolve the corporation.

(b) A professional corporation shall report to the appropriate licensing board the death of any of its shareholders within 30 days thereafter. Within one year of the date of such death, all of the shares owned by such deceased shareholder shall be transferred to and acquired by the professional corporation or persons qualified to own such shares. In the absence of an agreement which determines the equitable value of the shares, then the price for such shares shall be the fair market value of the stock, but not less than the book value as of the end of the month immediately preceding the death or disqualification. Notwithstanding any other provisions of this Chapter, the shares of stock owned by such deceased shareholder may be owned and held by the person or persons who may be legally entitled to receive such shares for a period of one year after the death of such deceased shareholder, or in the case of the death of the owner of all the shares of such corporation, for such period of time as may be necessary to liquidate the corporation. (1969, c. 718, s. 7.)

§ 55B-8. Rendition of professional services. — A professional service corporation may render professional services only through its officers, employees and agents who are duly licensed to render such professional services; provided, however, this provision shall not be interpreted to include in the term "employee," as used herein, clerks, secretaries, bookkeepers, technicians and other assistants who are not considered by law to be rendering professional services to the public. (1969, c. 718, s. 8.)

§ 55B-9. Professional relationship and liability. — Nothing in this Chapter shall be interpreted to abolish, modify, restrict, limit or alter the law in this State applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service, or the standards of professional conduct applicable to the rendering therein of such services. (1969, c. 718, s. 9.)

§ 55B-10. Registration with licensing board. — No professional corporation shall open, operate, or maintain an establishment for any of the purposes set forth in this Chapter without first having obtained a certificate of registration from the licensing board or boards. Applications for such registration shall be made to the licensing board or boards in writing and shall contain the name and address of the corporation and such other information as may be required by the licensing board or boards. If the board finds that no disciplinary action is pending before the board against any of the licensed incorporators, officers, directors, shareholders or employees of such corporation, and if it appears that such corporation will be conducted in compliance with the law and the regulations of the board, the board shall issue, upon the payment of a registration fee, not to exceed fifty dollars ($50.00), a certificate of registration which shall remain effective until January 1 following the date of such

registration or until such other expiration or renewal date as may be established by law or by the regulations of the licensing board. (1969, c. 718, s. 10.)

§ 55B-11. Renewal of certificate of registration. — Upon written application of the holder, accompanied by a fee not to exceed the sum of twenty-five dollars ($25.00), the licensing board shall renew the certificate of registration of a professional corporation as required by law or the regulations of the licensing board if the board finds that the corporation has complied with its regulations and the provisions of this section. If the corporation does not apply for renewal of its certificate of registration within 30 days after the date of the expiration of such certificate, the certificate of registration shall be automatically suspended and may be reinstated within the calendar year upon the payment of the required renewal fee plus a penalty of ten dollars ($10.00), if such corporation is then otherwise qualified and entitled to a renewal of its certificate of registration. (1969, c. 718, s. 11.)

§ 55B-12. Application of regulations of licensing boards. — A professional corporation shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the licensing board as herein defined. Nothing in this Chapter shall impair the disciplinary powers of any licensing board applicable to a licensee as herein defined. No professional corporation may do any act which its shareholders as licensees are prohibited from doing. (1969, c. 718, s. 12.)

§ 55B-13. Suspension or revocation of certificate of registration. — A licensing board may suspend or revoke a certificate of registration issued by it to a professional corporation for any of the following reasons:

(1) Upon the failure of such corporation to promptly remove or discharge an officer, director, shareholder or employee who becomes disqualified by reason of the revocation or suspension of his license to practice; or

(2) Upon a finding by the licensing board that the professional corporation has failed to comply with the provisions of this Chapter or the regulations of the licensing board.

Upon the suspension or revocation of a certificate of registration issued to a professional corporation, such corporation shall cease forthwith to render professional services, and the Secretary of State shall be notified to the end that the corporation may be removed from active status and remain as such until reinstatement. (1969, c. 718, s. 13.)

§ 55B-14. Types of professional services. — A professional corporation shall render only one specific type professional service, and such services as may be ancillary thereto, and shall not engage in any other business or profession; provided, however, such corporation may own real and personal property necessary or appropriate for rendering the type of professional services it was organized to render and it may invest in real estate, mortgages, stocks, bonds, and any other type of investments; provided further, that in the case of architectural, landscape architectural, engineering or land surveying services, as defined in Chapters 83, 89, and 89A respectively, one corporation may be authorized to provide such of these services where such corporation, and at least one corporate officer who is a stockholder thereof, is duly licensed by the licensing board of each such profession. (1969, c. 718, s. 14; 1971, c. 196, s. 2; 1973, c. 1446, s. 9.)

Editor's Note. — The 1973 amendment inserted Chapter 89 in the list of Chapters near the end of the section.

§ 55B-15. Applicability of Chapter. — This Chapter shall not apply to any corporation which prior to June 5, 1969, was permitted by law to render professional services as herein defined; provided, however, any such corporation rendering "professional service" as defined in G.S. 55B-2(6) may be brought within the provisions of this Chapter by the filing of an amendment to its articles of incorporation declaring that its shareholders have elected to bring the corporation within the provisions of this Chapter and to make the same conform to all of the provisions of this Chapter. (1969, c. 718, s. 15.)

Chapter 56.

Electric, Telegraph and Power Companies.

§§ 56-1 to 56-11: Repealed by Session Laws 1963, c. 1165, s. 1.

Editor's Note. — Session Laws 1963, c. 1165, s. 1, amended, revised and rewrote Chapters 56, 60 and 62 of the General Statutes and recodified them as a new Chapter 62 and a new Chapter 74A.

Chapter 57.

Hospital, Medical and Dental Service Corporations.

Sec.
57-1. Regulation and definitions; application of other laws; profit and foreign corporations prohibited.
57-1.1. Contract for joint assumption or underwriting of risks.
57-1.2. Premium or dues paid by employer, employee, principal or agent or jointly and severally.
57-2. Incorporation.
57-3. Hospital, physician and dentist contracts.
57-3.1. Dentists' services.
57-3.2. Nurses' services.
57-4. Supervision of Commissioner of Insurance; form of contract with subscribers; schedule of rates.
57-4.1. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.
57-5. Application for certificate of authority or license.
57-6. Issuance of certificate.
57-7. Subscribers' contracts; required and prohibited provisions.
57-8. Investments and reserves.
57-9. Reports filed with Commissioner of Insurance.
57-10. Visitations and examinations.
57-11. Expenses.
57-12. Licensing of agents.
57-12.1. Medical, dental and hospital service associations and agent to transact business through licensed agents only.
57-13. Revocation of certificate of authority; dissolution.
57-14. Taxation.
57-15. Amendments to certificate of incorporation.
57-16. Cost plus plans.
57-17. Preexisting hospital service corporations.
57-18. Construction of Chapter as to single employer plans; associations exempt.
57-19. Merger or consolidation, proceedings for.
57-19.1. Merger.
57-20. Commissioner of Insurance determines corporations exempt from this Chapter.

§ 57-1. Regulation and definitions; application of other laws; profit and foreign corporations prohibited. — Any corporation heretofore or hereafter organized under the general corporation laws of the State of North Carolina for the purpose of maintaining and operating a nonprofit hospital and/or medical and/or dental service plan whereby hospital care and/or medical and/or dental service may be provided in whole or in part by said corporation or by hospitals and/or physicians and/or dentists participating in such plan, or plans, shall be governed by this Chapter and shall be exempt from all other provisions of the insurance laws of this State, heretofore enacted, unless specifically designated herein, and no laws hereafter enacted shall apply to them unless they be expressly designated therein.

The term "hospital service plan" as used in this Chapter includes the contracting for certain fees for, or furnishing of, hospital care, laboratory facilities, X-ray facilities, drugs, appliances, anesthesia, nursing care, operating and obstetrical equipment, accommodations and/or any and all other services authorized or permitted to be furnished by a hospital under the laws of the State of North Carolina and approved by the North Carolina Hospital Association and/or the American Medical Association.

The term "medical service plan" as used in this Chapter includes the contracing for the payment of fees toward, or furnishing of, medical, obstetrical, surgical and/or any other professional services authorized or permitted to be furnished by a duly licensed physician, except that in any plan in any policy of insurance governed by this Chapter that includes services which are within the scope of practice of a duly licensed optometrist, a duly licensed chiropractor and a duly licensed physician, then the insured or beneficiary shall have the right to choose the provider of the care or service, and shall be entitled to payment of or reimbursement for such care or service, whether the provider be a duly licensed optometrist, a duly licensed chiropractor or a duly licensed physician notwithstanding any provision to the contrary contained in such policy. The term "medical services plan" also includes the contracting for the payment

of fees toward, or furnishing of, professional medical services authorized or permitted to be furnished by a duly licensed provider of health services licensed under Chapter 90 of the General Statutes.

The term "dental service plan" as used in this Chapter includes contracting for the payment of fees toward, or furnishing of dental and/or any other professional services authorized or permitted to be furnished by a duly licensed dentist.

The insured or beneficiary of every "medical service plan" and of every "dental service plan," as those terms are used in this Chapter, or of any policy of insurance issued thereunder, that includes services which are within the scope of practice of both a duly licensed physician and a duly licensed dentist shall have the right to choose the provider of such care or service, and shall be entitled to payment of or reimbursement for such care or service, whether the provider be a duly licensed physician or a duly licensed dentist notwithstanding any provision to the contrary contained in any such plan or policy.

The term "hospital service corporation" as used in this Chapter is intended to mean any nonprofit corporation operating a hospital and/or medical and/or dental service plan, as herein defined. Any corporation heretofore or hereafter organized and coming within the provisions of this Chapter, the certificate of incorporation of which authorizes the operation of either a hospital or medical and/or dental service plan, or any or all of them, may, with the approval of the Commissioner of Insurance, issue subscribers' contracts or certificates approved by the Commissioner of Insurance, for the payment of either hospital or medical and/or dental fees, or the furnishing of such services, or any or all of them, and may enter into contracts with hospitals for physicians and/or dentists, or any or all of them, for the furnishing of fees or services respectively under a hospital or medical and/or dental service plan, or any or all of them.

No foreign or alien hospital or medical and/or dental service corporation as herein defined shall be authorized to do business in this State. (1941, c. 338, s. 1; 1943, c. 537, s. 1; 1953, c. 1124, s. 1; 1961, c. 1149; 1965, c. 396, s. 1; c. 1169, s. 1; 1967, c. 690, s. 1; 1973, c. 642.)

Cross Reference. — As to authority of Commission for Health Services to regulate the sanitation of private hospitals, etc., see § 130-170.

Editor's Note. — The 1973 amendment inserted "a duly licensed chiropractor" in two places in the third paragraph.

Session Laws 1965, c. 396, s. 4, provides: "Nothing in this act shall be construed to equate optometrists with physicians except to the extent that each must be duly licensed."

Session Laws 1965, c. 1169, s. 4, provides that the right to payment or reimbursement notwithstanding any provision to the contrary contained in any plan or policy shall be applicable only to those plans and policies entered into, issued, or renewed after Jan. 1, 1966, there being no legislative intent to impair or enlarge obligations under any existing contracts.

Session Laws 1967, c. 690, s. 4, provides: "Nothing in this act shall be construed to equate podiatrists with physicians except to the extent that each must be duly licensed."

For comment on this Chapter, see 19 N.C.L. Rev. 487.

Applicable provisions of Chapter 58. — For provisions of Chapter 58 of the General Statutes made applicable to hospital and medical service corporations, see notes to §§ 58-41, 58-44.6, 58-54.4, 58-250.1, 58-252, 58-257 and 58-257.1.

For provisions of Chapter 58 of the General Statutes made applicable to medical service plan policies and hospital service plan policies issued under this Chapter, see § 58-251.3 and the note thereto.

As to coverage to be afforded to mentally retarded and physically handicapped children, see § 58-251.3.

Cited in Cato v. Hospital Care Ass'n, 220 N.C. 479, 17 S.E.2d 671 (1941).

§ 57-1.1. Contract for joint assumption or underwriting of risks. — Any corporation organized or regulated by the provisions of this Chapter is authorized to enter into such contracts with any other firm or corporation for joint assumption or underwriting of any part or all of any risks undertaken upon

such terms and conditions as are approved by the Commissioner of Insurance. (1955, c. 894, s. 1.)

§ 57-1.2. Premium or dues paid by employer, employee, principal or agent or jointly and severally. — Any premium or dues charged by a corporation regulated under the provisions of this Chapter may be paid by the employer, employee, principal, or agent, or jointly and severally. The term "employer" as used herein includes counties, municipal corporations, and all departments or subdivisions of the State, county, municipal corporation, and official boards including city and county boards of alcoholic control, together with all others occupying the status of employer and employee, principal and agent. (1955, c. 894, s. 2.)

§ 57-2. Incorporation. — Any number of persons not less than seven, desiring to form a nonprofit hospital service corporation, shall incorporate under the provisions of the general laws of the State of North Carolina governing corporations, but subject to the following provisions:

(1) The certificate of incorporation of each such corporation shall have endorsed thereon or attached thereto, the consent of the Commissioner of Insurance, if he shall find the same to be in accordance with the provisions of this Chapter.

(2) A statement of the services to be rendered by the corporation and the rates currently to be charged therefor which said statement shall be accompanied by two copies of each contract for services which the corporation proposes to make with its subscribers, and two copies of the type of contract which said corporation proposes to make with participating hospitals, shall have been furnished the Commissioner of Insurance; provided, however, that if the articles of incorporation of any such corporation within the meaning of this Chapter shall have been filed with the Secretary of State prior to March 15, 1941, the approval thereof by the Commissioner of Insurance shall be evidenced by a separate instrument in writing filed with the Secretary of State. (1941, c. 338, s. 2.)

§ 57-3. Hospital, physician and dentist contracts. — Any corporation organized under the provisions of this Chapter may enter into contracts for the rendering of hospital service to any of its subscribers by hospitals approved by the American Medical Association and/or the North Carolina Hospital Association, and may enter into contracts for the furnishing of, or the payment in whole or in part for, medical and/or dental services rendered to any of its subscribers by duly licensed physicians and/or dentists. All obligations arising under contracts issued by such corporations to its subscribers shall be satisfied by payments made directly to the hospital or hospitals and/or physicians and/or dentists rendering such service, or direct to the subscriber or his, her, or their legal representatives upon the receipt by the corporation from the subscriber of a statement marked paid by the hospital(s) and/or physician(s) and/or dentist(s) or both rendering such service, and all such payments heretofore made are hereby ratified. Nothing herein shall be construed to discriminate against hospitals conducted by other schools of medical practice.

On and after January 1, 1956, all certificates, plans or contracts issued to subscribers or other persons by hospital and medical and/or dental service corporations operating under Chapter 57 of the General Statutes shall contain a provision as follows: "After two years from the date of issue of this certificate, contract or plan no misstatements, except fraudulent misstatements made by the applicant in the application for such certificate, contract or plan, shall be used to void said certificate, contract or plan, or to deny a claim for loss incurred or disability (as therein defined) commencing after the expiration of such two-year period. No claim for loss incurred or disability (as defined in the certificate,

contract or plan) commencing after two years from the date of issue of this certificate, contract or plan shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specifically described, effective on the date of loss, had existed prior to the effective date of coverage of this certificate, contract or plan." (1941, c. 338, s. 3; 1943, c. 537, s. 2; 1947, c. 820, s. 1; 1955, c. 850, s. 7; 1961, c. 1149.)

§ 57-3.1. Dentists' services. — Any corporation organized under the provisions of this Chapter may, in addition to its authority to contract under G.S. 57-3, enter into contracts to pay duly licensed dentists for treatment of fractures and dislocations of the jaw, and cutting procedures in the oral cavity other than extractions, repairs and care of the teeth and gums. (1957, c. 987.)

§ 57-3.2. Nurses' services. — No agency, institution or physician providing a service for which payment or reimbursement is required to be made under a contract governed by this Chapter shall be denied such payment or reimbursement on account of the fact that the service was rendered through a registered nurse acting under authority of rules and regulations adopted by the Board of Medical Examiners and the Board of Nursing pursuant to G.S. 90-6 and 90-162.

Nothing herein shall be construed to authorize contracting with or making payments directly to a nurse not otherwise permitted. (1973, c. 436.)

§ 57-4. Supervision of Commissioner of Insurance; form of contract with subscribers; schedule of rates. — No hospital service corporation shall enter into any contract with subscribers unless and until it shall have filed with the Commissioner of Insurance a specimen copy of the contract or certificate and of all applications, riders, and endorsements for use in connection with the issuance or renewal thereof to be formally approved by him as conforming to the section of this Chapter entitled "Subscribers' contracts," and conforms to all rules and regulations promulgated by the Commissioner of Insurance under the provisions of this Chapter. The Commissioner of Insurance shall, within a reasonable time after the filing of any such form, notify the corporation filing the same either of his approval or of his disapproval of such form.

No corporation subject to the provisions of this Chapter shall enter into any contract with a subscriber after the enactment hereof unless and until it shall have filed with the Commissioner of Insurance a full schedule of rates to be paid by the subscribers to such contracts and shall have obtained the Commissioner's approval thereof. The Commissioner may refuse approval if he finds that such rates are excessive, inadequate or discriminatory or if he finds the form of subscribers' contracts is unfair or discriminatory. At all times such rates and form of subscribers' contracts shall be subject to modification and approval of the Commissioner of Insurance under rules and regulations adopted by the Commissioner, in conformity to this Chapter. (1941, c. 338, s. 4.)

§ 57-4.1. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice. — Whenever any hospital service corporation licensed under this Chapter makes a rate filing or any proposal to revise an existing rate schedule or contract form, the effect of which is to increase or decrease the charge for its contracts, or to set up a new rate schedule, and such rate schedule is subject to the approval of the Commissioner, such hospital service corporation shall file its proposed rate change or contract form and supporting data with the Commissioner, who shall thereafter, before acting on any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the Commissioner of Insurance; and then in accordance therewith fix a time and place for such hearing not earlier than 20 days thereafter. The hospital service corporation making such proposal shall, not more than 10 days prior to the time of such public hearing, cause to

be published in a daily newspaper or newspapers published in North Carolina, and in accordance with the rules and regulations of the Commissioner of Insurance, a notice, in the form and content approved by the Commissioner, setting forth the nature and effect of such proposal and the time and place of the public hearing to be held. (1953, c. 1118.)

§ 57-5. Application for certificate of authority or license. — No corporation subject to the provisions of this Chapter shall issue contracts for the rendering of hospital or medical and/or dental service to subscribers, until the Commissioner of Insurance has, by formal certificate or license, authorized it to do so. Application for such certificate of authority or license shall be made on forms to be supplied by the Commissioner of Insurance, containing such information as he shall deem necessary. Each application for such certificate of authority or license, as a part thereof shall be accompanied by duplicate copies of the following documents duly certified by at least two of the executive officers of such corporation:

(1) Certificate of incorporation with all amendments thereto.
(2) Bylaws with all amendments thereto.
(3) Each contract executed or proposed to be executed by and between the corporation and any participating hospital, and/or physicians under the terms of which hospital and/or medical and/or dental service is to be furnished to subscribers to the plan.
(4) Each form of contract, application, rider, and endorsement, issued or proposed to be issued to subscribers to the plan, or in renewal of any of contracts with subscribers to the plan, together with a table of rates charged or proposed to be charged to subscribers for each form of such contract.
(5) Financial statement of the corporation which shall include the amounts of each contribution paid or agreed to be paid to the corporation for working capital, the name or names of each contributor and the terms of each contribution. (1941, c. 338, s. 5; 1943, c. 537, s. 3; 1961, c. 1149.)

§ 57-6. Issuance of certificate. — Before issuing any such license or certificate the Commissioner of Insurance may make such an examination or investigation as he deems expedient. The Commissioner of Insurance shall issue a certificate of authority or license upon the payment of an annual fee of one hundred dollars ($100.00) and upon being satisfied on the following points:

(1) The applicant is established as a bona fide nonprofit hospital service corporation as defined by this Chapter.
(2) The rates charged and benefits to be provided are fair and reasonable.
(3) The amounts provided as working capital of the corporation are repayable only out of earned income in excess of amounts paid and payable for operating expenses and hospital and medical and/or dental expenses and such reserve as the Department of Insurance deems adequate, as provided hereinafter.
(4) That the amount of money actually available for working capital be sufficient to carry all acquisition costs and operating expenses for a reasonable period of time from the date of the issuance of the certificate. (1941, c. 338, s. 6; 1943, c. 537, s. 4; 1947, c. 820, s. 2; 1961, c. 1149.)

§ 57-7. Subscribers' contracts; required and prohibited provisions. — (a) Every contract made by a corporation subject to the provisions of the Chapter shall be for a period not to exceed 12 months, and no contract shall be made providing for the inception of benefits at a date later than one year from the date of the contract. Any such contract may provide that it shall be automatically renewed for a similar period unless there shall have been one month's prior written notice of termination by either the subscriber or the corporation.

(b) Contracts may be issued which entitle one or more persons to benefits thereunder, provided that persons entitled to benefits thereunder, other than the certificate holder, are either spouse, lawful or legally adopted child of the certificate holder or his spouse, or other members of the immediate family of the certificate holder who reside in the same household with certificate holder and are legally, equitably, or morally dependent upon and rely upon certificate holder to a material degree for the reasonable necessities of life, such as food, clothing, lodging, maintenance, support, and/or education.

(c) Every contract entered into by any such corporation with any subscriber thereof shall be in writing and a certificate stating the terms and conditions thereof shall be furnished to the subscriber to be kept by him. No such certificate form, other than to group subscribers of groups of 10 or more certificate holders or those issued pursuant to a master group contract covering 10 or more certificate holders shall be made, issued or delivered in this State unless it contains the following provisions, provided, however, groups between five and 10 certificate holders complying with and maintaining eligibility status under regulations approved by the Commissioner of Insurance for group enrollment may be cancelled if such participation falls below the minimum participation of five certificate holders; or if the group takes other group hospital, medical or surgical coverage:

(1) A statement of the amount payable to the corporation by the subscriber and the times at which and manner in which such amount is to be paid; this provision may be inserted in the application rather than in the certificate. Application need not be attached to certificate.

(2) A statement of the nature of the benefits to be furnished and the period during which they will be furnished.

(3) A statement of the terms and conditions, if any, upon which the contract may be cancelled or otherwise terminated at the option of either party. Said statement shall be in the following language:

a. "Renewability": Any contract subject to the provisions hereof is renewable at the option of the subscriber unless sufficient notice in writing of nonrenewal is mailed to the subscriber by the corporation addressed to the last address recorded with the corporation.

b. "Sufficient notice" shall be as follows:

1. During the first year of any such contract, or during the first year following any lapse and reinstatement, or reenrollment, a period of 30 days.

2. During the second and subsequent years of continuous coverage, a number of full calendar months most nearly equivalent to one fourth the number of months of continuous coverage from the first anniversary of the date of issue or reinstatement or reenrollment, whichever date is more recent, to the date of mailing of such notice.

3. No period of required notice shall exceed two years, and no renewal hereunder shall renew any such contract for any period beyond the required period of notice except by written agreement of the subscriber and corporation.

Any such contract may be modified, terminated or cancelled by the corporation at any time at its option, upon:

a. Nonpayment of fees or dues as required, or

b. Failure or refusal to comply with rate or benefit changes approved by the State Insurance Department after public hearing as outlined in G.S. 57-4.1.

c. Failure or refusal after 30 days' written notice to subscriber to transfer into hospital and medical and/or dental service plan

serving the area to which he has changed residence and is eligible for or to which corporation is required to transfer by interplan agreement of transfer.

d. The provisions of these amendments to subsection (c) and (c)(3) shall apply only to such contracts as are first issued on and after January 1, 1956.

(4) A statement that the contract includes the endorsement thereon and attached papers, if any, and together with the applications contains the entire contract.

(5) A statement that if the subscriber defaults in making any payment, under the contract, the subsequent acceptance of a payment by the corporation at its home office shall reinstate the contract, but with respect to sickness and injury, only to cover such sickness as may be first manifested more than 10 days after the date of such acceptance.

(d) In every such contract made, issued or delivered in this State:

(1) All printed portions shall be plainly printed;

(2) The exceptions from the contract shall appear with the same prominence as the benefits to which they apply; and

(3) If the contract contains any provision purporting to make any portion of the articles, constitution or bylaws of the corporation a part of the contract, such portion shall be set forth in full.

(e) A hospital service corporation may issue a master group contract with the approval of the Commissioner of Insurance provided such contract and the individual certificates issued to members of the group, shall comply in substance to the other provisions of this Chapter. Any such contract may provide for the adjustment of the rate of the premium or benefits conferred as provided in said contract, and in accordance with an adjustment schedule filed with and approved by the Commissioner of Insurance. If such master group contract is issued, altered or modified, the subscribers' contracts issued in pursuance thereof are altered or modified accordingly, all laws and clauses in subscribers' contracts to the contrary notwithstanding. Nothing in this Chapter shall be construed to prohibit or prevent the same. Forms of such contract shall at all times be furnished upon request of subscribers thereto.

(f) Any hospitalization contract renewed in the name of the subscriber during the grace period shall be construed to be a continuation of the contract first issued. (1941, c. 338, s. 7; 1947, c. 820, ss. 3, 4; 1955, c. 679, ss. 1-3; 1957, c. 1085, s. 1; 1961, c. 1149.)

Cross Reference. — As to contracts covering newborn infants, see § 58-251.4.

§ 57-8. Investments and reserves. — No hospital service corporation shall invest in any securities other than securities permitted by the laws of this State for the investment of assets of life insurance companies, banks, trust companies, executors, administrators and guardians.

Every such corporation after the first full year of doing business after the passage of this Chapter shall accumulate and maintain, in addition to proper reserves for current administrative liabilities and whatever reserves are deemed adequate and proper by the Commissioner of Insurance for unpaid hospital and/or medical and/or dental bills, and unearned membership dues, a special contingent surplus or reserve at the following rates annually of its gross annual collections from membership dues, exclusive of receipts from cost plus plans, until said reserve shall equal three times its average monthly expenditures for hospital and/or medical and/or dental claims and administrative and selling expenses:

(1) First $200,000 ..... 4%

(2) Next $200,000 ..... 2%
(3) All above $400,000 ..... 1%

Any such corporation may accumulate and maintain a contingent reserve in excess of the reserve hereinabove provided for, not to exceed an amount equal to six times the average monthly expenditures for hospital and/or medical and/or dental claims and administrative and selling expenses.

In the event the Commissioner of Insurance finds that special conditions exist warranting an increase or decrease in the reserves or schedule of reserves, hereinabove provided for, it may be modified by the Commissioner of Insurance accordingly, provided however, when special conditions exist warranting an increase in said schedule of reserves, said schedule shall not be increased by the Commissioner of Insurance until a reasonable length of time shall have elapsed after notice of such increase. (1941, c. 338, s. 8; 1943, c. 537, s. 5; 1947, c. 820, s. 5; 1961, c. 1149.)

Cross References. — As to investments by banks, see §§ 53-44, 53-45 and 53-60. As to investments by executors, administrators and guardians, see §§ 36-1 to 36-5.1.

§ 57-9. Reports filed with Commissioner of Insurance. — Every such corporation shall annually on or before the first day of March of each year, file in the office of the Commissioner of Insurance a sworn statement verified by at least two of the principal officers of the said corporation showing its condition on the thirty-first day of December, then next preceding; which shall be in such form and shall contain such matter as the Commissioner of Insurance shall prescribe. In case any such corporation shall fail to file any such annual statement as herein required, the said Commissioner of Insurance shall be authorized and empowered to suspend the certificate of authority issued to such corporation until such statement shall be properly filed. (1941, c. 338, s. 9.)

§ 57-10. Visitations and examinations. — The Commissioner of Insurance or any deputy or examiner or other person whom he may appoint shall have the power of visitations and examination into the affairs of any such corporation and free access to all the books, papers and documents that relate to the business of the corporation, and may summon and qualify witnesses under oath to examine its officers, agents, or employees or other persons in relation to the affairs, transactions and conditions of the corporation, the actual expense of which shall be paid by the association so examined. (1941, c. 338, s. 10.)

§ 57-11. Expenses. — All acquisition expenses in connection with the solicitation of subscribers to such hospital and/or medical and/or dental service plan and administration costs including salaries paid to officers of the corporations, if any, shall at all times be subject to inspection by the Commissioner of Insurance. (1941, c. 338, s. 11; 1943, c. 537, s. 6; 1961, c. 1149.)

§ 57-12. Licensing of agents. — Every agent of any hospital service corporation authorized to do business in this State under the provisions of this Chapter shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that the company for which he is agent is licensed to do business in this State and that he is an agent of such company and duly authorized to do business for it. And every such agent, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit hospital service. For said license, each agent shall annually pay the sum of one dollar ($1.00). Before a license is issued to an agent, hereunder, the agent and the company for which he desires to act, shall apply for the license on forms to be prescribed by the Commissioner of Insurance, and before he issues a license to such agent, the Commissioner or Insurance shall satisfy himself by examination, or otherwise, that the person applying for a license as

an agent is a person of good moral character, that he intends to hold himself out in good faith as a hospital and/or medical and/or dental service agent and has sufficient knowledge of the business proposed to be done; that he has not willfully violated any of the insurance laws of the State, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interest. For said examination applicant shall pay the sum of ten dollars ($10.00): Provided, that where an applicant has already paid the ten-dollar ($10.00) examination fee prescribed in G.S. 105-228.7, such applicant shall not be required to pay an additional examination fee. All agents operating as such for a corporation subject to the provisions of this Chapter on the date of its ratification are deemed qualified to act as such without the examination herein provided for. Licenses issued hereunder shall be subject to revocation by the Commissioner of Insurance for cause after notice and hearing and if any person shall assume to act as an agent or broker without obtaining the license herein provided for, or makes any false statements or representations concerning the said hospital and/or medical and/or dental service, knowingly or willfully, he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) for each offense. (1941, c. 338, s. 12; 1943, c. 537, s. 7; 1947, c. 1023, s. 1; 1961, c. 1149; 1971, c. 1080, s. 2.)

§ 57-12.1. Medical, dental and hospital service associations and agent to transact business through licensed agents only. — No medical and/or dental or hospital service association; nor any agent of any association shall on behalf of such association or agent, knowingly permit any person not licensed as an agent as provided by law, to solicit, negotiate for, collect or transmit a premium for a new contract of medical and/or dental or hospital service certificate or to act in any way in the negotiation for any contract or policy; provided, no license shall be required of the following:

(1) Persons designated by the association or subscriber to collect or deduct or transmit premiums or other charges for medical and/or dental care or hospital contracts, or to perform such acts as may be required for providing coverage for additional persons who are eligible under a master contract.

(2) An agency office employee acting in the confines of the agent's office, under the direction and supervision of the duly licensed agent and within the scope of such agent's license, in the acceptance of request for insurance and payment of premiums, and the performance of clerical, stenographic, and similar office duties. (1955, c. 1268; 1961, c. 1149.)

§ 57-13. Revocation of certificate of authority; dissolution. — Whenever the Commissioner of Insurance shall find as a fact that any corporation subject to the provisions of this Chapter is being operated for profit or fraudulently conducted, or is not complying with the provisions of this Chapter, he shall be authorized to revoke the certificate of authority or license theretofore granted after notice and hearing, and may at any time thereafter institute or cause to be instituted the necessary proceedings under the laws of this State looking to the dissolution of such corporation, and any dissolution, liquidation, merger, or reorganization of a corporation or corporations subject to the provisions of this Chapter shall be under the supervision of the Commissioner of Insurance who shall have all powers with respect thereto granted to him under the insurance laws of this State. If, at any time, a corporation organized under the provisions of this Chapter is financially unable to comply with the provisions of this Chapter or to comply with any of the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this Chapter, the Commissioner of Insurance shall have the right without court action, to

transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this Chapter, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interests of the corporation, its members and creditors whose assets, obligations and liabilities, are transferred. This action on the part of the Commissioner of Insurance is without prejudice to the rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the Commissioner of Insurance as herein provided, provided, however, that the action taken by the Commissioner of Insurance herein shall not be affected pending a final determination by the court with reference thereto. (1941, c. 338, s. 13; 1943, c. 537, s. 8; 1971, c. 1080, s. 3.)

§ 57-14. Taxation. — For the purpose of raising revenues sufficient to defray the expenses of the administration of this Chapter, and in lieu of all other state-levied taxes, an annual franchise or privilege tax is hereby levied upon every corporation subject to the provisions of this Chapter at the rate of one third of one percent ($^1/_3$ of 1%) of the gross annual collections from membership dues exclusive of receipts from cost plus plans. The real and personal property of such corporations is taxable under the provisions of Subchapter II of Chapter 105 of the General Statutes. (1941, c. 338, s. 14; 1965, c. 1128; 1973, c. 839.)

Editor's Note. — The 1973 amendment deleted the former first and second sentences, which exempted the corporations from all State and local taxes, but provided that nothing in the section should prevent the corporation from paying for services rendered by municipalities and counties. The amendment also inserted "state-levied" in the present first sentence, added the present second sentence and deleted the former last sentence, appropriating $4,000 annually to be paid to the Department of Insurance for its use in the discharge of the duty imposed upon the Commissioner of Insurance by this Chapter.

For comment on this provision, see 19 N.C.L. Rev. 518.

§ 57-15. Amendments to certificate of incorporation. — Any corporation subject to the provisions of this Chapter may hereafter amend its charter in the following manner only:

(1) a. A meeting of the board of directors, trustees or other governing authority shall be called in accordance with the bylaws specifying the amendment to be voted upon at such meeting.

b. If at such meeting two thirds of the directors, trustees or other governing authority present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, a statement showing service of such call upon all directors, and a certified copy of so much of the minutes of the meeting as relate to the adoption of the proposed amendment.

c. Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the corporation's principal office is located, or posted at the courthouse door if no newspaper be published within the county. Said printed or posted notices shall be in such form and of such size as the Commissioner may approve, and in addition to setting forth in full the certificate required in paragraph b shall state that application for amending the corporation's charter in the manner specified has been proposed by the board of directors, trustees, or other governing authority, and shall also state the time set for the meeting of certificate holders thereby called to be held

at the principal office of the corporation to take action on the proposed amendment. A true copy of such notice shall be filed with the Commissioner. Such publication and filing of notice shall be completed at least 30 days prior to the date set therein for the meeting of the certificate holders and due proof thereof shall be filed with the Commissioner at least 15 days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of certificate holders, such special meeting can be called only after the Commissioner has given his approval in writing, and the published notice shall show the fact of such approval. At said meeting those present in person or represented by proxy shall constitute a quorum.

d. If at such certificate holders' meeting two thirds of those present in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within 30 days after such meeting, be submitted to the Commissioner for his approval as conforming to the requirement of law, and it shall be the duty of the Commissioner to act upon all proposed amendments within 10 days after filing of such certificates with him. Should the Commissioner approve the proposed amendment or amendments, he shall certify this fact, together with the full text of such amendments as are approved by him, to the Secretary of State who shall thereupon issue the charter amendment in the usual form. Should the Commissioner disapprove of any amendment, then the same shall not be allowed.

(2) All charters and charter amendments heretofore issued upon application of the board of directors, trustees or other governing authority of any corporations subject to the provisions of this Chapter are hereby validated.

(3) The charter of any corporation subject to the provisions of this Chapter may be amended to convert that corporation, so amending its charter, into either a mutual nonstock or stock accident and health insurance company or life insurance company subject to the provisions of Chapter 58 of the General Statutes of North Carolina provided the rights of the subscribers or certificate holders in the reserves and capital of such corporation are adequately protected under rules and regulations adopted by the Commissioner of Insurance. (1941, c. 338, s. 15; 1947, c. 820, s. 6; 1953, c. 1124, s. 2.)

§ 57-16. Cost plus plans. — Any corporation organized under the provisions of this Chapter shall be authorized as agent of any other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, to administer on behalf of such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, any group hospitalization or medical and/or dental service plan, promulgated by such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, on a cost plus administrative expense basis, provided said other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof shall have had an active existence for at least one year preceding the establishment of such plan, and was formed for purposes other than procuring such group

hospitalization and/or medical and/or dental service coverage in a cost plus administrative expense basis, and provided only that administrative costs of such a cost plus plan administered by a corporation organized under the provisions of this Chapter, acting as an agent as herein provided, shall not exceed the remuneration received therefor, and provided further that the corporation organized under this Chapter administering such a plan shall have no liability to the subscribers or to the hospitals for the success or failure, liquidation or dissolution of such group hospitalization or medical and/or dental service plan and provided further, that nothing herein contained shall be construed to require of said corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, conformity to the provisions of this Chapter if such group hospitalization is administered by a corporation organized under this Chapter, on a cost plus expense basis. The administration of any cost plus plans as herein provided shall not be subject to regulation or supervision by the Commissioner of Insurance. (1941, c. 338, s. 16; 1943, c. 537, s. 9; 1947, c. 820, s. 7; 1961, c. 1149.)

§ 57-17. **Preexisting hospital service corporations.** — No corporations organized under the laws of this State prior to the ratification of this Chapter, for the purposes herein provided, shall be required to reincorporate as provided for herein, and the provisions of this Chapter shall apply to said corporations only with regard to operations by said corporations with respect to subscribers' contracts, participating hospital contracts, reserves, investments, reports, visitations, expenses, taxation, amendments to charters, supervision of Commissioner of Insurance, application for certificate, issuance of certificates, licensing of agents after the date of the passage of this Chapter, provided, however, as soon as practical hereafter and in accordance with rules and regulations adopted by the Commissioner of Insurance said corporations shall conform to this Chapter as near as practical with respect to subscribers' contracts, endorsements, riders, and applications entered into prior to the ratification of this Chapter. (1941, c. 338, s. 17.)

§ 57-18. **Construction of Chapter as to single employer plans; associations exempt.** — Nothing in this Chapter shall be construed to affect or apply to hospital or medical and/or dental service plans which limit their membership to employees and the immediate members of the families of the employees of a single employer or his or its subsidiary or subsidiaries and which plans are operated by such employer of such limited group of the employees; nor shall this Chapter be construed to affect or apply to any nonstock, nonprofit medical service association which was, on January 1, 1943, organized solely for the purpose of, and actually engaged in, the administration of any medical service plan in this State upon contracts and participating agreements with physicians, surgeons, or medical societies, whereby such physicians or surgeons underwrite such plan by contributing their services to members of such association upon agreement with such association as to the schedule of fees to apply and the rate and method of payment by the association from the common fund paid in periodically by the members for medical, surgical and obstetrical care; and such hospital service plans, and such medical service associations as are herein specifically described, are hereby exempt from the provisions of this Chapter. The Commissioner of Insurance may require from any such hospital service plan or medical service association such information as will enable him to determine whether such hospital service plan or medical service association is exempt from the provisions of this Chapter. (1941, c. 338, s. 18; 1943, c. 537, s. 10; 1947, c. 140; 1961, c. 1149.)

§ 57-19. **Merger or consolidation, proceedings for.** — Any two or more hospital and/or medical and/or dental service corporations organized under

and/or subject to the provisions of this Chapter as determined by the Commissioner of Insurance may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations, herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed by the means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation, and the directors and/or trustees, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect and stating such other facts as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, and with such other details as to conversion of certificates of the subscribers as are deemed necessary and/or proper.

Said agreement shall be submitted to the certificate holders of each constituent corporation, at a separate meeting thereof, called for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication once a week for two consecutive weeks in some newspaper published in Raleigh, North Carolina, and in the counties in which the principal offices of the constituent corporations are located, and if no such paper is published in the county of the principal office of such constituent corporations, then said notice shall be posted at the courthouse door of said county or counties for a period of two weeks.

Said printed or posted notices shall be in such form and of such size as the Commissioner of Insurance may approve. A true copy of said notices shall be filed with the Commissioner of Insurance.

Such publication and filing of notices shall be completed at least 15 days prior to the date set therein for the meeting, and due proof thereof shall be filed with the Commissioner of Insurance at least 10 days prior to the date of such meeting.

At this meeting those present in person or represented by proxy shall constitute a quorum and said agreement shall be considered and voted upon by ballot in person or by proxy or both taken for the adoption or rejection of the same; and if the votes of two thirds of those at said meeting voting in person or by proxy shall be for the adoption of the said agreement, then that fact shall be certified on said agreement by the president and secretary of each such corporation, under the seal thereof.

The agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice-president of each such corporation before any officer authorized by the laws of this State to take acknowledgement of deeds to be the respective act, deed, and agreement of each of said corporations.

The said agreement shall be submitted to and approved by the Commissioner of Insurance, in advance of the merger or consolidation and his approval thereof shall be indicated by his signature being affixed thereto under the seal of his office.

The Commissioner shall not approve any such plans, unless, after a hearing, he finds that it is fair, equitable to certificate holders and members, consistent with law, and will not conflict with the public interest.

The agreement so certified and acknowledged with the approval of the Commissioner of Insurance noted thereon, shall be filed in the office of the Secretary of State, and shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said corporations; and a copy of said agreement and act of consolidation or merger duly certified by the Secretary of State under the seal of his office shall also be recorded, in the office

of the register of deeds of the county of this State in which the principal office of the surviving or consolidated corporation is, or is to be established, and in the office of the registers of deeds of the counties of this State in which the respective corporations so merging or consolidating shall have their original certificates of incorporation recorded, and also in the office of the register of deeds in each county in which either or any of the corporations entering into merger or consolidation owns any real estate; and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger. When an agreement shall have been signed, authorized, adopted, acknowledged, approved, and filed and recorded as hereinabove set forth in this section, for all purposes of the laws of this State, the separate existence of all constituent corporations, parties to said agreement, or of all such constituent corporations, except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, shall be vested in the corporation resulting from or surviving such consolidation or merger, and all property, rights, privileges, powers, and franchises and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether vested by deed or otherwise, under the laws of this State, vested in any such constituent corporations shall not revert or be in any way impaired by reason of such consolidation or merger; provided, however, that all rights of creditors and all liens upon the property of either of or any of said constituent corporations shall be preserved, unimpaired, limited in lien to the property affected by such lien at the time of the merger or consolidation, and all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it; and further provided that notice of any said liens, debts, liabilities, and duties is given in writing to the resulting or surviving corporation within six months after the date of the filing of the agreement of merger in the office of the Secretary of State. All such liens, debts, liabilities, and duties of which notice is not given as provided herein are forever barred. The certificate of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that the changes in its certificates of incorporation are stated in the agreement of merger. All certificates theretofore issued and outstanding by each constituent corporation in good standing upon the date of the filing of such agreement with the Secretary of State without reissuance thereof by the resulting or surviving corporation shall be the contract and agreement of the resulting or surviving corporation with each of the certificate holders thereof and subject to all terms and conditions thereof and of the agreement of merger filed in the office of the Secretary of State.

Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment as if such consolidation or merger had not taken place, or the corporations resulting from or surviving such consolidation or merger may be substituted in its place.

The liability of such constituent corporations to the certificate holders thereof, and the rights or remedies of the creditors thereof, or persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this section, except as provided in this section.

When two or more corporations are consolidated or merged, the corporation resulting from or surviving such consolidation or merger shall have the power and authority to continue any contracts which any of the constituent corporations might have elected to continue. All contracts entered into between any constituent corporations and any other persons shall be and become the contract of the resulting corporations according to the terms and conditions of said contract and the agreement of consolidation or merger.

For the filing of the agreement as hereinabove provided, the Secretary of State is entitled to receive such fees only as he would have received had a new corporation been formed.

Any agreement for merger and/or consolidation as shall conform to the provisions of this section, shall be binding and valid upon all the subscribers, certificate holders and/or members of such constituent corporations, provided only that any subscriber, certificate holder and/or member who shall so indicate his disapproval thereof to the resulting, consolidated or surviving corporation within 90 days after the filing of said agreement with the Secretary of State shall be entitled to receive all unearned portions of premiums paid on his certificate from and after the date of the receipt of the application therefor by the resulting, surviving, or consolidated corporation; each subscriber, certificate holder and/or member who shall not so indicate his or her disapproval of said agreement and said merger within said period of 90 days is deemed and presumed to have approved said agreement and said merger and/or consolidation and shall have waived his or her right to question the legality of said merger and/or consolidation.

No director, officer, subscriber, certificate holder and/or member as such of any such corporation, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation. (1947, c. 820, s. 8; 1961, c. 1149; 1967, c. 823, s. 25.)

Cross Reference. — See Editor's note to § 53-5.

§ 57-19.1. Merger. — Nothing in this Chapter shall be construed to prohibit or prevent a corporation organized under, or subject to, the provisions of this Chapter from merging or consolidating with a mutual nonstock or stock accident and health insurance company or life insurance company operating under the provisions of Chapter 58 of the General Statutes of North Carolina provided the rights of the subscribers or certificate holders in the reserves and capital of such merging or consolidating corporation are adequately protected under rules and regulations adopted by the Commissioner of Insurance. The provisions of this Chapter shall be followed with reference to the adoption of such contract of merger or consolidation by the corporation operating under this Chapter and such contract, upon adoption, shall be approved and filed as herein provided. The laws of merger or consolidation applicable to the other corporation with which merger or consolidation is proposed shall be followed by such other corporation. (1953, c. 1124, s. 3.)

§ 57-20. Commissioner of Insurance determines corporations exempt from this Chapter. — The Commissioner of Insurance may require from any corporation writing any hospital service contracts and any corporation writing

medical and/or dental service contracts or any or all of them, such information as will enable him to determine whether such corporation is subject to the provisions of this Chapter. (1947, c. 820, s. 9; 1961, c. 1149.)

Chapter 58.

Insurance.

SUBCHAPTER I. INSURANCE DEPARTMENT.

Article 1.

Title and Definitions.

Sec.
58-1. Title of the Chapter.
58-2. Definitions.
58-3. Contract of insurance.
58-3.1. Motor vehicle warranties.

Article 2.

Commissioner of Insurance.

58-4. Department established.
58-5. Commissioner's election and term of office.
58-6. Salary of Commissioner.
58-7. Bond of Commissioner.
58-7.1. Chief deputy commissioner.
58-7.2. Chief actuary.
58-7.3. Other deputies, actuaries, examiners and employees.
58-8. Seal of Department.
58-9. Powers and duties of Commissioner.
58-9.1. Orders of Commissioner; when writing required.
58-9.2. Examinations, investigations and hearings; notice of hearing.
58-9.3. Court review of orders and decisions.
58-9.4. Court review of rates and classification.
58-9.5. Procedure on appeal under § 58-9.4.
58-9.6. Extent of review under § 58-9.4.
58-10. Commissioner to supervise local inspectors.
58-11. Office of Commissioner a public office; records, etc., subject to inspection.
58-12. Original documents and certified copies as evidence.
58-13. Admissibility of certificate as evidence of agent's authority.
58-14. Reports of Commissioner to the Governor and General Assembly.
58-15. Authority over all insurance companies; no exemptions from license.
58-16. Examinations to be made.
58-16.1. Examination dispensed with under certain circumstances.
58-16.2. Results of examination not to be made public until company is given opportunity to be heard; exception.
58-17. Oath required for compliance with law.
58-18. Investigation of charges.
58-19, 58-20. [Repealed.]
Sec.
58-21. Annual statements to be filed with Commissioner.
58-22. Punishment for making false statement.
58-23, 58-24. [Repealed.]
58-25. Record of business kept by companies and agents; Commissioner may inspect.
58-25.1. Commissioner may require special reports.
58-26. Commissioner may require records, reports, etc., for agencies, agents and others.
58-27. Books and papers required to be exhibited.
58-27.1 Insurance advisory board; organization and powers.
58-27.2. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.

Article 3.

General Regulations for Insurance.

58-28. State law governs insurance contracts.
58-29. No insurance contracts except under this Chapter.
58-30. Statements in application not warranties.
58-30.1. Additional or coinsurance clause.
58-30.2. Group plans other than life, annuity or accident and health.
58-31. Stipulations as to jurisdiction and limitation of actions.
58-31.1. Proof of loss forms required to be furnished.
58-32. Insurance as security for a loan by the company.
58-33. Companies must do business in own name; emblems, insignias, etc.
58-33.1. Must not pay death benefits in services.
58-34. Publication of assets and liabilities; penalty for failure.
58-34.1. Publication of financial information.
58-35. Unearned premium reserves.
58-35.1. Loss reserves of fire and marine insurance companies.
58-35.2. Loss and loss expense reserves of casualty insurance and surety companies.
58-36. Corporation or association maintaining office in State required to qualify and secure license.
58-37. Revocation of license of foreign company; publication of notice.

Sec.
58-38. Revocation of license of domestic company; injunction and receiver.
58-39. Revocation, suspension and refusal to renew license.
58-39.1. Limitation of risk.
58-39.2. Limitation of liability assumed.
58-39.3. Reinsurance, when permitted; effect on reserves.
58-39.4. Definitions.
58-39.5, 58-39.6. [Repealed.]
58-40. Agents and others must procure license.
58-40.01. Companies writing automobile insurance to notify Commissioner upon termination of relationship with agent.
58-40.1. Insurance brokers must procure license.
58-40.2. Bond required of brokers.
58-40.3. Broker's authority and commissions.
58-40.4. Salaried officers not required to be licensed.
58-40.5. Exceptions to requirements for licensing.
58-40.6. Motor vehicle damage appraiser's qualifications.
58-41. Agent's and adjuster's qualifications.
58-41.1. Examinations for license.
58-41.2. Limited licenses.
58-41.3. Temporary license.
58-41.4. Employment in agency.
58-42. Revocation of license.
58-42.1. "Twisting" with respect to insurance policies defined; penalties.
58-43. Nonresident agents forbidden; exception.
58-44. Resident agents required.
58-44.1. Agents not to pay commissions to nonresidents or unlicensed persons.
58-44.2. Licensing nonresident brokers.
58-44.3. Discrimination forbidden.
58-44.4. Revocation of license for violation; power of Commissioner.
58-44.4A. Notice and hearing prior to revocation of license, etc.
58-44.5. Rebates prohibited.
58-44.6. Imposition of civil penalty.
58-44.7. Rebate of premiums on credit life and credit accident and health insurance; retention of funds by agent.
58-44.8. Agents prohibited from representing unauthorized companies.
58-45. Agents personally liable, when.
58-46. Payment of premium to agent valid; obtaining by fraud a crime.
58-47. Representing unlicensed company prohibited; penalty.
58-48. Agent failing to exhibit license.
58-49. False statements in applications for insurance.
58-50. Agents signing certain blank policies.
58-51. Adjuster acting for unauthorized company.
58-51.1. Agent may adjust.
Sec.
58-51.2. Nonresident adjusters and motor vehicle damage appraisers.
58-51.3. Companies and agents to transact business through licensed agents.
58-51.4. Lending institutions.
58-52. Agent, adjuster, etc., acting without a license or violating insurance law.
58-52.1. Process against nonresident licensees.
58-53. Informer to receive half of penalty.
58-53.1. Citizens authorized to procure policies in unlicensed foreign companies.
58-53.2. Punishment for failure to file affidavit and statements.
58-53.3. Tax deducted from premium; reports filed.
58-54. Forms to be approved by Commissioner of Insurance.

Article 3A.

Unfair Trade Practices.

58-54.1. Declaration of purpose.
58-54.2. Definitions.
58-54.3. Unfair methods of competition or unfair and deceptive acts or practices prohibited.
58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.
58-54.5. Power of Commissioner.
58-54.6. Hearings, witnesses, appearances, production of books and service of process.
58-54.7. Cease and desist orders and modifications thereof.
58-54.8. Judicial review of cease and desist orders.
58-54.9. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.
58-54.10. Judicial review by intervenor.
58-54.11. Penalty.
58-54.12. Provisions of Article additional to existing law.
58-54.13. Immunity from prosecution.

Article 3B.

Unauthorized Insurers False Advertising Process Act.

58-54.14. Purpose; construction.
58-54.15. Definitions.
58-54.16. Unlawful advertising; notice to unauthorized insurer and domiciliary insurance supervisory official.
58-54.17. Action by Commissioner under Unfair Trade Practice Act.
58-54.18. Acts appointing Commissioner as attorney for service of statement of charges, notices and process; manner of service; limitation on entry of order or judgment.

Sec.
58-54.19. Short title.

Article 3C.

Unauthorized Insurers.

58-54.20. Purpose of Article.
58-54.21. Transacting business without certificate of authority prohibited; exceptions.
58-54.22. Acts or transactions deemed to constitute transacting insurance business in this State.
58-54.23. Validity of acts or contracts of unauthorized company shall not impair obligation of contract as to the company; maintenance of suits; right to defend.
58-54.24. Commissioner empowered to enjoin unauthorized companies.
58-54.25. Service of process upon unauthorized company by Commissioner of Insurance.
58-54.25:1. [Repealed.]

Article 3D.

Unauthorized Insurance by Domestic Companies.

58-54.26. Purpose of Article.
58-54.27. Domestic insurers prohibited from transacting business in foreign states without authorization; exceptions.
58-54.28. Domestic insurers; advertising; exceptions.
58-54.29. Penalties provided for unauthorized acts.

Article 4.

Insurance Premium Financing.

58-55. Definitions.
58-56. License required; fees.
58-56.1. Exceptions to license requirements.
58-56.2. Issuance or refusal of license; bond; duration of license; renewal; one office per license; display of license; notice of change of location.
58-56.3. Grounds for refusal, suspension or revocation of licenses; surrender of licenses; reinstatement.
58-57. Investigations; hearings.
58-57.1. Licensee's books and records; reports; refusing to exhibit records; making false statements.
58-57.2. Excessive insurance premium finance charges; penalty.
58-57.3. Rebates and inducements prohibited; assignment of insurance premium finance agreements.
58-58. Filing and approval of forms and service charges.
58-58.1. Form, contents and execution of insurance premium finance agreements.
Sec.
58-59. Limitations on service charges; computation; minimum charges.
58-59.1. Prohibited provisions in insurance premium finance agreements.
58-59.2. Delivery of copy of insurance premium finance agreement to insured.
58-59.3. Payments by insured without notice of assignment of agreement.
58-59.4. Statement of account; release on payment in full.
58-59.5. Credit upon anticipation of payments.
58-60. Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value.
58-61. Violations; penalties.
58-61.1. Disposition of fees.

Article 4A.

Insurance Business through Credit Cards Prohibited.

58-61.2. Solicitation, negotiation or payment of premiums on insurance policies through credit card facilities prohibited; exceptions.

Article 5.

License Fees and Taxes.

58-62. Commissioner to report and pay monthly.
58-63. Schedule of fees and charges.
58-64. [Repealed.]
58-65. Licensing of underwriters reinsurance agencies.
58-66. Licenses run from July 1; pro rata payment.
58-67. Statements of gross receipts filed and tax paid.
58-68. Policyholders to furnish information.

SUBCHAPTER II. INSURANCE COMPANIES.

Article 6.

General Domestic Companies.

58-69. Application of this Chapter and general laws.
58-70. Extension of existing charters.
58-71. Certificate required before issuing policies.
58-72. Kinds of insurance authorized.
58-73. Manner of creating such corporations.
58-74. First meeting; organization; license.
58-75. Bylaws; classification and election of directors.
58-76. [Repealed.]
58-77. Amount of capital and/or surplus required; impairment of capital or surplus.
58-78. Capital stock fully paid in cash.
58-79. Investments; life.

Sec.
58-79.1. Investments; fire, casualty and miscellaneous.
58-79.2. Establishment of separate accounts by life insurance companies.
58-80. Valuation of bonds and other evidences of debt; discretion of Commissioner of Insurance.
58-81. Authority to increase or reduce capital stock.
58-82. Assessment of shares; revocation of license.
58-83. Increase of capital stock.
58-84. Reduction of capital stock.
58-85. Dividends not payable when capital stock impaired; liability of stockholders for unlawful dividends.
58-85.1. Payment of dividends impairing financial soundness of company or detrimental to policyholders.
58-86. Loans insufficiently secured.
58-86.1. Certain officers debarred from commissions.
58-86.2. Restrictions on purchase and sale of equity securities of domestic companies.

Article 6A.

Exchange of Stock.

58-86.3. Exchange of securities.
58-86.4. Procedure for exchange.
58-86.5. Filing plan of exchange.
58-86.6. Effect of exchange.
58-86.7. Authorized insurance business and regulatory authority.
58-86.8. Powers of Commissioner not affected.
58-86.9. Application of Article to other domestic corporations.

Article 7.

Guaranty Fund for Domestic Companies.

58-87. Guaranty fund established.
58-88. Separate accounts; application of fund.
58-89. Reduction or retirement of fund.
58-90. Insolvency; return of fund.
58-91. Conversion to guaranty fund.

Article 8.

Mutual Insurance Companies.

58-92. Mutual insurance companies organized; requisites for doing business.
58-92.1. Manner of amending charter.
58-93. [Transferred.]
58-94. Policyholders are members of mutual companies.
58-95. Directors in mutual companies.
58-96. Mutual companies with a guaranty capital.
58-97. Dividends to policyholders.
58-97.1. Contingent liability of policyholders.
58-97.2. Contingent liability printed on policy.
58-97.3. Nonassessable policies; foreign or alien companies.
58-98. Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee.
58-99. Guaranty against assessments prohibited.
58-100. Manner of making assessments; rights and liabilities of policyholders.
58-101, 58-102. [Repealed.]

Article 9.

Conversion of Stock Corporations into Mutual Corporations.

58-103. Domestic stock life insurance corporations authorized to convert into mutual corporations; procedure.
58-104. Stock acquired to be turned over to voting trust until all stock acquired; dividends repaid to corporation for beneficiaries.

Article 10.

Assessment Companies.

58-105. Copies of charter and bylaws filed.
58-106. Contracts must accord with charter and bylaws.
58-107. "Assessment plan" printed on application and policy.
58-108. Revocation for noncompliance.
58-109. Deposits and advance assessments required.
58-110. Deposits by foreign assessment companies or orders.
58-111. [Repealed.]
58-112. Revocation of license.
58-112.1. Mutual life insurance companies; assessments prohibited.

Article 11.

Fidelity Insurance Companies.

58-113 to 58-119. [Repealed.]

Article 12.

Promoting and Holding Companies.

58-120. Terms defined.
58-121. Certificate of authority to sell securities required.
58-122. Application for certificate by agent.
58-123. Application for certificate by corporation.
58-124. Approval of advertising matter; misrepresentation.

Article 12A.

Insurer Holding Registration and Disclosure Act.

58-124.1. Definitions.
58-124.2. Registration of insurers.

Sec.
58-124.3. Standards.
58-124.4. Examination.
58-124.5. Confidential treatment.
58-124.6. Rules and regulations.
58-124.7. Injunctions.
58-124.8. Criminal proceedings.
58-124.9. Receivership.
58-124.10. Revocation, suspension, or nonrenewal of insurer's license.
58-124.11. Judicial review; mandamus.

Article 13.

Fire Insurance Rating Bureau.

58-125. North Carolina Fire Insurance Rating Bureau created.
58-126. Scope of Article.
58-126.1. Policies combining other coverage with fire insurance.
58-127. Rating Bureau.
58-128. Power to secure information.
58-129. Rate information.
58-130. Statistical reports.
58-131. Reasonableness of rates.
58-131.1. Approval of rates.
58-131.2. Reduction or increase of rates.
58-131.3. Deviations.
58-131.4. Pools, groups or associations.
58-131.5. Hearing.
58-131.6. Revocation or suspension of license.
58-131.7. Penalties.
58-131.8. Review of order of Commissioner.
58-131.9. Limitation.

Article 13A.

Casualty Insurance Rating Regulations.

58-131.10. Scope of Article.
58-131.11. License.
58-131.12. Organization.
58-131.13. Filing of rates; approval.
58-131.14. Statistical reports.
58-131.15. Deviation.
58-131.16. Discrimination; revision of rates.
58-131.17. Filing rate amendments.
58-131.18. Restriction on use of rates.
58-131.19. Examinations.
58-131.20. False information.
58-131.21. Suspension of license; hearing.
58-131.22. Revocation or suspension of license.
58-131.23. Penalties.
58-131.24. Review of order of Commissioner.
58-131.25. Exceptions.

Article 13B.

Rate Regulation of Miscellaneous Lines.

58-131.26. Information to be filed with Commissioner.
58-131.27. Examination by Commissioner; reports.
58-131.28. Schedule of rates filed.
58-131.29. Certain conditions forbidden; no discrimination.
58-131.30. Record to be kept; hearing on rates.
58-131.31. Hearing on rates before the Commissioner.
58-131.32. Review of order of Commissioner.
58-131.33. Certain insurance contracts excepted.

Article 14.

Real Estate Title Insurance Companies.

58-132. Purpose of organization; formation.
58-133. Certificate of authority to do business.
58-134. Annual statement and license required.
58-134.1. Investment of capital.
58-134.2. Unearned premium reserve.
58-134.3. Amount of unearned premium reserve.
58-134.4. Unearned premium reserve on policies issued by foreign or alien title insurance companies.
58-134.5. Maintenance of the unearned premium reserve.
58-134.6. Use of the unearned premium reserve on liquidation, dissolution or insolvency.

Article 15.

Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates.

58-135. Issuance of collateral loan certificates; security.
58-135.1. Prohibition against payment or receipt of title insurance kickbacks, rebates, commissions and other payments.
58-136. Licenses.
58-137. Annual statements furnished.

Article 16.

Reciprocal or Interinsurance Exchanges.

58-138. Exchange of insurance contracts authorized; power of attorney.
58-139. Statement to be filed with Commissioner of Insurance.
58-140. Agreement for service of process.
58-141. Statement as to amount of risks.
58-142. Certificate issued by Commissioner.
58-143. Reserve fund.
58-144. Annual reports; examination by Commissioner.
58-145. Corporations empowered to exchange insurance.
58-146. Punishment for failing to comply with law.
58-147. Certificate to attorney; revocation.
58-148. Application of other sections.

Article 16A.

"Lloyds" Insurance Associations.

Sec.
58-148.1. "Lloyds" insurance associations may transact business of insurance other than life, on certain conditions.

Article 17.

Foreign or Alien Insurance Companies.

58-149. Admitted to do business.
58-150. Conditions of admission.
58-151. Limitation as to kinds of insurance.
58-151.1. Foreign companies; requirements for admission.
58-151.2. Company owned or controlled by alien government prohibited from doing business.
58-152. Retaliatory laws.
58-153. Service of legal process upon Commissioner of Insurance.
58-153.1. Unauthorized Insurers Process Act.
58-153.2. Alternative service of process on insurers.
58-154. Commissioner to notify company of service or acceptance of service of process.
58-155. Action to enforce compliance with this Chapter.

Article 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

58-155.1. Merger or consolidation.
58-155.2. Grounds for rehabilitation.
58-155.3. Order of rehabilitation; termination.
58-155.4. Grounds for liquidation.
58-155.5. Order of liquidation.
58-155.6. Liquidation of alien insurers.
58-155.7. Conservation of assets of foreign insurer.
58-155.8. Conservation of assets of alien insurer.
58-155.9. Order of conservation or ancillary liquidation of foreign or alien insurers.
58-155.10. Uniform Insurers Liquidation Act; definitions.
58-155.11. Conduct of delinquency proceedings against insurers domiciled in this State.
58-155.12. Conduct of delinquency proceedings against insurers not domiciled in this State.
58-155.13. Claims of nonresidents against domestic insurers.
58-155.14. Claims against foreign insurers.
58-155.15. Priority of certain claims.
58-155.16. Attachment and garnishment of assets.
58-155.17. Uniformity of interpretation.
58-155.18. Commencement of proceedings.
58-155.19. Injunctions.
Sec.
58-155.20. Removal of proceedings.
58-155.21. Deposit of moneys collected.
58-155.22. Exemption from filing fees.
58-155.23. Borrowing on pledge of assets.
58-155.24. Report to the General Assembly.
58-155.25. Date rights fixed on liquidation.
58-155.26. Voidable transfers or liens.
58-155.27. Priority of claims for compensation.
58-155.28. Offsets.
58-155.29. Allowance of certain claims.
58-155.30. Time to file claims.
58-155.31. Report for assessment.
58-155.32. Levy of assessment.
58-155.33. Order to pay assessment.
58-155.34. Publication and transmittal of assessment order.
58-155.35. Judgment upon the assessment.
58-155.36. Special deputy commissioners, counsel, clerks and assistants; expenses of liquidation or rehabilitation.
58-155.37 to 58-155.40. [Reserved.]

Article 17B.

Postassessment Insurance Guaranty Association.

58-155.41. Short title.
58-155.42. Purpose of Article.
58-155.43. Scope.
58-155.44. Construction.
58-155.45. Definitions.
58-155.46. Creation of the Association.
58-155.47. Board of directors.
58-155.48. Powers and duties of the Association.
58-155.49. Plan of operation.
58-155.50. Duties and powers of the Commissioner.
58-155.51. Effect of paid claims.
58-155.52. Nonduplication of recovery.
58-155.53. Prevention of insolvencies.
58-155.54. Examination of the Association.
58-155.55. Tax exemption.
58-155.56. Recognition of assessments in rates.
58-155.57. Immunity.
58-155.58. Stay of proceedings; reopening of default judgments.
58-155.59. Termination; distribution of funds.
58-155.60 to 58-155.64. [Reserved.]

Article 17C.

Life and Accident and Health Insurance Guaranty Association.

58-155.65. Title.
58-155.66. Purpose.
58-155.67. Scope.
58-155.68. Construction.
58-155.69. Definitions.
58-155.70. Creation of the Association.
58-155.71. Board of directors.
58-155.72. Powers and duties of the Association.
58-155.73. Assessments.
58-155.74. Plan of operation.

Sec.
58-155.75. Duties and powers of the Commissioner.
58-155.76. Prevention of impairments.
58-155.77. Appointment of Association nominee.
58-155.78. Miscellaneous provisions.
58-155.79. Examination of the Association; annual report.
58-155.80. Tax exemptions.
58-155.81. Immunity.
58-155.82. Stay of proceedings; reopening default judgments.
58-155.83. Hearings; review.

SUBCHAPTER III. FIRE INSURANCE.

Article 18.

General Regulations of Business.

58-156. [Repealed.]
58-157. Performance of contracts as to devices not prohibited.
58-158. Limitation as to amount and term; indemnity contracts for difference in actual value and cost of replacement.
58-159. Limit of liability on total loss.
58-160. Policies for the benefit of mortgagees.
58-161. [Repealed.]
58-162. Reinsurance assumed from unlicensed companies prohibited.
58-162.1. Limitation of fire insurance risks.
58-163. [Repealed.]
58-164. Uniform Unauthorized Insurers Act.
58-165. [Repealed.]
58-166, 58-167. [Transferred.]
58-168. Resident agents required.
58-169. Policies through nonresident agent prohibited.
58-170, 58-171. [Repealed.]
58-172. Agreements restricting agent's commission; penalty.
58-173. Punishment for issuing fire policies contrary to law.

Article 18A.

Fire and Extended Coverage for Beach Area Property.

58-173.1. Declarations and purpose of Article.
58-173.2. Definition of terms.
58-173.3. North Carolina Insurance Underwriting Association created.
58-173.4. Powers and duties of Association.
58-173.5. Temporary directors of Association.
58-173.6. Each member of Association to participate in its writings, expenses, profits and losses in proportion to net direct premium of such member.
58-173.7. Directors to submit plan of operation to Commissioner; review and approval; amendments.
58-173.8. Persons eligible to apply to Association for coverage; contents of application.
58-173.9. Association members may cede insurance to Association.
58-173.10. Rates, rating plans and rate rules applicable.
58-173.11. Appeal from acts of Association to Commissioner; appeal from Commissioner to superior court.
58-173.12. Reports of inspection made available.
58-173.13. Association and Commissioner immune from liability.
58-173.14. Association to file annual report with Commissioner.
58-173.15. Commissioner may examine affairs of Association.
58-173.16. Commissioner authorized to promulgate reasonable rules and regulations.

Article 18B.

Fair Access to Insurance Requirements.

58-173.17. Purpose of Article.
58-173.18. Organization of underwriting association.
58-173.19. Participation in association.
58-173.20. Requirements of Plan and authority of association.
58-173.21. Authority of Commissioner.
58-173.22. Temporary directors of association.
58-173.23. Appeals; judicial review.
58-173.24. Reports of inspection made available; immunity from liability.
58-173.25. Riot Reinsurance Reimbursement Fund; assessment of insurers.
58-173.26. Assessment; inability to pay.
58-173.27. Termination; outstanding obligations.
58-173.28. Recoupment by insurers.

Article 19.

Fire Insurance Policies.

58-174. Terms and conditions must be set out in policy.
58-175. Items to be expressed in policies.
58-175.1. Agent to inspect risks.
58-176. Fire insurance contract; standard policy provisions.
58-177. Standard policy; permissible variations.
58-177.1. Optional provisions as to loss or damage from nuclear reaction, nuclear radiation or radioactive contamination.
58-178. Notice by insured or agent as to increase of hazard, unoccupancy and other insurance.
58-178.1. Judge to select umpire.
58-179. [Repealed.]
58-180. Effect of failure to give notice of encumbrance.

Sec.
58-180.1. Policy issued to husband or wife on joint property.
58-180.2. Bar to defense of failure to render timely proof of loss.
58-181. [Repealed.]

Article 20.

Deposits by Insurance Companies.

58-182. Amount of deposits required of foreign or alien fire and/or marine insurance companies.
58-182.1. Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies.
58-182.2. Minimum deposit required upon admission.
58-182.3. Type of deposits.
58-182.4. Replacements upon depreciation of securities.
58-182.5. Power of attorney.
58-182.6. Securities held by Treasurer; faith of State pledged therefor; nontaxable.
58-182.7. Authority to increase deposit.
58-182.8. Deposits of domestic companies.
58-183. Right of company to receive interest on deposits.
58-184. Sale of deposits for payment of liabilities.
58-185. Lien of policyholders; action to enforce.
58-186. Substitution for securities paid.
58-187. Return of deposits.
58-188. Deposit required before license granted; exception.
58-188.1. Deposits held in trust by Commissioner or Treasurer.
58-188.2. Deposits subject to approval and control of Commissioner.
58-188.3. Deposits by alien companies required and regulated.
58-188.4. Deposits by life companies not chartered in United States.
58-188.5. Registration of bonds deposited in name of Treasurer.
58-188.6. Notation of registration; release.
58-188.7. Expenses of registration.
58-188.8. Bond in lieu of deposit.

Article 21.

Insuring State Property.

58-189. State Property Fire Insurance Fund created.
58-190. Appropriations; fund to pay administrative expenses.
58-191. Payment of losses; rules and regulations; sprinkler leakage insurance.
58-191.1. Extended coverage insurance.
58-191.2. Use and occupancy and business interruption insurance.
58-192. Information furnished Commissioner by officers in charge.
58-193. Commissioner to inspect State property; plans submitted.
58-194. Report required of Commissioner.
58-194.1. Liability insurance required for state-owned vehicles.

SUBCHAPTER IV. LIFE INSURANCE.

Article 22.

General Regulations of Business.

58-195. Definitions; requisites of contract.
58-195.1. Industrial life insurance defined.
58-195.2. Credit life insurance defined.
58-195.3. Any type of survivorship fund in life insurance contract prohibited.
58-195.4. Tie-in sales with life insurance prohibited.
58-196. [Transferred.]
58-197. Soliciting agent represents the company.
58-198. Discrimination between insurants forbidden.
58-199. Misrepresentations of policy forbidden.
58-200. [Repealed.]
58-201. Reserve fund of domestic companies to be calculated.
58-201.1. Standard Valuation Law.
58-201.2. Standard nonforfeiture provisions.
58-202. Reinsurance of companies regulated.
58-203. [Repealed.]
58-204. Insurable interest as between stockholders, partners, etc.
58-204.1. Insurable interest in life and physical ability of employee or agent.
58-204.2. Insurable interest in life and physical ability of partner.
58-204.3. Insurable interest in life of person covered by pension plan.
58-204.4. Construction of §§ 58-204.1 to 58-204.3.
58-205. Rights of beneficiaries.
58-205.1. Minors may enter into insurance or annuity contracts and have full rights, powers and privileges thereunder.
58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud.
58-207. Notice of nonpayment of premium required before forfeiture.
58-208. Minimum premium rates for assessment life insurance companies.
58-209. Distribution of surplus in mutual companies.
58-210. Group life insurance defined.
58-211. Group life insurance standard provisions.
58-211.1. Group annuity contracts defined; requirements.
58-211.2. Employee life insurance defined.
58-211.3. Assignment of interest in group policies and annuity contracts.

Sec.
58-212. Voting power under policies of group life insurance.
58-213. Exemption from execution.

Article 23.

Registered Policies.

58-214. Deposits to secure registered policies.
58-215. Additional deposits may be required.
58-216. Withdrawal of deposits.
58-217. [Repealed.]
58-218. Record of securities kept by Commissioner; deficit made good.
58-219. Registered policies certified.
58-220, 58-221. [Repealed.]
58-222. Power of Commissioner in case of insolvency.
58-223. Fees for registering policies.
58-223.1. Registration of policies.

Article 24.

Mutual Burial Associations.

58-224. Mutual burial associations placed under supervision of Burial Association Commissioner.
58-224.1. North Carolina Mutual Burial Association Commission; membership; election; duties.
58-224.2. Duties of Commission; meetings; Burial Commissioner; secretary.
58-225. [Repealed.]
58-226. Requirements as to rules and bylaws.
58-227. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.
58-228. Assessments against associations for expenses of Burial Commissioner.
58-229. Unlawful to operate without written authority of Commissioner.
58-229.1. Revocation of license.
58-229.2. Deposit or investment of funds of mutual burial associations.
58-229.3. Unclaimed funds of defunct burial association.
58-230. Penalty for failure to operate in substantial compliance with Article 24.
58-231. Penalty for wrongfully inducing person to change membership.
58-232. Penalty for making false and fraudulent entries.
58-233. Accepting application without collecting fee.
58-234. Removal of secretary-treasurer for failure to maintain proper records.
58-235. Free services; failure to make proper assessments, etc., made a misdemeanor.
58-236. Right of appeal upon revocation or suspension of license.
58-237. Bond of secretary or secretary-treasurer of burial association.
58-237.1. Assessments.
Sec.
58-237.2. Minimum membership required.
58-237.3. [Repealed.]
58-237.4. Making false or fraudulent statement a misdemeanor.
58-238. Statewide organization of associations.
58-239. Article 24 deemed exclusive authority for organization, etc., of mutual burial associations.
58-240. Operation of association in violation of law prohibited.
58-241. Appointment and removal of Burial Association Commissioner; bond.
58-241.1. Election for benefits or return of assessments on death of member in armed forces.
58-241.2. Member in armed forces failing to pay assessments; reinstatement.
58-241.3. Prior death of member in armed forces.
58-241.4. Hearing by Commissioner of dispute over liability for funeral benefits; appeal.
58-241.5. Commissioner authorized to subpoena witnesses, administer oaths and compel attendance at hearings.

SUBCHAPTER V. AUTOMOBILE INSURANCE.

Article 25.

Regulation of Automobile Liability Insurance Rates.

58-242 to 58-245. [Repealed.]
58-246. North Carolina Automobile Rate Administrative Office created; objects and functions; hearings on rates.
58-247. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses; Commissioner of Insurance ex officio chairman.
58-248. Personnel and assistants; general manager; submission of rate proposals to Commissioner of Insurance; approval or disapproval.
58-248.1. Order of Commissioner revising improper rates, classifications and classification assignments.
58-248.2. Insurance policy must conform to rates, etc., filed by rating bureau; when higher rate allowed.
58-248.3. Revocation or suspension of license for violation of Article.
58-248.4. Punishment for violation of Article.
58-248.5. Review of order of Commissioner.
58-248.6. Appeal to Commissioner from decision of bureau.
58-248.7. Validation of experience rating plans in use prior to April 7, 1953.
58-248.8. Rates to distinguish between safe and nonsafe drivers.

Sec.
58-248.9. The power of Commissioner to establish private passenger vehicle rate classification.
58-248.10. Transfer of coverage; no rate increase for remainder of contract period permitted.
58-248.11 to 58-248.25. [Reserved.]

Article 25A.

North Carolina Motor Vehicle Reinsurance Facility.

58-248.26. Definitions.
58-248.27. North Carolina Motor Vehicle Reinsurance Facility; creation; membership.
58-248.28. Obligations after termination of membership.
58-248.29. Insolvency.
58-248.30. Merger, consolidation or cession.
58-248.31. General obligations of insurers.
58-248.32. General obligations of agents.
58-248.33. The Facility; functions; administration.
58-248.34. Plan of operation.
58-248.35. Limit on cessions.
58-248.36. Termination of insurance.
58-248.37. Exemption from requirements of this Article of companies and their agents.
58-248.38. Physical damage insurance availability.
58-248.39. Hearings; review.
58-248.40. Termination of North Carolina Automobile Insurance Plan.

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

Article 26.

Nature of Policies.

58-249. Form, classification and rates to be approved by Commissioner of Insurance.
58-250. Form of policy.
58-250.1. Right to return policy and have premium refunded.
58-251. [Repealed.]
58-251.1. Accident and health policy provisions.
58-251.2. Renewability of individual and blanket hospitalization and accident and health insurance policies.
58-251.3. Policy coverage to continue as to mentally retarded or physically handicapped children.
58-251.4. Policies to cover newborn infants.
58-251.5. Insurers and others to afford coverage to mentally retarded and physically handicapped children.
58-252. Meaning of term "preexisting conditions" in certain policies.
58-253, 58-254. [Repealed.]

Sec.
58-254.1. Industrial sick benefit insurance defined.
58-254.2. Industrial sick benefit insurance; provisions.
58-254.3. Blanket accident and health insurance defined.
58-254.4. Group accident and health insurance defined.
58-254.5. Group or blanket accident and health insurance; approval of forms and filing of rates.
58-254.6. Definition of franchise accident and health insurance.
58-254.7. Approval by Commissioner of forms, classification and rates; hearing; exceptions.
58-254.8. Credit accident and health insurance.
58-254.9. Hospitalization insurance defined.

Article 26A.

Joint Action to Insure Elderly.

58-254.10. Definitions.
58-254.11. Joint action to insure persons 65 years of age or over and their spouses permitted; associations of insurers; individual and group policies.
58-254.12. Regional plans authorized.
58-254.13. Forms and rate manuals subject to § 58-249; disapproval of rates.
58-254.14. Organization of associations of insurers; powers; annual statements; mutual insurers may participate.
58-254.15. No additional licensing required.

Article 27.

General Regulations.

58-255. [Repealed.]
58-256. Waiver by insurer.
58-257. Application.
58-257.1. Claim forms.
58-258. Conforming to statute.
58-259. [Repealed.]
58-259.1. Age limit.
58-259.2. Nurses' services.
58-260. Discrimination forbidden; right to choose services of optometrist, podiatrist, dentist or chiropractor.
58-260.1. Notice of nonpayment of premium required before forfeiture.
58-260.2. Premium rates on credit accident and health insurance.
58-261. Certain policies of insurance not affected.
58-262. Punishment for violation.

Article 27A.

Health Insurance Advisory Board.

58-262.1. Creation of Board.

Sec.
58-262.2. Membership of Board; appointment; terms; Commissioner of Insurance ex officio member.
58-262.3. Organization and other meetings; election of officers; adoption of rules; expenses and per diem paid from Department of Insurance appropriations.
58-262.4. Review of analysis of complaints; calling company before Board to examine its operation and procedure; reprimanding, placing on probation or suspending license; study of health insurance industry and making recommendations.
58-262.5. Immunity of Board and Commissioner of Insurance from civil suit or criminal prosecution.
58-262.6. Board may subpoena persons and records, administer oaths and take testimony.
58-262.7. Per diem and travel allowances of members.

SUBCHAPTER VII. FRATERNAL ORDERS AND SOCIETIES.

Article 28.

Fraternal Orders.

58-263. General insurance law not applicable.
58-264. Fraternal orders defined.
58-265. Funds derived from assessments and dues.
58-266. Appointment of member as receiver or collector; appointee as agent for order or society; rights of members.
58-267. Meetings of governing body; principal office.
58-268. Conditions precedent to doing business.
58-269. Certain lodge systems exempt.
58-270. Fraternal benefit society defined.
58-271. Lodge system defined.
58-272. Representative form of government defined.
58-273. Organization.
58-274. Constitution and bylaws.
58-275. Amendments to constitution and bylaws.
58-276. Waiver of the provisions of the laws.
58-277. Place of meeting; location of office.
58-278. No personal liability for benefits.
58-279. Qualifications for membership.
58-280. Benefits.
58-281. Beneficiaries.
58-282. Benefit certificates.
58-283. Benefits not subject to debts.
58-284. Certificates of insurance to members.
58-285. Funds provided.
Sec.
58-286. Investment of funds.
58-287. Application of funds.
58-288. Powers of existing societies retained; reincorporation.
58-289. Mergers and transfers.
58-290. Accident societies may be licensed.
58-291. Certain societies not included.
58-292. Reports to Commissioner of Insurance.
58-293. Additional or increased rates.
58-294. Provisions to insure future security.
58-295. Valuation on accumulation basis; tabular basis.
58-296. Examination of domestic societies.
58-297. Proceedings for dissolution.
58-298. Proceedings only by Attorney General.
58-299. Examination of foreign societies.
58-300. No adverse publications.
58-301. Revocation of license.
58-302. Criminal offenses.
58-303. Merger, consolidation or reinsurance of fraternal risks with licensed life insurance companies or with other fraternal orders or benefit societies.
58-304. Contracts approved by boards of directors or governing bodies of parties to same; approval by Commissioner of Insurance.
58-304.1. Application of §§ 58-155.1 to 58-155.35, inclusive.
58-305. Expenses; compensation to officers or employees of contracting parties and State employees.
58-306. Violation of law a felony.
58-307. Appointment of Commissioner of Insurance as process agent.

Article 29.

Whole Family Protection.

58-308. Insurance on children.
58-309. Medical examination; certificates and contributions.
58-310. Reserve fund; exchange of certificates.
58-311. Separation of funds.
58-312. Payments to expense or general fund.
58-313. Continuation of certificates.

Article 30.

General Provisions for Societies.

58-314. Appointment of trustees to hold property.
58-315. Unauthorized wearing of badges, etc.

Article 31.

Nonprofit Life Benefit Association.

58-316 to 58-340. [Repealed.]

SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 1.

Title and Definitions.

§ 58-1. Title of the Chapter. — This Chapter may be cited and shall be known as the Insurance Law. (1899, c. 54; Rev., s. 4677; C. S., s. 6260.)

Editor's Note. — For article on the 1945 revision of the Insurance Law, see 23 N.C.L. Rev. 283. For changes made by the Session Laws of 1947, see 25 N.C.L. Rev. 429.

For case law survey as to insurance, see 44 N.C.L. Rev. 1022 (1966); 45 N.C.L. Rev. 955 (1967).

Purpose of Chapter. — The statute law makes elaborate and minute provisions for the protection of the people from imposition under the guise of insurance, and the Department of Insurance is charged with the special duty of seeing that these provisions are complied with. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-2. Definitions. — In this Chapter, unless the context otherwise requires,

(1) "Alien company" means a company incorporated or organized under the laws of any jurisdiction outside of the United States.

(2) "Commissioner" means Commissioner of Insurance of North Carolina.

(3) "Company" or "insurance company" or "insurer" shall be deemed to include any corporation, association, partnership, society, order, individual or aggregation of individuals engaging or proposing or attempting to engage as principals in any kind of insurance business, including the exchanging of reciprocal or interinsurance contracts between individuals, partnerships and corporations.

(4) "Department" means Department of Insurance of North Carolina.

(5) "Domestic company" means a company incorporated or organized under the laws of this State.

(6) "Foreign company" means a company incorporated or organized under the laws of the United States or of any jurisdiction within the United States other than this State.

(6a) "Nuclear insured" means a public utility procuring insurance against radioactive contamination and other risks of direct physical loss at a nuclear electric generating plant.

(7) "Person" includes an individual, aggregation of individuals, corporation, company, association and partnership.

(8) The singular form shall include the plural, and the masculine form shall include the feminine wherever appropriate. (1899, c. 54, s. 1; Rev., s. 4678; C. S., s. 6261; 1945, c. 383; 1971, c. 510, s. 1.)

Companies Contemplated. — The Insurance Law clearly contemplates both incorporated and unincorporated companies. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

§ 58-3. Contract of insurance. — A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest. (1899, c. 54, s. 2; Rev., s. 4679; C. S., s. 6262; 1945, c. 383.)

Contract to Indemnify Assured for Loss Is Insurance Contract. — That portion of a contract under which a company agrees to indemnify the assured for loss or damage from perils therein defined, with provision for subrogation of the company to the right of assured against

third persons, constitutes a contract of insurance. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

But Contract to Pay Claims for Which Assured Liable Is Surety Contract. — A contract under which a company obligates itself to pay to any shipper or consignee, claims for which the assured would be liable by provision of § 62-111, with stipulation that the assured should reimburse the company for any such payment, is a surety contract and not a contract of insurance. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

Cited in Charleston & W. Carolina Ry. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934).

§ 58-3.1. Motor vehicle warranties. — Any motor vehicle warranty issued by a person as defined in this Article, other than a warranty made solely by the manufacturer or seller without charge, guaranteeing indemnity for defective parts, mechanical breakdown and labor shall be a contract of insurance. (1959, c. 866.)

ARTICLE 2.

Commissioner of Insurance.

§ 58-4. Department established. — The Insurance Department is hereby established as a separate and distinct department, which is charged with the execution of laws relating to insurance and other subjects placed under the Department. (1899, c. 54, s. 3; 1901, c. 391, s. 1; Rev., s. 4680; C. S., s. 6263.)

Quoted in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Cited in O'Neal v. Wake County, 196 N.C. 184, 145 S.E. 28 (1928).

§ 58-5. Commissioner's election and term of office. — The chief officer of the Insurance Department shall be called the Commissioner of Insurance; whenever in the statutes of this State the words "Insurance Commissioner" appear, they shall be deemed to refer to and to be synonymous with the term "Commissioner of Insurance." He shall be elected by the people in the manner prescribed for the election of members of the General Assembly and State officers, and the result of the election shall be declared in the same manner and at the same time as the election of State officers is now declared. His term of office begins on the first day of January next after his election, and is for four years or until his successor is elected and qualified. If a vacancy occurs during the term, it shall be filled by the Governor for the unexpired term. (Rev., ss. 4680, 4681; 1907, c. 868; C. S., s. 6264; 1943, c. 170.)

Cross References. — As to Commissioner taking oath and being inducted into office, see § 147-4. As to penalty for failure to take oath, see § 128-5.

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-6. Salary of Commissioner. — The salary of the Commissioner of Insurance shall be thirty-one thousand dollars ($31,000) a year, payable in equal monthly installments. (1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; c. 771, s. 3; Rev., s. 2756; 1907, c. 830, s. 10; c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; C. S., s. 3874; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342; 1945, c. 383; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 6; 1967, c. 1130; c. 1237, s. 6; 1969, c. 1214, s. 6; 1971, c. 912, s. 6; 1973, c. 778, s. 6.)

Editor's Note. — The 1973 amendment increased the salary from $25,000 to $31,000.

§ 58-7. Bond of Commissioner. — The Commissioner of Insurance, before he enters upon the execution of his official duties, must give a bond to the State in the sum of twenty-five thousand dollars ($25,000), with sufficient surety, to be approved by the State Treasurer, conditioned upon the faithful performance of the duties of his office during his term of office; this bond extends to the faithful execution of the office of Commissioner of Insurance by the person elected or appointed thereto until a new election or appointment of Commissioner of Insurance is made and a new bond given. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. (1899, c. 54, s. 55; 1905, c. 430, s. 2; Rev., s. 293; C. S., s. 6265; 1969, c. 844, s. 7.)

§ 58-7.1. Chief deputy commissioner. — The Commissioner shall appoint and may remove at his discretion a chief deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner, or in case the office of Commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner. He shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-7.2. Chief actuary. — The Commissioner shall appoint and may remove at his discretion a chief actuary, who shall receive such compensation as fixed and provided by the Budget Bureau. (1945, c. 383.)

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-7.3. Other deputies, actuaries, examiners and employees. — The Commissioner shall appoint or employ and may remove at his discretion such other deputies, actuaries, examiners, clerks and other employees as may be found necessary for the proper execution of the work of the Insurance Department, at such compensation as shall be fixed and provided by the Budget Bureau. (1945, c. 383.)

Cross Reference. — As to assistant attorney general assigned to Commissioner and Insurance Department, see § 114-4.2A.

Quoted in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-8. Seal of Department. — The Commissioner of Insurance, with the approval of the Governor, shall devise a seal, with suitable inscription, for his office, a description of which, with the certificate of approval by the Governor, shall be filed in the office of the Secretary of State, with an impression thereof, which seal shall thereupon become the seal of office of the Commissioner of the Insurance Department. The seal may be renewed whenever necessary. (1899, c. 54, s. 11; Rev., s. 4682; C. S., s. 6266.)

§ 58-9. Powers and duties of Commissioner. — The Commissioner shall:

(1) See that all laws of this State governing insurance companies, associations, orders or bureaus relating to the business of insurance

are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provision of this Chapter which will prevent practices injurious to the public by insurance companies, fraternal orders and societies, agents, adjusters and motor vehicle damage appraisers. The Commissioner may likewise, from time to time, withdraw, modify or amend any such regulation.

(2) Have the power and authority to make and promulgate rules and regulations pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.

(3) Furnish to the companies, associations, orders or bureaus required by this Chapter to report to him, the necessary blank forms for the statements required, which forms may be changed by him from time to time when necessary to secure full information as to the standing, condition and such other information desired of companies, associations, orders or bureaus under the Insurance Department.

(4) Receive and thoroughly examine each annual statement required by this Chapter and prepare an abstract of each annual statement at the expense of the company, association, order or bureau making the same and receive therefor the sum of four dollars ($4.00). If the annual statement is made in compliance with the laws of this State, the Commissioner shall publish the abstract of the same, at the expense of the company, association, order or bureau making it, in one of the newspapers of the State, which newspaper may be selected by the company, association, order or bureau making the statement, if within 30 days after the filing of the statement, the Commissioner is notified in writing of the name of the paper selected.

(5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance, and he shall have power to institute civil actions or criminal prosecutions either by the Attorney General or such other attorney as the Attorney General may select, for any violation of the provisions of this Chapter.

(6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.

(7) Administer by himself or by his deputy all oaths required in the discharge of his official duty. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C. S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1.)

Cross References. — As to control over building and loan associations, see §§ 54-24 to 54-33.3. As to duties with regard to Firemen's Relief Fund, see § 118-1 et seq. As to certain duties with regard to fire inspection and prevention, see §§ 69-1 to 69-7.

Commissioner of Insurance had no authority to enjoin an insurance company from entering into an agreement to lease property owned by the company's president and treasurer. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965); State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Cited in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

§ 58-9.1. Orders of Commissioner; when writing required. — Whenever by any provision of this Chapter, the Commissioner is authorized to grant any approval, authorization or permission or to make any other order affecting any insurer, insurance agent, insurance broker or other person or persons subject to the provisions of this Chapter, such order shall not be effective unless made in writing and signed by the Commissioner or by his authority. (1945, c. 383.)

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-9.2. Examinations, investigations and hearings; notice of hearing. — All examinations, investigations and hearings provided for by this Chapter may be conducted by the Commissioner personally or by one or more of his deputies, investigators, actuaries, examiners or employees designated by him for the purpose. If the Commissioner or any investigator appointed to conduct such investigations is of the opinion that there is evidence to charge any person or persons with a criminal violation of the insurance laws he may arrest with warrant or cause such person or persons to be arrested. All hearings shall, unless otherwise specially provided, be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the person cited to appear, at least 10 days before the date designated therein. The notice shall state the subject of inquiry and the specific charges, if any. It shall be sufficient to give such notice either by delivering it to such person or by depositing the same in the United States mail, postage prepaid, and addressed to the last known place of business of such person. (1945, c. 383; 1969, c. 1009.)

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-9.3. Court review of orders and decisions. — (a) Any order or decision made, issued or executed by the Commissioner, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets and except an order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory, or not in the public interest, shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person. A copy of such petition for review as filed with and certified to by the clerk of said court shall be served upon the Commissioner or in his absence upon someone in active charge of the Department within five days after the filing thereof. If such petition for review is not filed within the said 30 days, the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise, to enforce or restrain the enforcement of the same.

(b) The Commissioner shall within 30 days, unless the time be extended by order of court, after the service of the copy of the petition for review as provided in subsection (a) of this section, prepare and file with the clerk of the Superior Court of Wake County a complete transcript of the record of the hearing, if any, had before him, and a true copy of the order or decision duly certified. The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing,

(1) Upon consent of the parties; or

(2) When the convenience of witnesses and the ends of justice would be promoted by the change; or

(3) When the judge has at any time been interested as a party or counsel.

The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. It shall be the duty of the trial judge to hear and determine such petition with all convenient speed and to this end the cause shall be placed on the calendar for the next succeeding term for hearing ahead of all other cases except those already given priority by law. If on the hearing before the trial judge it shall appear that the record filed by the Commissioner is incomplete, he may by appropriate order direct the Commissioner to certify any or all parts of the record so omitted.

(c) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof.

(d) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Commissioner may be taken to the appellate division of the General Court of Justice by any party to the action as in other civil cases.

(e) The commencement of proceedings under this section shall not operate as a stay of the Commissioner's order or decision, unless otherwise ordered by the court. (1945, c. 383; 1947, c. 721; 1969, c. 44, s. 55; 1971, c. 703, s. 1.)

Editor's Note. — For comment on the 1947 amendment which rewrote subsection (b), see 25 N.C.L. Rev. 439.

The Commissioner's projection of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence and if he has taken into account all of the relevant facts which he is directed by statute to consider. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Applied in In re Blue Bird Taxi Co. of Asheville, Inc., 237 N.C. 373, 75 S.E.2d 156 (1953); In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965); In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Stated in Elmore v. Lanier, 270 N.C. 674, 155 S.E.2d 114 (1967); In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Cited in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-9.4. Court review of rates and classification. — Any order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby. Any such order shall be based on findings of fact, and if applicable, findings as to trends related to the matter under investigation, and conclusions of law based thereon. Any order or decision of the Commissioner, if supported by substantial evidence, shall be presumed to be correct and proper. For the purposes of the appeal the Insurance Commissioner, who shall be represented by his general counsel, shall be deemed an aggrieved party. (1971, c. 703, s. 2.)

In the application of the "substantial evidence" standard, courts will generally defer to the expertise of the administrator in his specialized field if there is reasonable evidence to support his decision. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 19 N.C. App. 263, 198 S.E.2d 575 (1973).

Applied in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

§ 58-9.5. Procedure on appeal under § 58-9.4. — Appeals to the North Carolina Court of Appeals pursuant to G.S. 58-9.4 shall be subject to the following provisions:

(1) No party to a proceeding before the Commissioner may appeal from any final order or decision of the Commissioner unless within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commissioner, by order made within 30 days, the party aggrieved by such decision or order shall file with the Commissioner notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commissioner.

(2) Any party may appeal from all or any portion of any final order or decision of the Commissioner in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commissioner, to each party to the proceeding to the addresses as they appear in the files of the Commissioner in the proceeding. The failure of any party, other than the Commissioner, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(3) The Commissioner may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commissioner.

(4) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The appellant shall cause to be prepared a statement of the case as required by the rules of the Court of Appeals. A copy of this statement shall be served on the Commissioner and all other parties, as appellees, within 45 days from the entry of the appeal taken; within 20 days after such service, the appellee shall return the copy with its approval or specified amendments endorsed or attached; if the case be approved by the appellee it shall be filed by the appellant with the clerk of the Court of Appeals as part of the record; if not returned with objection within the time prescribed, it shall be deemed approved. The Commissioner shall have the power, in the exercise of its discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counterstatement of case.

(5) If the case on appeal is returned by appellee with objections as prescribed, or if a countercase is served on appellant, the appellant shall immediately request the Commissioner to fix a time and place for meeting to agree on the case on appeal. If the appellant delays longer than 15 days after the appellee serves its countercase or exceptions to request the Commissioner to set a meeting to agree on the case on appeal, then the exceptions filed by the appellee shall be allowed, or the countercase served by him shall constitute the case on appeal; but the time may be extended by agreement of counsel.

(6) The Commissioner shall forthwith notify the attorneys of the parties to meet before it for the purpose at a certain time and place, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the Commissioner shall determine if all parties have agreed on a case on appeal. If they have, the appellant shall within five days thereafter file it with the clerk of the Court of Appeals, and if he fails to do so the appellee may file its copy. If the case on appeal is not agreed upon by all parties to the appeal at said meeting, the Commissioner shall immediately file with the Court of Appeals a request for appointment of a referee to settle the case on appeal,

whereupon the chief judge of the Court of Appeals shall appoint a referee to settle and sign the case on appeal under such rules as may be set forth in his appointment.

(7) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals.

(8) Unless otherwise provided by the rules of the Court of Appeals, the cause on appeal from the Commissioner of Insurance shall be entitled "State of North Carolina ex rel. Commissioner of Insurance (here add any additional parties in support of the Commissioner's order and their capacity before the Commissioner). Appellee(s) v. (here insert name of appellant and his capacity before the Commissioner), Appellant." Appeals from the Insurance Commissioner pending in the superior courts on January 1, 1972, shall remain on the civil issue docket of such superior court and shall have priority over other civil actions. Appeals to the Court of Appeals under G.S. 7A-29 shall be docketed in accordance with the rules of the Court of Appeals.

(9) In any appeal to the Court of Appeals, the complainant in the original complaint before the Commissioner shall be a party to the record and each of the parties to the proceeding before the Commissioner shall have a right to appear and participate in said appeal.

(10) An appeal under this section shall operate as a stay of the Commissioner's order or decision until said appeal has been dismissed or the questions raised by the appeal determined according to law. (1971, c. 703, s. 3.)

Applied in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

§ 58-9.6. Extent of review under § 58-9.4. — (a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of the Court of Appeals, and any alleged irregularities in procedures before the Commissioner, not shown in the record, shall be considered under the rules of the Court of Appeals.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner. The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commissioner, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commissioner.

(d) The court shall also compel action of the Commissioner unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner under the provisions of this Chapter shall be prima facie correct. (1971, c. 703, s. 4.)

Applied in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

Quoted in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 19 N.C. App. 263, 198 S.E.2d 575 (1973).

§ 58-10. Commissioner to supervise local inspectors. — The Commissioner shall exercise general supervision over local investigators of fires and fire prevention inspectors. Whenever the Commissioner has reason to believe that the local inspectors are not doing their duty, he or his deputy shall make special trips of inspection and take proper steps to have all the provisions of the law relative to the investigation of fires and the prevention of fire waste enforced. (1905, c. 506, s. 6; Rev., s. 4690; C. S., s. 6270; 1925, c. 89; 1969, c. 1063, s. 2.)

§ 58-11. Office of Commissioner a public office; records, etc., subject to inspection. — The office of the Commissioner shall be a public office and the records, reports, books and papers thereof on file therein shall be accessible to the inspection of the public, except that the records compiled as a part of an investigation for the crime of arson, that of unlawful burning, or of fraud, shall not be considered as public records and may be made available to the public only upon an order of court of competent jurisdiction. Provided that such records shall upon request be made available to the district attorney of any district if the same concerns persons or investigations in his district. (1899, c. 54, ss. 9, 77; Rev., s. 4683; 1907, c. 1000, s. 1; C. S., s. 6271; 1945, c. 383; 1951, c. 781, s. 11; 1955, c. 456; 1973, c. 47, s. 2.)

Editor's Note. — The 1973 amendment substituted "district attorney" for "solicitor" in the last sentence.

For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-12. Original documents and certified copies as evidence. — Every certificate, assignment, or conveyance executed by the Commissioner, in pursuance of any authority conferred on him by law and sealed with his seal of office, may be used as evidence and may be recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged or proved before an officer authorized by law to take the probate of deeds; and all copies of papers in the office of the Commissioner, certified by him and authenticated by his official seal, shall be evidence as the original. (1899, c. 54, s. 11; Rev., s. 4684; C. S., s. 6272.)

§ 58-13. Admissibility of certificate as evidence of agent's authority. — In any case or controversy arising in any court of original jurisdiction within this State wherein it is necessary to establish the question as to whether any insurance or other corporation or agent thereof is or has been licensed by the State Insurance Department to do business in this State, the certificate of the Commissioner of Insurance under the seal of his office shall be admissible in evidence as proof of such corporation or agent's authority as conferred by the State Insurance Department. (1929, c. 289, s. 1.)

§ 58-14. Reports of Commissioner to the Governor and General Assembly. — The Commissioner shall biennially submit to the General Assembly, through the Governor, a report of his official acts, including a summary of official rulings

and regulations. The Commissioner shall, from time to time, report to the General Assembly any change which in his opinion should be made in the laws relating to insurance and other subjects pertaining to his department. On or before the first day of February of each year in which the General Assembly is in session he shall make to the Governor the recommendations called for in this section, to be transmitted to the General Assembly, with the last annual report of this Department, including receipts and disbursements. (1899, c. 54, ss. 6, 7, 10; 1901, c. 391, s. 2; Rev., ss. 4687, 4688; 1911, c. 211, s. 2; C. S., s. 6273; 1927, c. 217, s. 5; 1945, c. 383.)

§ 58-15. Authority over all insurance companies; no exemptions from license. — Every insurance company must be licensed and supervised by the Commissioner of Insurance, and must pay all licenses, taxes, and fees as prescribed in the insurance laws of the State for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the Commissioner of Insurance to grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his Department and release for the payment of license, fees, and taxes. (1903, c. 594, ss. 1, 2, 3; Rev., s. 4691; C. S., s. 6274; 1945, c. 383.)

A fraternal insurance order incorporated under the laws of another state, but with branch offices in this State, comes within the meaning of this section and must be licensed and supervised by the Commissioner of Insurance. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Cited in Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-16. Examinations to be made. — Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the Commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the State to transact business therein. As often as once in three years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, creditors, policyholders, or persons pecuniarily interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the Commissioner deems it prudent for the protection of policyholders in this State he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this State, and such company shall pay the proper charges incurred in this examination, including the expenses of the Commissioner or his deputy and the expenses and compensation of his assistants employed therein. The refusal of any insurer to submit to examination, or the refusal or failure of an insurer to pay the expenses of examination upon presentation of a bill therefor by the Commissioner, shall be grounds for the revocation or refusal of a license. The Commissioner is authorized to make public any such revocation or refusal of license as he may determine and to give his reasons therefor. The Commissioner

shall promptly institute a civil action to recover the expenses of examination against any insurer which refuses or fails to pay. For these purposes the Commissioner or his deputy or persons making the examination shall have free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, or to the books and papers of any affiliated or subsidiary corporations or partnerships that affect the affairs or financial condition of said company and may summon, administer oaths to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, and any other person, affiliate or subsidiary in relation to its affairs, transactions, and condition. (1899, c. 54, s. 13; Rev., s. 4692; C. S., s. 6275; 1945, c. 383.)

Cited in In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-16.1. Examination dispensed with under certain circumstances. — Before ordering or making the examination provided for in G.S. 58-16 of any foreign or alien company, the Commissioner shall first inquire of the insurance department of the state or country (if there be any such department therein), in which is located the principal office of such company, as to the financial and business standing and solvency of such company. If, upon such inquiry, it shall appear that such company is of good financial and business standing, and is solvent, and it be certified, in writing, attested by the seal (if any) of the insurance department of the state or country wherein is located the principal office of such company, that it has been examined by the insurance department of such state or country in the manner prescribed by the laws thereof, and was by such examination found to be in sound condition, that there is no reason to doubt its solvency, and that it is still permitted, under the laws of such state or country, to do business therein, then in the discretion of the Commissioner, further examination may be dispensed with, and the information so obtained, and such certificate so furnished, may be accepted as sufficient evidence of the solvency of such company. (1945, c. 383.)

§ 58-16.2. Results of examination not to be made public until company is given opportunity to be heard; exception. — Pending, during and after the examination of any domestic, foreign or alien insurance company neither the Commissioner nor his representative or representatives shall make public or allow to be made public the financial statement, findings or report of examination, or any report affecting the status or standing of the company examined until the company has either accepted and approved the final report of examination or has been afforded a reasonable opportunity to be heard thereon and to answer or rebut any statements or findings therein. Such hearing, if requested, shall be informal and private.

If within 30 days after the final report of examination has been submitted to it, the company examined has neither notified the Commissioner of its acceptance and approval of the report nor requested to be heard thereon, the report shall thereupon be filed as a public document and shall be open to public inspection.

The provisions of this section shall not, however, prohibit the Commissioner from taking any action provided for, or from exercising any power conferred by, any other provision of this Chapter to suspend or revoke the license of any insurance company. (1945, c. 383.)

Cited in In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-17. Oath required for compliance with law. — Before issuing license to any insurance company to transact the business of insurance in this State, the Commissioner of Insurance shall require, in every case, in addition to the other requirements provided for by law, that the company file with him the affidavit of its president or other chief officer that it has not violated any of the provisions of this Chapter for the space of 12 months last past, and that it accepts the terms and obligations of this Chapter as a part of the consideration of the license. (1899, c. 54, s. 110; 1901, c. 391, s. 8; Rev., s. 4693; C. S., s. 6276.)

§ 58-18. Investigation of charges. — Upon his own motion or upon complaint being filed by a citizen of this State that a company authorized to do business in the State has violated any of the provisions of this Chapter, the Commissioner shall investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representatives the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and papers of the same. In case the Commissioner shall find upon substantial evidence that any complaint against a company is justified, said company, in addition to such penalties as are imposed for violation of any of the provisions of this Chapter, shall be liable for the expenses of the investigation, and the Commissioner shall promptly present said company with a statement of such expenses. If the company refuses or neglects to pay, the Commissioner is authorized to bring a civil action for the collection of these expenses. (1899, c. 54, s. 111; 1903, c. 438, s. 11; Rev., s. 4694; C. S., s. 6277; 1921, c. 136, s. 4; 1925, c. 275, s. 6; 1945, c. 383.)

§§ 58-19, 58-20: Repealed by Session Laws 1945, c. 383.

§ 58-21. Annual statements to be filed with Commissioner. — Every insurance company shall file in the office of the Commissioner of Insurance, on or before the first day of March in each year, in form and detail as the Commissioner of Insurance prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the Commissioner of Insurance or some officer authorized by law to administer oaths. The Commissioner of Insurance shall, in December of each year, furnish to each of the insurance companies authorized to do business in the State two or more blanks adapted for their annual statements. Provided, the Commissioner may, for good and sufficient cause shown by an applicant company, extend the filing date of such annual statement for such company, for a reasonable period of time, not to exceed 30 days. (1899, c. 54, ss. 72, 73, 83, 90, 97; 1901, c. 706, s. 2; 1903, c. 438, s. 9; Rev., s. 4698; C. S., s. 6280; 1945, c. 383; 1957, c. 407.)

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-22. Punishment for making false statement. — If any insurance company in its annual or other statement required by law shall wilfully misstate the facts, the insurance company and the person making oath to or subscribing the same shall severally be punished by a fine of not less than five hundred ($500.00) nor more than one thousand dollars ($1,000). (1899, c. 54, s. 97; Rev., s. 3493; C. S., s. 6281.)

§§ 58-23, 58-24: Repealed by Session Laws 1945, c. 383.

§ 58-25. Record of business kept by companies and agents; Commissioner may inspect. — All companies, agents, or brokers doing any kind of insurance business in this State must make and keep a full and correct record of the

business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the Commissioner of Insurance on demand, and the original books of records shall be open to the inspection of the Commissioner when demanded. (1899, c. 54, s. 108; 1903, c. 438, s. 11; Rev., s. 4696; C. S., s. 6284; 1945, c. 383.)

§ 58-25.1. Commissioner may require special reports. — The Commissioner may also address to any authorized insurer or its officers any inquiry in relation to its transactions or condition or any matter connected therewith. Every corporation or person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the Commissioner, by such individual, or by such officer or officers of a corporation, as he shall designate. (1945, c. 383.)

§ 58-26. Commissioner may require records, reports, etc., for agencies, agents and others. — (a) The Commissioner is empowered to make and promulgate reasonable rules and regulations governing the recording and reporting of insurance business transactions by insurance agencies, agents, brokers and producers of record, any of which agencies, agents, brokers or producers of record are defined by G.S. 58-39.4 and are licensed in this State or are transacting insurance business in this State to the end that such records and reports will accurately and separately reflect the insurance business transactions of such agency, agent, broker or producer of record in this State. Information from records required to be kept pursuant to the provisions of this section must be furnished the Commissioner on demand and the original records required to be kept pursuant to the provisions of this section shall be open to the inspection for the Commissioner or any other authorized employee described in G.S. 58-7.3 when demanded.

(b) Every insurance agency as defined by G.S. 58-39.4(a) transacting insurance business in this State shall at all times have appointed some person employed or associated with such agency who shall have the responsibility of seeing that such records and reports as are required pursuant to the provisions of this section are kept and maintained.

(c) Any person subject to the provisions of subsection (a) of this section who violates the provisions of this section or the rules and regulations prescribed by the Commissioner pursuant to the provisions of this section may after notice and hearing: for the first offense have his license or licenses (in case license be issued for more than one company in such person's case) suspended or revoked for not less than one month nor more than six months and for the second offense shall have his license or licenses (in case license be issued from more than one company in his case) suspended or revoked for the period of one year and such person shall not thereafter be licensed for one year from the date said revocation or suspension first became effective.

(d) For the purpose of enforcing the provisions of this section the Commissioner or any other authorized employee described in G.S. 58-7.3 is authorized and empowered to examine persons, administer oaths and require production of papers and records relative to this section. (1971, c. 948, s. 1.)

§ 58-27. Books and papers required to be exhibited. — It is the duty of any person having in his possession or control any books, accounts, or papers of any company licensed under this Chapter, to exhibit the same to the Commissioner of Insurance or to any deputy, actuary, accountant, or persons acting with or for the Commissioner of Insurance. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or willfully make any false statement in regard to the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined

or imprisoned, or both, at the discretion of the court. (1899, c. 54, s. 76; Rev., ss. 3494, 4697; 1907, c. 1000, s. 3; C. S., s. 6286; 1945, c. 383.)

§ 58-27.1. Insurance advisory board; organization and powers. — (a) There shall be in the Insurance Department an insurance advisory board which shall consist of seven members. The Commissioner shall be a member of the board and its chairman and executive head. The remaining six members shall be appointed by the Governor and any of them may be removed from office by the Governor whenever, in his judgment, the public interest may require. Of the six members appointed, three shall have had experience of such a nature as to make them familiar with the purposes and practices of the insurance business. Three members shall be appointed for two years and three for four years, and thereafter all appointments shall be for a term of four years and until a successor has been appointed; and in case of a vacancy for any reason, the Governor shall appoint a member to fill the unexpired term of office. The members of the insurance advisory board shall receive no salary but shall be paid for their services seven dollars ($7.00) per diem and their expenses. The board shall meet in regular session at least once each three months on call of the chairman. Special meetings may be had at any time upon call of the Commissioner, or at the request of any two members of the board. The board may adjourn its meetings from day to day or until a day certain until all its business has been transacted. The Commissioner shall keep a record of all proceedings of the board, which records shall be open to public inspection.

(b) The insurance advisory board shall have power to consider and, by a majority vote of its members present, to make recommendations to the Commissioner upon any matter which may be submitted to the board.

(c) The insurance advisory board shall, within three months of the ratification of this subsection promulgate rules and regulations to provide for the holding of public hearings before the Commissioner of Insurance, or any person employed by the Insurance Department authorized by the Commissioner to act in his stead, on such proposals, to revise an existing rating schedule the effect of which is to increase or decrease the charge for insurance or to set up a new rating schedule, as are subject to the approval of the Commissioner and as, in the judgment of the board, are of such nature and importance as to justify and require a public hearing. The board shall have authority to determine by such rules and regulations the circumstances under which such public hearings shall be held and the Commissioner of Insurance shall hold public hearings in accordance with such rules and regulations. From time to time the board may revise and change its promulgated rules and regulations in such manner as, in its judgment, the public interest may require. (1945, c. 383; 1949, c. 1079, s. 1.)

Editor's Note. — For comment on subsection (c), see 27 N.C.L. Rev. 460.

State Government Reorganization. — The insurance advisory board was transferred to the Department of Insurance by § 143A-76, enacted by Session Laws 1971, c. 864.

Rules of Evidence. — Former §§ 143-317 and 143-318 were not applicable to a public hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the Rate Office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-27.2. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice. — (a) Whenever any statutory or licensed insurance rating bureau or any insurance company making its own rate filings makes any proposal to revise an existing rating schedule, the effect of which is to increase or decrease the charge for insurance, or to set up a new rating schedule, and such rating schedules are subject to the approval of the Commissioner, such bureau or company shall file its proposed change and

supporting data with the Commissioner who shall thereafter, before acting upon any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the insurance advisory board and then in accordance therewith, and fix a time and place for such hearing not earlier than 20 days thereafter. The bureau or the company making such proposal shall, not more than 10 days prior to the time of such public hearing, cause to be published in a daily newspaper or newspapers published in North Carolina, and in accordance with the rules and regulations of the insurance advisory board, a notice, in the form and content approved by the Commissioner, setting forth the nature and effect of such proposal and the time and place of the public hearing to be held.

(b) The provisions of this section shall be applicable to all rating bureaus operating in North Carolina and all companies making independent filings under the provisions of Chapters 58 and 97 of the General Statutes of North Carolina, and shall be in addition to any requirements otherwise made specifically applicable to said bureaus and companies. (1949, c. 1079, s. 1.)

ARTICLE 3.

General Regulations for Insurance.

§ 58-28. State law governs insurance contracts. — All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof. (1899, c. 54, s. 2; 1901, c. 705, s. 1; Rev., s. 4806; C. S., s. 6287.)

Editor's Note. — See 13 N.C. Rev. 213, for note on validity of statutes localizing insurance contracts.

Constitutionality. — This section is constitutional. Williams v. Mutual Reserve Fund Life Ass'n, 145 N.C. 128, 28 S.E. 802 (1907).

North Carolina Choice-of-Law Rules Control. — The provision of this section that all contracts of insurance on lives in North Carolina shall be subject to the law of North Carolina seems to mean the whole law of North Carolina, including choice-of-law rules. Lowe's N. Wilkesboro Hdwe., Inc. v. Fidelity Mut. Life Ins. Co., 206 F. Supp. 427 (M.D.N.C. 1962).

Section Held Inapplicable. — See Turner v. Liberty Mut. Ins. Co., 105 F. Supp. 723 (M.D.N.C. 1952).

Laws in Force Become Part of Insurance Contract. — Laws in force at the time of executing a policy of insurance are binding on the insurer and become a part of the insurance contract. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

Application Taken out of State. — When neither party was a resident of the State at the time of the contract of insurance and the application was taken out of the State the rule of lex loci contractu will apply. Keesler v. Mutual Benefit Life Ins. Co., 177 N.C. 394, 99 S.E. 97 (1919).

Applications Taken within State. — Policies of insurance issued by a foreign company, the applications for which are taken in this State, are to be construed in accordance with the laws of this State. Horton v. Life Ins. Co., 122 N.C. 498, 29 S.E. 944 (1898). This is true although the insurance company may under its charter be allowed privileges which are contrary to statutes of this State. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917). See Cordell v. Brotherhood of Locomotive Firemen, 208 N.C. 632, 182 S.E. 141 (1935).

A contract of insurance, based upon the application of insured made while residing in this State, must be construed in accordance with the laws of this State rather than the laws in force at the time of the inception of the contract in the state in which insurer is incorporated. Pace v. New York Life Ins. Co., 219 N.C. 451, 14 S.E.2d 411 (1941).

Stipulation Making Policy a Foreign Contract. — A provision in a contract of insurance that, "This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the home office of said association," is void insofar as the courts of this State are concerned. Blackwell v. Life Ass'n, 141 N.C. 117, 53 S.E. 833 (1906). See Cordell v. Brotherhood of Locomotive Firemen, 208 N.C. 632, 182 S.E. 141 (1935).

Applied in Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937); Petty v. Pacific Mut. Life Ins. Co., 212 N.C. 157, 193 S.E. 228 (1937); Fountain & Herrington, Inc. v. Mutual Life Ins. Co., 55 F.2d 120 (4th Cir. 1932); Rossman v. New York Life Ins. Co., 19 N.C. App. 651, 199 S.E.2d 681 (1973).

§ 58-29. No insurance contracts except under this Chapter. — It is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this State, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this Chapter. (1899, c. 54, s. 2; Rev., s. 4807; C. S., s. 6288.)

Recovery by Insured Where Contract Void as to Insurer. — The statute does not impose on the insured the duty of showing the authority of the company or its agent, as the statute is for the protection of the policyholder, and a recovery can be had by the insured although as to the insurer the contract may be void. Gazzam v. German Union Fire Ins. Co., 155 N.C. 330, 71 S.E. 434 (1911).

When a statute or valid regulation in restraint only of the company's action is made for protection of the policyholder, a recovery may ordinarily be had, though the contract is in breach of the regulation. Blount v. Royal Fraternal Ass'n, 163 N.C. 167, 79 S.E. 299 (1913); Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913); Morgan v. Royal Fraternal Ass'n, 170 N.C. 75, 86 S.E. 975 (1915).

When Resident Process Agent Not Required for Foreign Company. — The issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another state, not by or through any agent, did not constitute "doing business" in the State of North Carolina, so as to require a resident process agent. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Applied in Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937); Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

Cited in Charleston & W. Carolina Ry. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934); Petty v. Pacific Mut. Life Ins. Co., 212 N.C. 157, 193 S.E. 228 (1937).

§ 58-30. Statements in application not warranties. — All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy. (1901, c. 705, s. 2; Rev., s. 4808; C. S., s. 6289.)

Editor's Note. — For note "Life Insurance Applications: Opinion Answers or Material Misrepresentations," see 49 N.C.L. Rev. 560 (1971).

The purpose of the statute is to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts. Cottingham v. Maryland Motor Car Ins. Co., 168 N.C. 259, 84 S.E. 274 (1915); Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957).

Material Representations. — In an application for a policy of life insurance every fact stated will be deemed material, which would materially influence the judgment of the insurance company either in accepting the risk or in fixing the premium rate. Bryant v. Metropolitan Life Ins. Co., 147 N.C. 181, 60 S.E. 983 (1908); Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913); Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957).

A material representation shall avoid the policy if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premiums. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

The North Carolina cases declare the rule to be that "the materiality of the representation depends on whether it was such as would naturally and reasonably have influenced the insurance company with respect to the contract or risk." Carroll v. Carolina Cas. Ins. Co., 227 N.C. 456, 458, 42 S.E.2d 607 (1947); Walker v. Philadelphia Life Ins. Co., 127 F. Supp. 26 (E.D.N.C. 1954); Old Colony Ins. Co. v. Garvey, 253 F.2d 299 (4th Cir. 1958).

A representation in an application for a policy of life insurance is deemed material if the knowledge or ignorance of it would naturally influence the judgment of insurer in making the contract,

and written questions relating to health and their answers in an application are deemed material as a matter of law. Tolbert v. Mutual Benefit Life Ins. Co., 236 N.C. 416, 72 S.E.2d 915 (1952).

Answers to questions in application for life insurance were material, and being also false, the contract of insurance is vitiated and there can be no recovery. Walker v. Philadelphia Life Ins. Co., 127 F. Supp. 26 (E.D.N.C. 1954).

Misrepresentations admitted, of which the court will take judicial notice, must be deemed material as a matter of law; and their making is sufficient ground for canceling of the policy, whatever may be proved in extenuation of the conduct of insured in making them. Jeffress v. New York Life Ins. Co., 74 F.2d 874 (4th Cir. 1935).

Same — As to Attendance of Physicians, Diseases, etc. — Where the application declares that the statements the applicant makes below are true and there is no evidence that the company or its agents were aware of any facts to the contrary, all of the misrepresentations made as to the prior attendance of physicians, diseases, surgical operations, and the like are deemed material. Alexander v. Metropolitan Life Ins. Co., 150 N.C. 536, 64 S.E. 432 (1909); Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N.C. 534, 90 S.E. 574 (1916).

A statement in an application for reinstatement of an insurance policy that applicant, in the year previous, had not had any injury, sickness, or ailment of any kind, and had not required the services of a physician, being a statement of fact within the knowledge of applicant is a material representation as a matter of law. Petty v. Pacific Mut. Life Ins. Co., 212 N.C. 157, 193 S.E. 228 (1937).

A representation by insured that he had never consulted a physician or been in a hospital is material, and testimony of physicians that insured was not in sound health at the date of the delivery of the policy is competent on the issue of fraud. Potts v. Life Ins. Co., 206 N.C. 257, 174 S.E. 123 (1934).

Same — As to Applications for Other Insurance. — Answers made in response to questions in the application as to applications for other insurance, where the applicant declares that they are true and offers them as an inducement to the issuance of the policy, are deemed material as a matter of law. Fountain & Herrington, Inc. v. Mutual Life Ins. Co., 55 F.2d 120 (4th Cir. 1932).

Immaterial Representations. — The false representation of the relationship between insured and beneficiary is, as a matter of law, immaterial. Howell v. American Nat'l Ins. Co., 189 N.C. 212, 126 S.E. 603 (1925).

A treatment for a mere temporary indisposition may well be regarded as immaterial where an applicant fully discloses medical treatment for a serious ailment administered at or about the same time. Jeffress v. New York Life Ins. Co., 74 F.2d 874 (4th Cir. 1935).

Under this section, a failure to disclose the fact that insured had had some time previous to her application one-half degree of fever due to a mild form of malaria and from which she had entirely recovered, taken in connection with the further fact that she was at the time of the application in sound health and otherwise insurable, was held not material. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

Misrepresentation Need Not Contribute to Loss. — It is not necessary, to defeat a recovery, that a material misrepresentation by the applicant must contribute in some way to the loss for which indemnity is claimed. Bryant v. Metropolitan Life Ins. Co., 147 N.C. 181, 60 S.E. 963 (1908).

Unintentional Misrepresentations. — The company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even if the misrepresentations are not intentional, the policy, when delivered, plainly discloses the untruthfulness of the representations. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N.C. 534, 90 S.E. 574 (1916).

The North Carolina law is that a fraudulent or material misrepresentation in the application for insurance, even though innocently made, will prevent recovery on the policy. Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957).

Fraud is not essential under this section and as a general rule recovery will not be allowed if the statements made and accepted as inducements to the contract of insurance are false and material. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

False Material Representations, Although Not Fraudulent, Void Policy. — Where representations were material to the issuance of an insurance certificate, the certificate was void notwithstanding the evidence tended to show that the representations, although false, were not fraudulent. Inman v. Sovereign Camp, W.O.W., 211 N.C. 179, 189 S.E. 496 (1937).

It is well settled that a material representation which is false will constitute sufficient ground upon which to avoid the policy. Tolbert v. Mutual Benefit Life Ins. Co., 236 N.C. 416, 72 S.E.2d 915 (1952).

Clearly a representation which is material and false will prevent recovery, even though not fraudulent. Walker v. Philadelphia Life Ins. Co., 127 F. Supp. 26 (E.D.N.C. 1954).

Same — Instruction. — An instruction of the court which tends to leave the impression that it was not only necessary that insurer show that the representations were false and material but also that they were fraudulently made with intent to deceive, must be held for prejudicial er-

ror. Tolbert v. Mutual Benefit Life Ins. Co., 236 N.C. 416, 72 S.E.2d 915 (1952).

Verbal Answers Made to Agent by Applicant for Fire Policy. — Whatever be the North Carolina rule with respect to the effect to be given to written answers to written questions in an application for a life insurance policy, which is attached to and made a part of the policy, there is nothing in the law of North Carolina, or anywhere else, which requires that any such rule be applied to verbal answers made by an applicant for a fire policy to an agent asking questions for the purpose of obtaining information upon which to describe the insured property in the policy. To hold that such answers are to be deemed material as a matter of law would be to give them the status of warranties in contravention of this section. Old Colony Ins. Co. v. Garvey, 253 F.2d 299 (4th Cir. 1958).

Identification of Insured Vehicle. — A vehicle covered by a policy of liability insurance may be identified as between the parties not only by the motor and serial numbers entered on the policy but also by descriptive insignia resorted to in the policy, or, in case of an ambiguous description, by evidence aliunde, and this without resort to the equitable doctrine of reformation for mutual mistake or fraud. Ratliff v. Virginia Sur. Co., 232 N.C. 166, 59 S.E.2d 609 (1950).

The complaint alleged in effect that insured owned but two White tractors, one of which had been scrapped for junk at the time the policy was issued and that the other was involved in the collision in suit, but that through mistake the motor and serial numbers of the scrapped vehicle were entered in the policy instead of those of the vehicle in use, and that the vehicle in use was the one actually insured. It was held that a demurrer to the complaint was improperly sustained, since, as between the parties, insured is entitled under the allegations of the complaint, admitted by the demurrer, to attempt to identify the property insured by other descriptive insignia contained in the policy and by evidence aliunde. Ratliff v. Virginia Sur. Co., 232 N.C. 166, 59 S.E.2d 609 (1950).

Unoccupancy of Insured House. — Evidence held insufficient to show that knowledge of the unoccupancy of the house insured would have influenced the company naturally and materially on the question of risk. Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957).

If the insurance company knew that the representations made by the insured were false, it cannot set the policy aside on the grounds that they were material or fraudulent. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

The failure of insured to disclose treatment by a physician within five years prior to the application was held not a suppression of a material fact in light of the evidence, and was not adequate cause for cancellation of the policy. Anthony v. Teachers Protective Union, 206 N.C. 7, 173 S.E. 6 (1934).

Where an insurance company has given a "binding slip" to an applicant for insurance, it only protects the applicant against the contingency of his sickness intervening its date and the delivery of the policy, if the applicant for insurance is accepted, and as such slip does not insure of itself, it does not affect the right of the insurer to avail itself of all defenses it may have, under the policy, after its delivery, to avoid payment thereof by reason of material misrepresentation made in the application for it. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

Where insured stated she was not pregnant and died of childbirth in less than nine months, this statement did not preclude recovery, in view of the evidence that insurer issued its policy on the life of the insured when it knew she was 33 years of age, had been married about a year, and that ordinarily pregnancy might be expected, and it required an additional premium on that account. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

Burden Is on Insurer to Prove Misrepresentation. — By offering in evidence the policy of insurance and the insurer's admission of its execution and delivery and of the death of the insured, the beneficiaries made out a prima facie case, and the burden was then upon the insurer to rebut it by proof of the alleged misrepresentation. And though the beneficiaries, in anticipation of the defense, elected to offer testimony as to misrepresentations, this did not change the rule as to the burden of proof. Wells v. Jefferson Std. Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937).

Evidence Admissible. — After a contract of life insurance has become effective, its terms may not be contradicted so as to affect its continued validity; but it may be shown that the delivery of the policy was made upon false representations in the application therefor, as to the health of the insured and as to his not having been subjected to contagious diseases for a prior period of one year, and the like, for such matters bear upon the question as to whether the policy had ever taken effect as a contract of insurance. Gardner v. North State Mut. Life Ins. Co., 163 N.C. 367, 79 S.E. 806 (1913).

Evidence Not Showing Fraud. — Where the evidence shows that insured was suffering with an incurable disease, but the uncontradicted evidence shows he was ignorant of this fact, and that he had been assured by a physician, whom he had consulted, that there was nothing the matter with him at the date of application, there is no evidence from which the jury could find that the statement made by the applicant in the application was fraudulent and this section is applicable. Missouri State Life Ins. Co. v. Hardin, 208 N.C. 22, 179 S.E. 2 (1935).

Questions for Jury. — Where the insured had hernia at the time of his application, and, without specific question as to this, stated he was in sound physical and mental condition, "no exceptions," and there is evidence tending to show that the hernia did not affect the soundness of his health, it was for the jury to determine whether his representation was false and material. Hines v. New England Cas. Co., 172 N.C. 225, 90 S.E. 131 (1916).

Whether a misrepresentation is made with fraudulent intent by insured, or whether it is material, so that insurer would not have issued the policy had it known the truth, are ordinarily questions for the jury. Harrison v. Metropolitan Life Ins. Co., 207 N.C. 487, 177 S.E. 423 (1934).

Same — Instruction. — The evidence tended to show that in her application for hospital insurance plaintiff inadvertently misrepresented that she did not have hernia, and that subsequent to the issuance of the policy plaintiff was hospitalized for appendicitis. The court held that a charge to the effect that the misrepresentation would bar recovery if the hernia in any way contributed to the hospitalization or materially affected the acceptance of the risk by insurer so that insurer would not have written the policy in the form it was issued if the existence of the hernia had been known, was without error, the question of materiality of misrepresentation being for the jury upon the evidence. Carroll v. Carolina Cas. Ins. Co., 227 N.C. 456, 42 S.E.2d 607 (1947), discussed in 26 N.C.L. Rev. 78.

Fraternal Benefit Associations and Fraternal Orders. — Fraternal benefit associations fall within the provision of this section as to representations, but fraternal orders as defined in § 58-264 do not. Gay v. Woodmen of the World, 179 N.C. 210, 102 S.E. 195 (1920).

Cited in Jones v. Home Security Life Ins. Co., 254 N.C. 407, 119 S.E.2d 215 (1961).

§ 58-30.1. Additional or coinsurance clause. — No insurance company or agent licensed to do business in this State may issue any policy or contract of insurance covering property in this State which shall contain any clause or provision requiring the insured to take or maintain a larger amount of insurance than that expressed in such policy, nor in any way provide that the insured shall be liable as a coinsurer with the company issuing the policy for any part of the loss or damage to the property described in such policy, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when there is printed or stamped on the filing face of such policy or on the form containing such clause the words "coinsurance contract," and the Commissioner may, in his discretion, determine the location of the words "coinsurance contract" and the size of the type to be used. If there be a difference in the rate for the insurance with and without the coinsurance clause, the rates for each shall be furnished the insured upon request. (1915, c. 109, s. 5; C. S., s. 6441; 1925, c. 70, s. 4; 1945, c. 377; 1947, c. 721.)

Cross Reference. — See § 58-177 and note.

§ 58-30.2. Group plans other than life, annuity or accident and health. — No policy of insurance other than life, annuity or accident and health may be written in North Carolina on a group plan which insures a group of individuals under a master policy at rates lower than those charged for individual policies covering similar risks. The master policy and certificates, if any, shall be first approved by the Commissioner and the rate, premiums or other essential information shall be shown on the certificate. (1945, c. 377.)

§ 58-31. Stipulations as to jurisdiction and limitation of actions. — No company or order, domestic or foreign, authorized to do business in this State under this Chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this

section are void. (1899, c. 54, ss. 23, 106; 1901, c. 391, s. 8; Rev., s. 4809; C. S., s. 6290.)

History of Section. — See Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Section Repealed to Extent of Conflict with Contractual Limitation in Standard Form Fire Policy. — This section was repealed by c. 378, Session Laws of 1945 (§ 58-176) insofar as it is in conflict with the contractual limitation in a standard form of a fire insurance policy that suit on the policy be instituted within one year of the inception of loss. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Limitation Not in Conflict with Statute Is Valid. — A stipulation in a policy as to time of bringing action is a contractual limitation, and has been held by the Supreme Court to be valid when it does not conflict with any provision of the statute. Parker v. Insurance Co., 143 N.C. 339, 55 S.E. 717 (1906), citing Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891), and Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892).

Section Construed with Standard Fire Insurance Policy. — The provisions of a standard fire insurance policy, as set out in the statute, must be construed with the provision of this section, and when the action is brought within the time herein prescribed it will not be barred. Modlin v. Atlantic Fire Ins. Co., 151 N.C. 35, 65 S.E. 605 (1909). Under the standard policy the insured has 60 days to file his proof of loss and then, according to the provisions of the statute, he has 12 months within which to commence his suit. Lowe v. United States Mut. Accident Ass'n, 115 N.C. 18, 20 S.E. 169 (1894); Gerringer v. North Carolina Home Ins. Co., 133 N.C. 407, 45 S.E. 773 (1903). See § 58-176.

The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute have no effect upon it. Hence, the imprisonment of the insured will not give him the right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. Holly v. London Assurance Co., 170 N.C. 4, 86 S.E. 694 (1915).

Waiver of Stipulation of Standard Policy — Estoppel. — As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892).

The stipulations in accident insurance policies that proceedings shall not be begun until 90 days after proof of loss do not contravene this section, when the policy also states that the insured may bring his action within 12 months after the accident, this being construed to mean that he will have 12 months after the cause of action accrues. Heilig v. Aetna Life Ins. Co., 152 N.C. 358, 67 S.E. 927 (1910).

Fraternal Orders. — Provisions of the constitution and bylaws of a fraternal insurance order, that suits shall not be brought or maintained for any cause or claim arising out of the benefit certificate of a member unless within one year from the time the right of action accrues, are valid. Faulk v. Fraternal Mystic Circle, 171 N.C. 301, 88 S.E. 431 (1916).

Contracts of indemnity against loss or surety bonds for the faithful performance of a building contract are regarded in the nature of contracts of insurance and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Guilford Lumber Mfg. Co. v. Johnson, 177 N.C. 44, 97 S.E. 732 (1919).

Requiring Insured to Join as Defendant Person Allegedly Responsible for Damage. — The provision of an automobile liability policy which required the insured, in an action against the insurer, to join as a party defendant the person or organization allegedly responsible for the damage to the insured, was held void as a violation of this section, where the party defendant was a nonresident uninsured motorist and not amenable to the jurisdiction of this State. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

Limitation Must Be Pleaded. — A limitation in a surety bond as to the time in which an action may be maintained against the surety thereon, after notice of default, is contractual, and affects the remedy, and it is necessary that the surety plead it in the action for it to be available as a defense. Ideal Brick Co. v. Gentry, 191 N.C. 636, 132 S.E. 800 (1926).

Nonsuit. — In case a nonsuit is entered and it does not appear on record when the nonsuit was entered it will be presumed that it was within six months prior to the date on which action was commenced. Parker v. Insurance Co., 143 N.C. 339, 55 S.E. 717 (1906).

§ 58-31.1. Proof of loss forms required to be furnished. — When any company under any insurance policy requires a written proof of loss after notice of such loss has been given by the insured or beneficiary, the company or its representative shall furnish a blank to be used for that purpose. If such forms

are not so furnished within 15 days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss, upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made. (1945, c. 377.)

Waiver of Policy Provision Requiring Proof of Loss. — The insurer waived policy provision requiring proof of loss to be furnished within 60 days, where (1) the insured went to the insurer's agent, who had sold him the policy, and notified him of the loss; (2) the insured notified the insurer in writing of his loss; and (3) the insurer failed to furnish to the insured proof of loss forms. McElrath v. State Capital Ins. Co., 13 N.C. App. 211, 184 S.E.2d 912 (1971).

Applied in Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545 (1973).

Cited in Northern Assurance Co. of America v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

§ 58-32. Insurance as security for a loan by the company. — Where an insurance company, as a condition for a loan by such company, of money upon mortgage or other security, requires that the borrower insure either his life or that of another, or his property, or the title to his property, with the company, and assign or cause to be assigned to it a policy of insurance as security for the loan, and agree to pay premiums thereon during the continuance of the loan, whether the premium is paid annually, semiannually, quarterly, or monthly, such premiums shall not be considered as interest on such loans, nor will any loan be rendered usurious by reason of any such requirements, where the rate of interest charged for the loan does not exceed the legal rate and where the premiums charged for the insurance do not exceed the premiums charged to other persons for similar policies who do not obtain loans. (1915, c. 8; 1917, c. 61; C. S., s. 6291.)

Editor's Note. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

Section Does Not Exempt from Usury Laws. — This section was held not to exempt insurance companies from the provisions of §§ 24-1 and 24-2, relating to usury, the purport and effect of the section being merely to allow insurance companies to require as a condition precedent to the loan of money that the borrower take out a policy of insurance and assign same as security for the loan. If this section did provide that insurance companies should be exempt from §§ 24-1 and 24-2, it would be void as in violation of former Art. I, § 7, of the State Constitution (see now N. C. Const., Art. I, § 32). Cowan v. Security Life & Trust Co., 211 N.C. 18, 188 S.E. 812 (1936).

Endowment Policy. — A 10-year endowment policy comes within the provisions of this section, when such endowment policy provides that the face amount thereof shall be paid to the beneficiary if insured dies during the 10-year period while the policy is in force. Cowan v. Security Life & Trust Co., 211 N.C. 18, 188 S.E. 812 (1936).

Stated in Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (1967).

§ 58-33. Companies must do business in own name; emblems, insignias, etc. — Every insurance company must conduct its business in the State in, and the policies and contracts of insurance issued by it shall be headed or entitled only by, its proper or corporate name. There shall not appear on the face of the policy or on its filing back anything that would indicate that it is the obligation of any other than the company or companies responsible for the payment of losses under the policy, though it will be permissible to stamp or print on the bottom of the filing back, the name or names of the department or general agency issuing the same, and the group of companies with which the company is financially affiliated. The use of any emblem, insignia, or anything other than the true and proper corporate name of such company shall be permitted only with the approval of the Commissioner. (1899, c. 54, s. 18; Rev., s. 4811; C. S., s. 6292; 1945, c. 377; 1951, c. 781, s. 10.)

Editor's Note. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-33.1. Must not pay death benefits in services. — No insurance company now doing business in this State or that may hereafter be authorized to do business in this State issuing contracts providing benefits in the event of death shall issue any contract providing for the payment of benefits in merchandise or service to be rendered to such policyholder or his beneficiary. (1945, c. 377.)

§ 58-34. Publication of assets and liabilities; penalty for failure. — When any company publishes its assets, it must in the same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements; and any publications purporting to show its capital must exhibit only the amount of such capital as has been actually paid in cash. Any company or agent thereof violating the provision of this section shall be punished by a fine of not less than fifty ($50.00) nor more than two hundred dollars ($200.00). (1899, c. 54, ss. 18, 96; Rev., ss. 3492, 4812; C. S., s. 6293.)

§ 58-34.1. Publication of financial information. — Notwithstanding any other provision of the laws of this State an insurer may, subject to requirements set forth by regulation promulgated by the Commissioner, publish financial statements or information based on financial statements prepared on a basis which is in accordance with requirements of a competent authority and which differs from the basis of the statements which have been filed with the Insurance Commissioner. Such differing financial statements or information based on financial statements shall not be made the basis for the application of provisions of any laws of this State not relating solely to the publication of financial information unless such provisions specifically so require. (1973, c. 1130.)

§ 58-35. Unearned premium reserves. — Every insurance company other than life and real estate title insurance shall maintain unearned premium reserves equal to the unearned portions of the gross premiums charged on unexpired or unterminated risks and policies, provided, that excluding commissions thereon, unmatured installment premiums on such risks and policies may be treated as admitted assets or allowed as deductions from liabilities in computing the necessary reserves therefor, subject to regulations issued by the Commissioner. No deductions may be made from the gross premiums in force except for original premiums canceled on risks terminated or reduced before expiration, or except for premiums paid or credited for risks reinsured with other solvent assuming insurers. Premiums charged for bulk or portfolio reinsurance assumed from other insurers shall be included as premiums in force on the basis of the original premiums and the original terms of the policies of the ceding insurer. Reinsurance ceded to such an assuming insurer may be deducted on the basis of original premiums and original terms except in the case of excess loss or catastrophe reinsurance which may be deducted only on the basis of actual reinsurance premiums and actual reinsurance terms. The Commissioner of Insurance may accept the valuation made by the company upon such evidence of its correctness as the Commissioner may require.

If in the opinion of the Commissioner the above method does not produce an adequate reserve he may require the company to calculate its unearned premium reserve upon the monthly pro rata fractional basis, or, if necessary, on each respective risk from the date of the issuance of the policy, and in case of premiums covering indefinite terms he may prescribe special regulations. (1899, c. 54, s. 67; 1901, c. 391, s. 5; Rev., s. 4704; 1907, c. 1000, s. 4; C. S., s. 6294; 1945, c. 377; 1947, c. 721.)

Editor's Note. — For comment on the 1947 amendment, see 25 N.C.L. Rev. 440.

Section Constitutional. — This section in no way impinges on the Constitution. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.C. 69, 185 S.E. 449 (1936).

Unearned premiums are a liability of the company. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.C. 69, 185 S.E. 449 (1936).

§ 58-35.1. Loss reserves of fire and marine insurance companies. — In any determination of the financial condition of any fire or marine or fire and marine insurance company authorized to do business in this State, such company shall be charged, in addition to its unearned premium liability as prescribed in G.S. 58-35, with a liability for loss reserves in an amount equal to the aggregate of the estimated amounts payable on all outstanding claims reported to it which arose out of any contract of insurance or reinsurance made by it, and in addition thereto an amount fairly estimated as necessary to provide for unreported losses incurred on or prior to the date of such determination, and including, both as to reported and unreported claims, an amount estimated as necessary to provide for the expense of adjusting such claims, and there shall be deducted, in determining such liability for loss reserves, the amount of reinsurance recoverable by such company, in respect to such claims, from assuming insurers. (1945, c. 377.)

§ 58-35.2. Loss and loss expense reserves of casualty insurance and surety companies. — (a) In determining the financial condition of any casualty insurance or surety company and in any financial statement or report of any such company, there shall be included in the liabilities of such company loss reserves and loss expense reserves at least equal to the amounts required under the provisions of this section, and the amount of such reserves shall be diminished by allowance or credit for reinsurance recoverable from assuming insurers. The date as of which such determination, statement or report is made is hereinafter referred to as the date of determination.

(b) For all outstanding losses, other than those incurred under policies of workmen's compensation, employer's liability or personal injury liability insurance, such loss reserves shall include the following:

(1) The aggregate estimated amounts due or to become due on account of all losses and claims incurred but not paid, including the estimated liability on any notice received by the company of the occurrence of any event which may result in a loss.

(2) The aggregate amounts of liability for all losses incurred but on which no notice has been received, estimated in accordance with the company's prior experience, if any, otherwise in accordance with the experience of similar companies under similar contracts of insurance. The estimated liabilities for such losses under all its bonds, policies or contracts of, or covering any of the risks of, fidelity insurance, shall be not less than ten percent (10%) of the net premiums in force thereon, and the estimated liabilities for all such losses under all its surety contracts shall be not less than five percent (5%) of the net premium in force thereon.

In any loss reserves computed in accordance with rules or regulations prescribed by the Commissioner under the provisions of subsections (g) or (h) there shall be included, for liability upon all losses incurred but on which no notice has been received, an amount not less than that indicated by the company's experience.

(c) The reserves for outstanding losses and loss expenses under policies of personal injury liability insurance and under policies of employer's liability insurance, except as provided in subsections (g) and (h), shall be computed as follows:

(1) For all liability suits being defended under policies written:

a. Ten years or more prior to the date of determination, one thousand five hundred dollars ($1,500) for each suit.

b. Five or more and less than 10 years prior to the date of determination, one thousand dollars ($1,000) for each suit.

c. Three or more and less than five years prior to the date of determination, eight hundred fifty dollars ($850.00) for each suit. In any event the total loss and loss expense reserves for all such liability policies written more than three years prior to the date of determination shall be not less than the aggregate of the estimated unpaid losses and loss expenses under such policies computed on an individual case basis.

(2) For all such liability policies written during the three years immediately preceding the date of determination, such reserves shall be the sum of the reserves for each such year, which shall be sixty percent (60%) of the earned premiums on liability policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the aggregate of the estimated unpaid losses and loss expense for claims incurred under liability policies written in the corresponding year computed on an individual case basis.

(d) The reserves for outstanding losses and loss expenses under policies of workmen's compensation insurance, except as provided in subsections (g) and (h), shall be computed as follows:

(1) For all such compensation policies written more than three years prior to the date of determination, such reserves shall be the present values, at three and one-half percent (3½%) interest per annum, of the determined and estimated future loss and loss expense payments under such policies computed on an individual case basis.

(2) For all such compensation policies written during the three years immediately preceding the date of determination, such reserve shall be the sum of the reserves for each such year, which shall be sixty-five percent (65%) of the earned premiums on such compensation policies written during such year less all loss and loss expense payments made under such policies written in such year. In any event such reserves for each of such three years shall be not less than the present values at three and one-half percent (3½%) interest per annum, of the determined and estimated unpaid losses and loss expenses in connection with claims incurred under compensation policies written in the corresponding year computed on an individual basis.

(e) The earned premiums referred to in this section shall be computed as follows: Determine the gross premiums charged on all such policies written or assumed, including all determined excess and additional premiums thereon; then deduct return premiums thereon other than premiums returned to policyholders as dividends, and deduct premiums for reinsurance ceded thereon to assuming insurers, and from such net premiums deduct the unearned premiums on such policies in force. The policy year basis as used in this section means the year in which a policy is written and all premiums, losses and loss expenses relating to policies written in such year shall be credited or charged to such year.

The terms "loss payments" and "loss expense payments" as used in this section shall be determined by including all payments to claimants under such policies, payments for medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and field men, apportionable salaries and expenses of the home office and branch offices and all other payments made by such insurer on account of claims under such policies, whether such payments shall be allocated to specific claims or unallocated. Loss and loss expense

payments shall be reduced by the amount of reinsurance recovered therefor from any assuming insurer.

(f) All unallocated payments of liability loss expenses on policies referred to in subsection (c), made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies shall be distributed by policy years as follows: Thirty-five percent (35%) shall be charged to that year, forty percent (40%) to the preceding year, ten percent (10%) to the second year preceding, ten percent (10%) to the third year preceding and five percent (5%) to the fourth year preceding. Such payments made in each of the first four calendar years in which an insurer issued liability policies shall be distributed by policy years as follows: In the first calendar year one hundred percent (100%) shall be charged to that year, in the second calendar year fifty percent (50%) to that year and fifty percent (50%) to the preceding year, in the third calendar year forty percent (40%) to that year and forty percent (40%) to the preceding year and twenty percent (20%) to the second year preceding, and in the fourth calendar year thirty-five percent (35%) to that year and forty percent (40%) to the preceding year and fifteen percent (15%) to the second year preceding and ten percent (10%) to the third year preceding. A schedule showing such distribution shall be included in the annual statement.

All unallocated payments of compensation loss expenses on policies referred to in subsection (d), made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed by policy years as follows: Forty percent (40%) shall be charged to that year, forty-five percent (45%) to the preceding year, ten percent (10%) to the second year preceding and five percent (5%) to the third year preceding. Such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed by policy years as follows: In the first calendar year one hundred percent (100%) shall be charged to that year, in the second calendar year fifty percent (50%) to that year and fifty percent (50%) to the preceding year, in the third calendar year forty-five percent (45%) to that year, and forty-five percent (45%) to the preceding year and ten percent (10%) to the second year preceding. A schedule showing such distribution shall be included in the annual statement.

(g) Whenever in the judgment of the Commissioner the loss and loss expense reserves of any casualty or surety company doing business in this State calculated in accordance with the foregoing provisions are inadequate, he may, in his discretion, modify the formulas hereinbefore set forth or prescribe any other basis which will produce adequate reserves. Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the Commissioner may prescribe.

(h) For the purpose of determining loss reserves every casualty insurance and every surety company doing business in this State shall keep a complete and itemized record showing all losses and claims on which it has received notice, including all notices received by it of the occurrence of any event which may result in a loss. (1945, c. 377.)

§ 58-36. Corporation or association maintaining office in State required to qualify and secure license. — Any corporation or voluntary association, other than an association of companies, the members of which are licensed in this State, issuing contracts of insurance and maintaining a principal, branch, or other office within this State, whether soliciting business in this State or in foreign states, shall qualify under the insurance laws of this State applicable to the type of insurance written by such corporation or association and secure license from the Commissioner of Insurance as provided under this Chapter on insurance, as amended, and the officers and agents of any such corporation or association maintaining offices within this State and failing to qualify and secure

license as herein provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1937, c. 39.)

§ 58-37. Revocation of license of foreign company; publication of notice. — If the Commissioner of Insurance is of the opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, or, if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities; or that it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination or to perform any legal obligation in relation thereto, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notification thereof to be published in one or more newspapers published in this State; and no new business may thereafter be done by it or its agents in this State while such default or disability continues, or until its authority to do business is restored by the Commissioner. (1899, c. 54, s. 14; 1901, c. 176, s. 1; Rev., s. 4701; C. S., s. 6295.)

§ 58-38. Revocation of license of domestic company; injunction and receiver. — If, upon examination, the Commissioner of Insurance is of the opinion that any domestic insurance company is insolvent, or has exceeded its powers, or failed to comply with any provision of law, or that its condition is such as to render its further proceeding hazardous to the public or to its policyholders, he shall revoke its license, and, if he deems it necessary, shall apply to a judge of the superior court to issue an injunction restraining it in whole or in part from further proceeding with its business. The judge may issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify the injunction or make it permanent, and may make all orders and judgments needful in the matter, and may appoint agents or a receiver to take possession of the property and effects of the company and to settle its affairs, subject to such rules and orders as the court from time to time prescribes. (1899, c. 54, s. 14; Rev., s. 4702; C. S., s. 6296.)

Commissioner Has No Statutory Power to Issue Restraining Orders or Injunctions. — The statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner do not purport to grant him the power of issuing restraining orders and injunctions. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

But May Apply to Courts for Such. — In administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions under the provisions of this section. Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

§ 58-39. Revocation, suspension and refusal to renew license. — The license of any insurer, including fraternal orders and societies, may in the discretion of the Commissioner be suspended or revoked or its renewal refused,

(1) Whenever it fails or refuses to comply with any law, order or regulation applicable to it;

(2) Whenever its condition is unsound, or its assets above its liabilities, exclusive of capital, are less than the amount of its capital or required minimum surplus;

(3) Whenever it has published or made to the Department or to the public any false statement or report;

(4) Whenever it refuses to submit to any examination authorized by law;

(5) Whenver it is found to make a practice of unduly engaging in litigation, or delaying the investigation of claims or the adjustment or payment of valid claims or whenever it fails to acknowledge a claim within 60 days after receiving written notice thereof, provided, such notice

contains sufficient information for the insurance company to identify the specific insurance coverage involved. Acknowledgment of the claim shall be made to the claimant or his legal representative advising that the claim is being investigated; or shall be a payment of the claim; or shall be a bona fide written offer of settlement; or shall be a written denial of the claim.

Any such suspension, revocation or refusal to renew a license may also be made applicable to the license of an agent who is a party to such default or improper practice. (1899, c. 54, ss. 66, 75, 112; 1901, c. 391, s. 5; Rev., ss. 4703, 4705; C. S., s. 6297; 1947, c. 721; 1963, c. 1234.)

§ 58-39.1. Limitation of risk. — Except as otherwise provided in this Chapter, no insurer doing business in this State shall expose itself to any loss on any one risk in an amount exceeding ten percent (10%) of its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. This section shall not apply to life insurance or to the insurance of marine risks, or marine protection and indemnity risks, or workmen's compensation or employer's liability risks, or to certificates of title or guaranties of title or policies of title insurance. For the purpose of determining the limitation of risk under any provision of this Chapter, "surplus to policyholders" shall

(1) Be deemed to include any voluntary reserves, or any part thereof, which are not required by or pursuant to law, and

(2) Be determined from the last sworn statement of such insurer on file with the Commissioner pursuant to law, or by the last report on examination filed by the Commissioner, whichever is more recent at the time of assumption of such risk.

In applying the limitation of risk under any provision of this Chapter to alien insurers, such provision shall be deemed to refer to the exposure to risk and to the surplus to policyholders of the United States branch of such alien insurer. (1945, c. 377.)

§ 58-39.2. Limitation of liability assumed. — (a) No company transacting fidelity or surety business in this State shall expose itself to any loss on any one fidelity or surety risk or hazard in an amount exceeding ten per centum (10%) of its policyholders' surplus, unless it shall be protected in excess of that amount by:

(1) Reinsurance in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or

(2) The cosuretyship of such a company similarly authorized; or

(3) By deposit with it in pledge or conveyance to it in trust for its protection of property; or

(4) By conveyance or mortgage for its protection; or

(5) In case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such company; except by decree or order of a court of competent jurisdiction;

(b) Provided:

(1) That such company may execute what are known as transportation or warehousing bonds for United States internal revenue taxes to an amount equal to fifty per centum (50%) of its policyholders' surplus;

(2) That, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to the supervision or control of the surety is not in excess of such limitation; and

(3) That, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section.

(c) No such company shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per centum (10%) of the policyholders' surplus of such surety, unless it shall be protected in excess of that amount by credits in accordance with subdivisions (1), (2), (3) or (4) of subsection (a) of this section: Provided, nothing in this section shall be construed to make invalid any contract entered into by such company with another person, firm, corporation or municipal corporation, notwithstanding any provisions of this section. (1911, c. 28; C. S., s. 6382; 1931, c. 285; 1945, c. 377.)

As to joint-control agreements between fiduciaries and their sureties, see State ex rel. Leonard v. York, 202 N.C. 704, 163 S.E. 878 (1932), citing Pierce v. Pierce, 197 N.C. 348, 148 S.E. 438 (1929).

§ 58-39.3. Reinsurance, when permitted; effect on reserves. — (a) Every insurer authorized to do an insurance business in this State, hereinafter called the "ceding insurer" may, subject to the limitations of this Chapter, reinsure its risks and policy liabilities in any other solvent insurer, hereinafter called the "assuming insurer," with the effects herein prescribed; but no prohibition or limitation herein contained shall invalidate any such contract of reinsurance as between the parties thereto. The Commissioner shall have authority to make investigations and call for information relating to all contracts of reinsurance and when in his judgment such reinsurance contracts are not satisfactory he may disallow credit therefor as an admitted asset or as a deduction from loss and unearned premium reserve.

(b) For the purpose of determining the financial condition of a ceding insurer, it shall, in addition to any credit allowed against its loss reserves, receive credit for such reinsurance calculated in the following manner:

(1) In the case of reinsurance of the whole or any part of any risk other than as specified in subdivision (2) following, the ceding insurer shall receive credit for such reinsurance by way of deduction from its unearned premium liability calculated in accordance with the provisions of G.S. 58-35.

(2) In the case of reinsurance of the whole or any part of any life insurance or annuity or noncancellable disability risk, the ceding insurer shall receive credit, by way of deduction from its reserve liability, in an amount not exceeding the amount of the reserve on the reinsured portion of such risk which the ceding insurer would have maintained if such portion had not been reinsured.

Nothing contained in this section shall be deemed to permit the ceding insurer to receive through the cession of the whole or any part of any risk or risks any advantage whereby its unearned premium reserve, or the net amount of its

valuation reserves, as the case may be, is reduced below the required amount thereof by the provisions of this Chapter.

(c) For the purpose of determining the financial condition of any assuming insurer, such insurer shall be charged with an amount in its unearned premium liability equal to the amount of the deduction specified in subdivision (1) of subsection (b), and in its valuation reserve liability with an amount at least equal to the amount which it would be required to maintain in accordance with the provisions of this Chapter if it were the direct insurer of such assumed risks on the basis specified in the reinsurance agreement.

(d) The Commissioner may revoke or suspend the license of any company violating the provisions of this section. (1945, c. 377.)

§ 58-39.4. Definitions. — (a) An insurance agency is hereby defined to be any person, partnership, or corporation designated in writing by any insurance company lawfully licensed to do business in this State, to act as its agent, with authority to solicit, negotiate, and effect contracts of insurance on behalf of the insurance company through duly licensed agents of such company, and to collect the premiums thereon, or to do any of such acts.

(b) An insurance broker is hereby defined to be an individual who being a licensed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent.

(c) A general agent is hereby defined to be an individual designated in writing by an insurance company lawfully licensed to do business in this State to act for it as agent or manager and with additional authority to appoint, designate, or supervise local agents within a specified territory.

(d) A special agent is hereby defined to be an individual other than an officer, manager, or general agent of the insurer, employed by an insurer or general agent to work with and assist agents in soliciting, negotiating, and effectuating insurance in such insurer or in the insurers represented by the general agent.

(e) A life insurance agent is hereby defined to be a person engaged in the business of selling any or all types of insurance offered by life insurance companies, including life, annuities, health, accident and hospital insurance.

(f) A credit life insurance agent is hereby defined to be a person engaged in selling any or all of the following types of insurance or collateral security for a loan in connection with which such insurance is written:

(1) Credit term life;

(2) Credit accident and health; and

(3) Hospital insurance.

(g) An accident and health insurance agent is hereby defined to be a person engaged in the business of selling accident and health insurance and hospital insurance as defined in G.S. 58-72(3).

(h) A hospital or medical care agent is hereby defined to be a person representing a hospital or medical service association selling prepaid hospital or medical care service.

(i) A fire and casualty insurance agent is hereby defined to be a person engaged in the business of selling any type of insurance offered by a fire and casualty company.

(j) A credit insurance agent is hereby defined to be a person engaged in the business of selling credit insurance as defined in G.S. 58-72(17) not including credit life, credit accident and health or hospital insurance.

(k) A physical damage insurance agent is hereby defined to be a person engaged in the business of selling physical damage insurance on a motor vehicle.

(l) A title insurance agent is hereby defined to be a person engaged in the business of selling title insurance.

(m) An insurance adjuster is hereby defined to be any individual, who for salary, fee, commission, or other compensation of any nature, as an independent contractor, or as an employee of an independent contractor or as an employee

of an insurer or as an adjuster for any insured investigates or reports to his principal relative to claims arising under insurance contracts other than life or annuity. It shall be unlawful and cause for revocation of license for a licensed insurance adjuster to engage in the practice of law.

(n) An attorney-at-law who adjusts insurance losses from time to time incidental to the practice of his profession, an adjuster of marine losses, or a special agent who adjusts for companies for which he is licensed as agent is not deemed to be an "adjuster" for the purposes of this Chapter.

(o) In this Chapter, unless the context otherwise requires, a motor vehicle damage appraiser is hereby defined to be an individual who for salary, fee, commission, or other compensation of any nature or as an independent contractor or as an employee of an independent contractor regularly investigates or advises relative to the nature and amount of damage to motor vehicles located in this State or the amount of money deemed necessary to effect repairs thereto and is not

(1) An adjuster licensed to adjust insurance claims in this State;
(2) An agent for an insurance company who is not required by law to be licensed as an adjuster;
(3) An attorney-at-law who is not required by law to be licensed as an adjuster; and
(4) A person who incident to his regular employment in the business of actually repairing defective or damaged motor vehicles investigates and advises relative to the nature and amount of motor vehicle damage or the amount of money deemed necessary to effect repairs thereto.

(p) Nothing in the above definitions shall be construed to prohibit any individual from applying for and upon passing any required examination from receiving license under any or all of the above definitions or classifications.

(q) A regular salaried officer or employee of a licensed mutual or reciprocal insurer who travels for his insurer in this State shall not be deemed an insurance agent if

(1) He has other duties than soliciting insurance,
(2) Any policies of insurance written by him are signed by a licensed insurance agent who is a bona fide resident of this State, and
(3) He receives no commission or other compensation directly dependent upon the amount of business obtained.

(r) Nothing in this section shall be construed to in any way prevent or restrict any insurance agent, general agent, or adjuster from continuing to engage in the business of selling the same kind and type of insurance as authorized by the license now held by him on or after April 1, 1957, except as provided in G.S. 58-41.1(b).

(s) A producer of record is hereby defined to be an individual who is licensed as a fire and casualty insurance agent and as a resident insurance broker under the insurance laws of this State and who is designated by an assigned-risk applicant as the producer of record on an assigned-risk application. (1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 1; 1957, c. 299; 1965, c. 1047; 1971, c. 757, s. 2; c. 926, s. 1.)

Editor's Note. — For changes made by the 1947 act in the laws relating to insurance agents, brokers and adjusters, see 25 N.C.L. Rev. 441.

Insurance Broker Agent of Insured. — An insurance broker is primarily the agent of the person who first employs him, and he is the agent of insured as to all matters within the scope of his employment, and acts or knowledge of such broker or agent will be binding on, or imputed to, insured and not to the company. Williams v. Canal Ins. Co., 21 N.C. App. 658, 205 S.E.2d 331 (1974).

Cited in Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

§§ 58-39.5, 58-39.6: Repealed by Session Laws 1951, c. 105, s. 1.

§ 58-40. Agents and others must procure license. — (a) Every agent of any insurance company authorized to do business in this State shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office, showing that the company for which he is agent is licensed to do business in this State and that he has been appointed an agent of such company as defined in G.S. 58-39.4 and is duly authorized to act for such company within the scope of the agency designated on such license.

(b) Every insurance adjuster shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that he is duly authorized to act as an adjuster.

(c) Every motor vehicle damage appraiser shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that he is duly authorized to act as a motor vehicle damage appraiser.

(d) Every such agent, motor vehicle damage appraiser, or adjuster, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit insurance or with whom he deals as an adjuster or motor vehicle damage appraiser. (1899, c. 54, s. 81; 1901, c. 391, s. 7; 1903, c. 438, s. 8; c. 774; Rev., s. 4706; 1915, c. 109, s. 7; c. 166, s. 1; C. S., s. 6298; 1951, c. 105, s. 1; 1953, c. 1043, s. 2; 1971, c. 757, s. 3.)

Cross Reference. — As to punishment for violating this section, see § 58-47.

Validity of Contract When Agent Not Licensed. — Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another state which is unauthorized to write it here, because of not having obtained the license required by law, the policy is valid as to the right of action of the insured thereon. T.T. Hay & Bro. v. Union Fire Ins. Co., 167 N.C. 82, 83 S.E. 241 (1914).

Agent of Fraternal Insurance Order. — This section is applicable to all agents including an organizer of a fraternal insurance order operating in North Carolina. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Cited in Charleston & W. Carolina Ry. Co. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934); Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 58-40.01. Companies writing automobile insurance to notify Commissioner upon termination of relationship with agent. — Whenever any insurance company writing automobile insurance shall cancel its relationship with a licensed North Carolina agent or whenever the relationship between the agent and the company is in any way terminated, the company shall notify the Commissioner of Insurance. The notification to the Commissioner shall state the number of policies written through the agent, as well as the number of automobiles covered by said policies, and shall further state whether or not the termination was at the instance of the company or of the agent. If the termination was at the instance of the company, then the notification shall further state the specific reason for the termination. (1973, c. 1083.)

§ 58-40.1. Insurance brokers must procure license. — Every insurance broker shall be required to obtain annually from the Commissioner a license under the seal of his office, showing that he is authorized to procure insurance through duly authorized agents of insurers for which he is not authorized to act as agent. Such license shall be issued to cover only those kinds of insurance authorized by his agent's license. Every such broker shall, on demand, exhibit his license to any representative of the Insurance Department or to any person from whom he shall solicit insurance. (1947, c. 922.)

§ 58-40.2. Bond required of brokers. — (a) Every applicant for a resident broker's license or for the renewal thereof shall file with the application and shall thereafter maintain in force while so licensed a bond in favor of the State of

North Carolina for the use of aggrieved parties, executed by an authorized corporate surety approved by the Commissioner, in the amount of one thousand dollars ($1,000). The bond may be continuous in form, and total aggregate liability on the bond may be limited to the payment of five thousand dollars ($5,000). The bond shall be conditioned on the accounting by the broker to any person requesting the broker to obtain insurance, for moneys or premiums collected in connection therewith, or to any insurer or association of insurers under any plan or plans for the placement of insurance under the laws of North Carolina.

(b) Any such bond shall remain in force until the surety is released from liability by the Commissioner, or until the bond is canceled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon 30 days' advance notice in writing filed with the Commissioner. (1947, c. 922; 1951, c. 781, s. 6; 1971, c. 950.)

Editor's Note. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-40.3. Broker's authority and commissions. — (a) A broker, as such, is not an agent or other representative of an insurer, and does not have power, by his own act, to bind an insurer for which he is not agent upon any risk or with reference to any insurance contract.

(b) An insurer or agent shall have the right to pay to a broker licensed under this Chapter, and such broker shall have the right to receive from the insurer or agent, the customary commissions upon insurance placed in the insurer by the broker. (1947, c. 922.)

Broker as Agent of Insured. — An insurance broker is primarily the agent of the person who first employs him, and he is the agent of insured as to all matters within the scope of his employment, and acts or knowledge of such broker or agent will be binding on, or imputed to, insured and not to the company. Williams v. Canal Ins. Co., 21 N.C. App. 658, 205 S.E.2d 331 (1974).

§ 58-40.4. Salaried officers not required to be licensed. — A regular salaried officer or employee of an insurer authorized to do business in this State shall not be deemed to be an insurance agent where his only activity in the solicitation of insurance is confined to the rendering of assistance to or on behalf of a licensed insurance agent; provided that such salaried officer or employee devotes substantially all of this time to activities other than the solicitation of applications for insurance or annuity contracts and receives no commission or other compensation directly dependent upon the amount of insurance obtained. (1953, c. 1043, s. 3.)

§ 58-40.5. Exceptions to requirements for licensing. — Nothing contained in Article 3 of Chapter 58 shall be construed as prohibiting the purchase of insurance by, or requiring the licensing of, a person who arranges the purchase of insurance to cover property in which he or his employer has an insurable interest, provided such insurance is issued through an agent duly licensed under this Article. (1953, c. 1043, s. 4.)

What Constitutes Insurable Interest. — As a general rule, anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972).

§ 58-40.6. Motor vehicle damage appraiser's qualifications. — An individual desiring to be licensed as a motor vehicle damage appraiser must

apply to the Commissioner for issuance of said license on forms prescribed by the Commissioner. Before issuing a license, the Commissioner shall satisfy himself that such license if issued shall serve the public interest and that the individual applying for the license as a motor vehicle damage appraiser:

(1) Be 21 years of age or over;
(2) Be a bona fide resident of and actually reside in this State except as provided in G.S. 58-51.2;
(3) Be a trustworthy person;
(4) Has not willfully violated any of the insurance laws of this State;
(5) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the Commissioner that he possess the competence necessary to fulfill the responsibilities of a motor vehicle damage appraiser; and
(6) Has advanced the fees provided in G.S. 105-228.7. (1971, c. 757, s. 4.)

§ 58-41. Agent's and adjuster's qualifications. — Before a license is issued to an insurance agent, general agent, or insurance adjuster in this State, the agent, general agent, or adjuster shall apply for license on forms to be prescribed by the Commissioner. In all cases where application is made for the license mentioned herein by an insurance agent or general agent, the company for which the agent or general agent desires to act shall also apply for the license on forms to be prescribed by the Commissioner. Upon the filing of an application of an insurance adjuster there shall also be an application, as above prescribed, by the insurance company for which that adjuster proposes to adjust in the event that the adjuster is to be an employee of that company. Upon the filing of an application of an adjuster who is to work as an employee of any person, firm, or corporation other than an insurance company, then the employer shall make an application on form prescribed by the Commissioner. Before he issues a license to such agent, general agent, or insurance adjuster, the Commissioner shall satisfy himself that such license, if issued, shall serve the public interest and that the person applying for the license as an agent, general agent, or insurance adjuster:

(1) Be 18 years of age or over;
(2) Meet residence requirements as follows:
    a. For insurance adjusters: be a bona fide resident of and actually reside in this State except as provided in G.S. 58-51.2.
    b. For agents and general agents: be a bona fide resident of and actually reside in this State for a period of 12 months next preceding the date when he applies for license, except as provided in G.S. 58-43: Provided, however, that the said 12-month waiting period shall not apply if the applicant for license files a good and sufficient bond of one thousand dollars ($1,000) with the Commissioner of Insurance, which bond shall be subject to forfeiture upon a finding by the Commissioner of Insurance that the licensed person or agent has moved his domicile or residence from this State within the period of the year for which license was issued; provided, however, that no such agent shall be required to file more than one bond under this section, irrespective of the number of licenses issued to him or the number of companies he may represent. Upon such forfeiture, the Commissioner of Insurance shall pay said penal amount of such bond to the board of education of the county where the agent resided. The provisions of this paragraph shall also be applicable to the agents of hospitals and medical and/or dental service corporations operating under Chapter 57 of the General Statutes, as amended. In lieu of the requirements of this paragraph that all agents shall file the bond herein prescribed, all insurance companies licensed to write

accident, health or hospitalization insurance in this State may file a blanket bond covering such of their agents who are duly authorized to sell accident, health or hospitalization insurance.

(3) Successfully pass an examination as required under G.S. 58-41.1;

(4) Be a trustworthy person;

(5) Has not willfully violated any of the insurance laws of this State;

(6) Has had special education, training or experience of sufficient duration and extent reasonably to satisfy the Commissioner that he possesses the competence necessary to fulfill the responsibilities of an agent, general agent or adjuster: Provided, that upon the expiration of any license of an agent, general agent, or insurance adjuster, the Commissioner of Insurance may grant a license to such agent, general agent, or insurance adjuster for a period not exceeding 12 months, upon an application of the company desiring to license such agent, or general agent, or upon the application of the employer of such insurance adjuster, and without any application from the agent, general agent, or insurance adjuster, upon such forms and in accordance with such rules as may be determined by the Commissioner of Insurance and upon the payment by either the insurance company or the agent, general agent, or insurance adjuster of the proper fees.

No license may be issued to any agent whose premium writings represented by the premiums on contracts of insurance signed, countersigned, issued or sold by him or the agency employing him for the general public during the preceding year shall not exceed those on insurance signed, countersigned, issued or sold by the agency covering his own property or life and the property or lives of members of his immediate family, his employer, his employees, and stockholders or employees of his employer. This limitation shall not apply to agents originally licensed and duly qualified prior to April 1, 1945.

In addition to the bond requirements of paragraph b of subdivision (2) of this section, all agents licensed to sell accident, health or hospitalization insurance in this State or certificates or service plans of a medical and/or dental service corporation shall be required to file with the Commissioner of Insurance a bond in the amount of five hundred dollars ($500.00), which shall be subject to forfeiture in whole or in part upon a finding made by the Commissioner of Insurance that such agent has wilfully misrepresented the terms of an accident, health or hospitalization insurance policy, or service plan or certificate of a medical and/or dental service corporation, offered for sale; provided, however, that no such agent shall be required to file more than one bond under this section, irrespective of the number of licenses issued to him or the number of companies he may represent. Upon such forfeiture being made final by the Commissioner of Insurance or his authorized deputy, the forefeiture shall be paid to the board of education of the county of the agent's residence. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7; c. 166, s. 7; C. S., s. 6299; 1931, c. 185; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 5; 1955, c. 850, ss. 1, 4; 1957, c. 96; 1961, c. 1149; 1971, c. 1231, s. 1.)

Opinions of Attorney General. — Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 321 (1969).

Employment Security Law. — An insurance agent is within the Employment Security Law. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939).

Cited in Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 58-41.1. Examinations for license. — (a) Each applicant for license as agent, general agent or adjuster shall, prior to the issuance of any such license, personally take and pass to the satisfaction of the Commissioner an examination

in writing given by the Commissioner as a test of his qualifications and competence; but this requirement shall not apply to:

(1) Applicants for license under G.S. 58-41.2 and as agents for companies or associations specified in G.S. 58-131.9;

(2) Applicants who have, within the three-year period next preceding the date of application, not including time spent in military service of the United States during war, been licensed in this State in the same capacity and to engage in the same kinds of insurance for which they were previously licensed;

(3) Applicants for an agent's, general agent's or adjuster's license covering the same kinds of insurance as authorized by the license then held by them except as provided in subsection (b) of this section;

(4) Applicants for license to write ocean marine insurance whenever the Commissioner deems the applicant to be qualified by past experience to deal in such insurance;

(5) Applicants (who are bona fide residents and actually residing in this State) for an agent's, general agent's, or adjuster's license covering the same kinds of insurance as authorized by the license or certificate granted him upon the successful passing of a written examination given by the insurance department of another state, or by the American College of Life Underwriters, Life Underwriters Training Council, American Institute of Property and Liability Underwriters, Institute of Insurance of America, or any insurance institute conducted at a recognized college or university in the State of North Carolina and meeting the standards as approved by the Commissioner of Insurance;

(6) Applicants for license as credit life insurance agents, credit accident and health insurance agents and credit insurance agents as defined in subdivision (17) of G.S. 58-72.

(b) The Commissioner may require any licensed agent, general agent or adjuster to take and successfully pass an examination in writing, testing his competence and qualifications as a condition to the continuance or renewal of his license, if the licensee has been guilty of any violation of any provision of this Chapter. If a person fails to pass such an examination, the Commissioner shall revoke all licenses issued in his name and no license shall be issued until such person has successfully passed an examination as provided in this Chapter.

(c) Each examination shall be as the Commissioner prescribes and shall be of sufficient scope to test the applicant's knowledge of the terms and provisions of the policies or contracts of insurance he proposes to effect or types of claims or losses he proposes to adjust, and of the duties and responsibilities of and the laws of this State applicable to such a license.

(d) The answers of the applicant to any such examination shall be written by the applicant under the Commissioner's supervision. The Commissioner shall give examinations at such times and places within this State as he deems necessary reasonably to serve the convenience of both the Commissioner and applicants. The Commissioner shall require a waiting period of at least 30 days' duration before giving a new examination to an applicant who has failed to pass a previous similar examination.

(e) The Commissioner shall collect in advance the examination fee provided in G.S. 105-228.7.

(f) Upon the filing of the application for the license as insurance adjuster and the advance payment of the examination fee referred to above and upon the filing with the Commissioner of a certificate signed by the employer of the applicant certifying that the applicant is a person of good character and is employed by the signer of a certificate and will operate as a student or learner under the instruction and general supervision of a licensed insurance adjuster, and that the employer will be responsible for the adjustment acts of the learner

during the learning period, the Commissioner may issue to the applicant a learner's permit authorizing the applicant to act as an insurance adjuster for a learning period of 90 days without a requirement of any other or additional license; provided that not more than one learner permit shall ever be issued to one individual. (1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 6; 1969, c. 1206; 1971, c. 926, s. 2.)

§ 58-41.2. Limited licenses. — (a) The Commissioner shall issue limited licenses to persons requesting to be licensed:

(1) As agents for any type of insurance to persons who continue to represent an insurance company solely for the purpose of servicing unexpired contracts of insurance.

(2) As travel insurance agents to employees of common carriers of persons or to individuals or employees of persons engaged in selling transportation on such common carriers.

(b) Travel insurance agents are restricted to the sale of insurance to individuals entitled to transportation on a common carrier, as follows:

(1) Transportation ticket policies of accident insurance.

(2) Baggage insurance on the personal effects of such individuals while in transit. (1947, c. 922; 1953, c. 1043, s. 7.)

§ 58-41.3. Temporary license. — (a) The Commissioner may issue an agent's, general agent's or broker's temporary license in the following circumstances:

(1) To applicants for licensing as agent of a life insurer pending the passing of the examination provided for in G.S. 58-41.1;

(2) To the personal representative of a deceased licensed agent, general agent or broker, or to his surviving spouse or to some other proper person in case the personal representative or surviving spouse does not apply or is not qualified therefor;

(3) To an employee, legal guardian or spouse of a licensed agent, general agent or broker becoming disabled because of sickness, insanity or injury, or to some other proper person;

(4) To an employee, spouse or other proper person as designated by a licensed agent who is called into the armed services.

(b) An individual to be eligible for any such temporary license must be qualified as for a permanent license except as to experience, training or the taking of the examination.

(c) The fee paid to the Commissioner for issuance of a temporary license as specified in G.S. 105-228.7 shall be credited toward the fee required for a permanent license which is issued to replace the temporary license prior to the expiration of such temporary license.

(d) No such temporary license shall be effective for more than 90 days in any 12-month period and shall automatically terminate upon such licensee's failing the examination required in G.S. 58-41.1. The Commissioner may refuse so to license again any person who has previously held a temporary license.

(e) An individual requesting a temporary license on account of death or disability of an agent, general agent or broker shall not be so licensed for any insurer as to which such agent, general agent or broker was not licensed at the time of death or commencement of disability. (1947, c. 922; 1953, c. 1043, s. 8.)

§ 58-41.4. Employment in agency. — No person shall be issued an agent's license to enter the employment of any agency or person, which agency or person is at that time found by the Commissioner of Insurance to be in violation of any of the insurance laws of this State, or which has been in any manner disqualified under the laws of this State to engage in the insurance business. (1953, c. 1043, s. 9.)

§ 58-42. Revocation of license. — When the Commissioner is satisfied that any insurance agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker or nonresident broker licensed by this State has willfully violated any of the insurance laws of this State or regulation of the Commissioner, or has willfully overinsured property or has willfully misrepresented any policy of insurance, or has dealt unjustly with or willfully deceived any person in regard to any insurance policies, or has exercised coercion in obtaining an application for or in selling insurance, or, on demand, has failed or refused to pay over or deliver to the company which he represents, or has represented, any money or property in his hands belonging to the company, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in this Chapter, or has obtained or attempted to obtain any license through willful misrepresentation or fraud, the Commissioner may immediately suspend his license or licenses and shall forthwith give to such licensee 10 days' notice of the charge or charges and of a hearing thereon, and if the Commissioner finds there has been any of the violations hereinbefore set forth, he shall specifically set out such finding and shall revoke the license of such agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker or nonresident broker and his license for all the companies which he represents in this State. Such agent, general agent, special agent, adjuster, motor vehicle damage appraiser, broker, or nonresident broker shall have the right to have such revocation reviewed as provided in G.S. 58-9.3. For the purposes of investigation under this section the Commissioner shall have all the power conferred upon him by G.S. 58-44.4. (1913, c. 79, ss. 2, 3; 1915, c. 166, s. 7; C. S., s. 6300; 1929, c. 301, s. 1; 1943, c. 434; 1945, c. 458; 1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1971, c. 757, s. 5.)

Cross Reference. — As to insurance agents and brokers wrongfully converting money being guilty of larceny, see § 14-96.

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right. — Former § 143-317(3) showed that former § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insurance Law." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district court divisions of the General Court of Justice." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Motions for Continuance and Bill of Particulars Are Addressed to Commissioner's Discretion. — In a hearing before the Commissioner of Insurance in proceedings for the revocation of an agent's license, the agent having been given more than the 10-day statutory notice, motions for a continuance and for a bill of particulars are addressed to the sound discretion of the Commissioner, and the denial of the motions will not be disturbed in the absence of a showing of abuse. Elmore v. Lanier, 270 N.C. 674, 155 S.E.2d 114 (1967).

Quoted in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-42.1. "Twisting" with respect to insurance policies defined; penalties. — Any insurer, or any agent of any insurer, who shall engage in twisting, as defined in this section, shall be subject to the provisions of G.S. 58-37 and 58-38 or G.S. 58-44.4 and 58-44.6. As used in this section "twisting" shall mean the willful, material misrepresentation of an insurance contract, whereby an insured is deceived and induced to cancel or terminate insurance in force to such insured's detriment. (1961, c. 823.)

§ 58-43. Nonresident agents forbidden; exception. — No nonresident of the State shall be licensed as an agent to do business in the State except as a special agent or organizer, and except as an agent licensed to sell life insurance and

annuities only, and then only when he reports his business as North Carolina business to some general or district agent of his company in the State, or having territory within the State. No such nonresident shall be licensed to represent a life insurance company in this State unless he is licensed to represent the same company in his home state and meets the licensing requirements of this Chapter. (1899, c. 54, s. 108; 1903, c. 438, s. 11; Rev., s. 4707; C. S., s. 6301; 1945, c. 458; 1947, c. 922; 1955, c. 850, s. 2.)

§ 58-44. Resident agents required. — All business done in this State by insurance companies doing the business of insurance as defined in G.S. 58-72, shall be transacted by their regularly authorized agents residing in this State, or through applications of such agents; and all policies issued by insurance companies doing the business of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72, must be countersigned by such agents; provided, however, that this section shall not apply to bid bonds issued by any such company in connection with any public or private building or construction project. It shall be unlawful for any salaried officer, manager or other representative of any such company to transact for his company any of the business of a licensed agent unless he himself shall be a bona fide resident licensed agent. (1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; Rev., s. 4810; 1911, c. 196, s. 5; 1913, c. 140, s. 3; C. S., s. 6302; 1921, c. 136, s. 3; 1925, c. 70, s. 1; 1945, c. 458; 1957, c. 548; 1959, c. 1013.)

Cited in Charleston & W. Carolina Ry. Co. v. Robert G. Lassiter & Co., 207 N.C. 408, 177 S.E. 9 (1934).

§ 58-44.1. Agents not to pay commissions to nonresidents or unlicensed persons. — No licensed agent of any insurer shall pay directly or indirectly, any commission or brokerage or other valuable consideration on account of any policy of insurance on any risk in this State to any person not licensed in this State to act as agent for the same kind of insurance, provided however that with respect to the kinds of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72 an agent may pay to a licensed nonresident broker not exceeding fifty per centum (50%) of the regular commissions allowed upon the issuance of such policies. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C. S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; 1947, c. 922.)

§ 58-44.2. Licensing nonresident brokers. — The Commissioner may license a nonresident as an insurance broker to represent companies doing the business of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72, upon application made in the form prescribed by the Commissioner, and upon such applicant's filing an affidavit setting forth that he has not after January 1, 1955, and will not during the period of the license solicit, directly or indirectly in this State, nor will he place any insurance on any risk located in this State except through licensed agents of companies licensed to do business in this State, that he is a bona fide broker, and proposes to hold himself out as such, and that neither he nor any member of the agency or corporation is an employee or active officer of an insurance company. The fee for such license shall be as fixed in the Revenue Act. For any violation of the terms on which such license is issued the Commissioner may revoke the same. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C. S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458; 1955, c. 902.)

§ 58-44.3. Discrimination forbidden. — No company doing the business of insurance as defined in subdivisions (3) through (22), inclusive, of G.S. 58-72, nor its agents, shall make any discrimination in favor of any person, and all

provisions of this Chapter prohibiting discrimination by companies doing the business of insurance as defined in subdivisions (1) and (2) of G.S. 58-72, shall equally apply to the companies referred to herein and to their agents. (1903, c. 488, s. 2; 1905, c. 170, s. 2; Rev., s. 4766; C. S., s. 6430; 1923, c. 4, s. 70; 1925, c. 70, s. 6; 1945, c. 458.)

§ 58-44.4. Revocation of license for violation; power of Commissioner. — When the Commissioner has information of a violation of any of the provisions of G.S. 58-44, 58-44.1, 58-44.2, 58-44.3, and 58-169, he shall immediately investigate or cause to be investigated such violation, and if any such insurance company has violated any of said provisions he may immediately revoke its license for not less than three nor more than six months for a first offense, and for each offense thereafter for not less than one year. If a licensed insurance agent violates or causes to be violated any of the provisions of said sections, he may for the first offense have his license revoked for all companies for which he has been licensed for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and he shall not thereafter be licensed for any company for one year from the date of the revocation. For the purpose of enforcing the provisions of said sections the Commissioner is authorized and empowered to examine persons, administer oaths, and require production of papers and records. A failure or refusal on the part of any such insurance company, licensed to do business in this State, or representative thereof, to appear before the Commissioner when requested to do so, or to produce records and papers, or answer under oath, subjects such company, or representative, to the penalties of this section. (1903, c. 488, ss. 3, 4; Rev., s. 4767; C. S., s. 6431; 1945, c. 458.)

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right. — Former § 143-317(3) showed that former § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insurance Law." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district court divisions of the General Court of Justice." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-44.4A. Notice and hearing prior to revocation of license, etc. — In all cases where a license may be suspended or revoked by the Commissioner of Insurance pursuant to the provisions of this Chapter, such suspension or revocation of such license shall not be ordered until after notice and opportunity to be heard has been given such licensee. (1971, c. 1080, s. 1.)

§ 58-44.5. Rebates prohibited. — No insurer or employee thereof, and no broker or agent shall knowingly charge, demand or receive a premium for any policy of insurance except in accordance with the applicable filing approved by the Commissioner of Insurance. No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit, or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance. No insured named in a policy of insurance, nor any employee of such insured shall knowingly receive or accept, directly or indirectly, any such rebate, discount, abatement or reduction

of premium, or any special favor or advantage or valuable consideration or inducement. Nothing herein contained shall be construed as prohibiting the payment of commissions or other compensation to duly licensed agents and brokers, nor as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits. As used in this section the word "insurance" includes suretyship and the word "policy" includes bond. (1943, c. 170; 1951, c. 781, s. 2.)

Editor's Note. — For brief comment on this section, see 29 N.C.L. Rev. 398.

Stated in Goforth v. Avemco Life Ins. Co., 368 F.2d 25 (4th Cir. 1966).

§ 58-44.6. Imposition of civil penalty. — Whenever any person, agent, adjuster, firm, corporation or company, subject to the provisions of Chapter 57 of the General Statutes, as amended, and the provisions of Chapter 58 of the General Statutes, as amended, shall do or commit any act or shall fail to comply with any requirements prohibited or required by said Chapters, by virtue of which any license is subject to suspension or revocation, the Commissioner of Insurance, in addition to or in lieu of any other official action that may be taken by him, may, in his discretion, inflict a civil penalty in an amount to be fixed by said Commissioner of Insurance not in excess of twenty-five thousand dollars ($25,000), and if said civil penalty is not paid within 10 days from the date of the finding and order inflicting said penalty, then said Commissioner of Insurance may revoke any license of such person, agent, adjuster, firm, corporation or company subject to the provisions of said Chapters. The Commissioner of Insurance before imposing any penalty or revoking any license shall conduct a hearing and shall make all necessary findings of fact in regard to the matter under inquiry. In giving notices, conducting hearings and producing evidence, as well as examining records, the Commissioner of Insurance shall have all the power and authority and shall follow the procedures conferred and given in G.S. 58-54.6. Any person, agent, adjuster, firm, corporation or company subject to said Chapters, whose rights are affected by the findings and order of the Commissioner of Insurance, shall have the right to appeal to the Superior Court of Wake County, and upon such appeal the record shall be certified to the Superior Court of Wake County, and the procedure and authority contained in G.S. 58-9.3 shall be followed and shall govern. The commencement of proceedings, as herein authorized, shall not operate as a stay of the Commissioner's order or decision, unless so ordered by the court. (1955, c. 850, s. 11.)

Constitutionality. — The attempted grant to the Commissioner of Insurance of judicial power to impose upon an insurance agent for a violation of the insurance laws a penalty, varying in the Commissioner's discretion from a nominal sum to $25,000, violates the State Constitution, there being no reasonable necessity for conferring such judicial power upon the Commissioner. State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968). But see State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

The Commissioner of Insurance is a real party in interest and is entitled to bring an action in the superior court to enforce the collection of a civil penalty imposed pursuant to this section. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

Penalty to Be Paid Over to State Treasurer. — By clear implication of §§ 58-62 and 58-63, the amount of any monetary civil penalty imposed and collected as authorized by this section should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-44.7. Rebate of premiums on credit life and credit accident and health insurance; retention of funds by agent. — It shall be unlawful for any

insurance carrier or officer or agent of an insurance company writing credit life and credit accident and health insurance, as defined in G.S. 58-195.2 and 58-254.8, or combination credit life, accident and health, hospitalization and disability insurance in connection with loans, to permit any agent or representative of such company to retain any portion of funds received for the payment of losses incurred, or to be incurred, under such policies of insurance issued by such company, or to pay, allow, permit, give or offer to pay, allow, permit or give, directly, or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium, to any loan agency, insurance agency or broker, or to any creditor of the debtor on whose account the insurance was issued, or to any person, firm or corporation which received a commission or fee in connection with the issuance of such insurance: Provided, that this section shall not prohibit the payment of commissions to a licensed insurance agent or agency on the sale of a policy of credit life and credit accident and health insurance, or combination credit life, accident and health, hospitalization and disability insurance in connection with loans.

It shall be unlawful for any broker, agent, agency or insured named in any such policy, or for any loan agency or broker, or any agent, officer or employee of any loan agency or broker to receive or accept, directly or indirectly, any such rebate, discount, abatement, credit or reduction of the premium as set out in this section. (1955, c. 1341, s. 1.)

A bank could not have legally made a refund of money which had gone, even through its hands, to an insurance company as premiums on credit life insurance. It is unlawful for an insurance company writing credit life insurance in connection with a loan to permit any agent to pay any rebate or refund any premiums without the consent of the policyholders. Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co., 271 N.C. 662, 157 S.E.2d 352 (1967).

§ 58-44.8. Agents prohibited from representing unauthorized companies. — No licensed agent of any insurer shall solicit anywhere in the boundaries of the State of North Carolina, or receive or transmit an application or premium of insurance, for a company not authorized to do business in the State, except as provided in G.S. 58-53.1. (1957, c. 547.)

§ 58-45. Agents personally liable, when. — Any agent representing an insurer is personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any company not authorized to do business in the State. A person or citizen of the State who fills up or signs any open policy, certificate, blank or coupon of, or furnished by, an unlicensed company, agent, or broker, the effect of which is to bind any insurance in an unlicensed company on property in this State, is the agent of such company, and personally liable for all licenses and taxes due on account of such transaction. (1899, c. 54, s. 70; 1903, c. 438, s. 7; Rev., s. 4813; C. S., s. 6303; 1947, c. 922.)

§ 58-46. Payment of premium to agent valid; obtaining by fraud a crime. — Any agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment, of a premium of insurance, shall punished by a fine of not less than one hundred ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned for not more than one year. (1899, c. 54, s. 69; Rev., ss. 3486, 4814; C. S., s. 6304; 1947, c. 922.)

Payment to Agent or Broker as Payment to Company. — Payment of the initial premium on a policy of life insurance to one who is a soliciting agent or broker of the company to solicit the insurance and deliver the policy, constitutes payment to the company by virtue of this section.

Creech v. Sun Life Assurance Co. of Canada, 224 N.C. 144, 29 S.E.2d 348 (1944).

Where Broker Fails to Deliver Funds. — Where the insurer has credited the amount of the unearned premiums to its broker's account, who in turn has credited the amount to account of the broker who has procured the employer's application for the insurance, the insurer is liable to the employer for the amount of the unearned premiun not actually paid to the employer by the broker. Hughes v. Lewis, 203 N.C. 775, 166 S.E. 909 (1932).

Where Policy Requires Receipt. — Where a policy provided that premiums were payable to a duly authorized agent only in exchange for insurer's official receipt and where plaintiff's evidence showed payment of a note given for a premium to insurer's agent without obtaining the note or insurer's official receipt, and there was no evidence that insurer received any part of the payment, in insured's action to recover the premium paid after insurer had declared the policy forfeited, it was held that insurer's motion to nonsuit was properly allowed, payment to the agent under the circumstances not constituting payment to insurer. Mills v. New York Life Ins. Co., 209 N.C. 296, 183 S.E. 289 (1936).

§ 58-47. Representing unlicensed company prohibited; penalty. — If any person shall unlawfully solicit, negotiate for, collect or transmit a premium for a contract of insurance or act in any way in the negotiation or transaction of any unlawful insurance with an insurance company not licensed to do an insurance business in North Carolina, he shall be guilty of a misdemeanor and upon conviction shall pay a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (1899, c. 54, s. 94; Rev., s. 3484; 1907, c. 1000, s. 8; C. S., s. 6305; 1945, c. 458.)

Editor's Note. — The case annotated below was decided prior to the 1945 amendment.

The purpose of this section is to protect people from harmful imposition in contracts of insurance, and the evil which the statute is designed to prevent is as threatening in the case of a bogus as a real company, perhaps more so. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Section Applies to Agents of Fraternal Insurance Orders. — The agents of fraternal insurance orders are punishable under this section. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911), wherein the conduct of an agent assuming to represent a fraternal insurance order was held to come within the statute.

Same — Indictment. — An indictment under this section will not be held fatally defective because it contains no direct averment that the fraternal order for which insurance business has been solicited is a company subject to insurance regulations. State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-48. Agent failing to exhibit license. — If any agent representing an insurer or any broker shall, on demand of any person from whom he shall solicit insurance, fail to exhibit a certificate from the Commissioner of Insurance bearing the seal of his office, and dated within one year from such demand, he shall be fined five dollars ($5.00) or imprisoned 10 days for each offense. (1899, c. 54, s. 81; Rev., s. 3485; C. S., s. 6306; 1947, c. 922.)

Commissioner Cannot Require Prosecution or Punishment. — The Commissioner of Insurance has no authority to require the solicitor to institute or prosecute a criminal action nor to require a judge to punish the defendant upon conviction. Elmore v. Lanier, 270 N.C. 674, 155 S.E.2d 114 (1967).

§ 58-49. False statements in applications for insurance. — If any agent, examining physician, applicant, or other person shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for insurance, or shall make any such statement for the purpose of obtaining any fee, commission, money or benefit from any company engaged in the business of insurance in this State, he shall be guilty of a

misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or imprisonment in the county jail for not less than 30 days nor more than one year, or by both fine and imprisonment, at the discretion of the court. The provisions of this section shall be applicable to contracts and certificates issued pursuant to Chapters 57 and 58 of the General Statutes. (1899, c. 54, s. 60; Rev., s. 3487; C. S., s. 6307; 1945, c. 458; 1947, c. 922; 1965, c. 911.)

§ 58-50. Agents signing certain blank policies. — No agent shall sign any blank contract or policy of insurance, and any agent guilty of violating this section shall, upon conviction, be fined for each offense not less than one hundred dollars ($100.00) nor more than two hundred dollars ($200.00); provided, however, that transportation ticket policies of accident insurance and baggage insurance policies may be countersigned in blank for issuance only through coin-operated machines, subject to regulations prescribed by the Commissioner. (1899, c. 54, ss. 108, 109; Rev., s. 3488; 1911, c. 196, s. 6; C. S., s. 6308; 1945, c. 458; 1947, c. 922.)

§ 58-51. Adjuster acting for unauthorized company. — If any person shall act as adjuster on a contract made otherwise than as authorized by the laws of this State, or by any insurance company or other person not regularly licensed to do business in this State, or shall adjust or aid in the adjustment, either directly or indirectly, of a claim arising under a contract of insurance not authorized by the laws of the State, he shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), or imprisoned not less than six months nor more than two years, or both, in the discretion of the court. (1899, c. 54, s. 114; Rev., s. 3482; C. S., s. 6309; 1945, c. 458; 1949, c. 958, s. 1; 1951, c. 105, s. 1.)

§ 58-51.1. Agent may adjust. — On behalf and on request of an insurer for which he is licensed, any agent may from time to time act as an adjuster and investigate and report upon claims without being required to be licensed as an adjuster, provided: In no event may any agent or agents adjust any losses in any amount where his remuneration for the sale of insurance is in any way dependent upon the adjustment of such losses. (1947, c. 922; 1951, c. 781, s. 7.)

Editor's Note. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-51.2. Nonresident adjusters and motor vehicle damage appraisers. — (a) The Commissioner may license a nonresident as an insurance adjuster upon his compliance with all the requirements of this Chapter applicable to resident adjusters. No license shall be required of an adjuster licensed as such in another state for the adjustment in this State of a single loss, or of losses arising out of a catastrophe common to all such losses: Provided such adjuster notifies the Commissioner of Insurance in writing prior to the adjusting of such loss or losses. The Commissioner of Insurance may permit an experienced adjuster, who regularly adjusts in another state and who is licensed in such other state (if such state requires a license), to act as adjuster in this State without a North Carolina license, for emergency insurance adjustment work, for a period of not exceeding 30 days, done for an employer who is an insurance adjuster licensed by the State of North Carolina or who is a regular employer of one or more insurance adjusters licensed by the State of North Carolina; provided that the employer shall furnish to the Commissioner a notice in writing immediately upon the beginning of any such "emergency insurance adjustment work."

(b) The Commissioner may license a nonresident as a motor vehicle damage appraiser upon his compliance with all the requirements of this Chapter applicable to resident motor vehicle damage appraisers and may permit an experienced motor vehicle damage appraiser who regularly appraises in another state (if such state requires a license) to act as a motor vehicle damage appraiser in this State without a North Carolina license for emergency motor vehicle damage appraisal work for a period not exceeding 30 days done for an employer who is

(1) An insurance adjuster licensed by the State of North Carolina,
(2) A motor vehicle damage appraiser licensed by the State of North Carolina,
(3) A regular employer of one or more insurance adjusters licensed by the State of North Carolina, or
(4) A regular employer of one or more motor vehicle damage appraisers licensed by the State of North Carolina;

Provided that the employer shall furnish to the Commissioner a notice in writing immediately upon the beginning of any such emergency appraisal work. (1947, c. 922; 1951, c. 105, s. 1; 1957, c. 360; 1971, c. 757, s. 6.)

§ 58-51.3. Companies and agents to transact business through licensed agents. — No insurance company, nor any agent of any insurance company, shall on behalf of such company or agent knowingly permit any person not licensed as an insurance agent as provided by law, to solicit insurance, negotiate for, collect or transmit a premium for a new contract of insurance or to act in any way in the negotiation for any contract or policy of insurance; provided, no license shall be required of the following:

(1) Persons designated by the insurance company or the insured to collect or deduct and transmit premiums or other charges for life, accident and/or health and/or hospitalization insurance, or to perform such acts as may be required for providing coverage for additional persons who are eligible under the terms of a master contract.
(2) Of an agency office employee acting within the confines of the agent's office, under the direction and supervision of the duly licensed agent and within the scope of such agent's license, in the acceptance of request for insurance and payment of premiums and the performance of clerical, stenographic, and similar office duties.
(3) Of those persons described as a regular salaried officer or employee of an insurer or reciprocal as defined in this Article. (1949, c. 1120; 1953, c. 1043, s. 10.)

Editor's Note. — For brief comment on section, see 27 N.C.L. Rev. 461.

§ 58-51.4. Lending institutions. — Nothing in this act shall prohibit or prevent lending institutions or their officers or employees from acting as insurance agents as heretofore. (1953, c. 1043, s. 11.)

Editor's Note. — The words "this act" in the section evidently refer to Chapter 1043 of the 1953 Session Laws, which also amended or inserted §§ 58-39.4, 58-40, 58-40.4, 58-40.5, 58-41 to 58-41.4, 58-51.3.

§ 58-52. Agent, adjuster, etc., acting without a license or violating insurance law. — If any person shall assume to act either as principal, agent, broker, adjuster or motor vehicle damage appraiser without license as is required by law or pretending to be a principal, agent, broker, adjuster or

licensed motor vehicle damage appraiser, shall solicit, examine or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, investigate or advise relative to the nature and amount of damages to motor vehicles or the amount necessary to effect repairs thereto, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making or executing any contract of insurance of any kind otherwise than the law permits, or as principal or agent shall violate any provision of law contained in this Chapter, the punishment for which is not elsewhere provided for, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned for not less than one nor more than two years, or both, at the discretion of the court. (1899, c. 54, s. 115; Rev., s. 3490; C. S., s. 6310; 1945, c. 458; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1971, c. 757, s. 7.)

§ 58-52.1. Process against nonresident licensees. — (a) Each licensed nonresident agent, adjuster, motor vehicle damage appraiser, or broker shall by the act of acquiring such license thereby be deemed to appoint the Commissioner as his attorney to receive service of legal process issued against the agent, adjuster, motor vehicle damage appraiser, or broker in this State upon causes of action arising within this State.

(b) The appointment shall be irrevocable for as long as there could be any cause of action against the agent, adjuster, motor vehicle damage appraiser, or broker arising out of his insurance transactions in this State.

(c) Duplicate copies of such legal process against such agent, adjuster, motor vehicle damage appraiser, or broker shall be served upon the Commissioner either by a person competent to serve a summons, or through registered mail. At the time of such service the plaintiff shall pay to the Commissioner a fee of one dollar ($1.00), taxable as costs in the action to defray the expense of such service.

(d) Upon receiving such service, the Commissioner shall forthwith send one of the copies of the process, by registered mail with return receipt requested, to the defendant agent, adjuster, motor vehicle damage appraiser, or broker at his last address of record with the Commissioner.

(e) The Commissioner shall keep a record of the day and hour of service upon him of all such legal process. No proceedings shall be had against the defendant agent, adjuster, motor vehicle damage appraiser, or broker, and such defendant shall not be required to appear, plead or answer until the expiration of 40 days after the date of service upon the Commissioner. (1947, c. 922; 1971, c. 757, s. 8.)

§ 58-53. Informer to receive half of penalty. — The person, if other than the Commissioner of Insurance or his deputy, upon whose complaint a conviction is had for violation of the law, prohibiting insurance in or by companies not authorized to do business in the State, or for soliciting, examining, inspecting any risk, or receiving, collecting, or transmitting any premium, or adjusting or aiding in the adjustment of a loss, under a contract made otherwise than as authorized by the laws of this State, is entitled to one half of the penalty recovered therefor. (1899, c. 54, s. 93; Rev., s. 4831; C. S., s. 6311; 1945, c. 377.)

§ 58-53.1. Citizens authorized to procure policies in unlicensed foreign companies. — (a) What Applicant Must Show. — The Commissioner, upon the annual payment of a fee of twenty dollars ($20.00), may issue licenses to citizens of this State, subject to revocation at any time, permitting the person named therein to procure policies of insurance on risks in this State in foreign or alien insurance companies not authorized to transact business in the State. Before the person named in such a license may procure any insurance in such companies or on any risks in this State, he must execute and file with the Commissioner an affidavit that he is unable to procure in companies admitted to do business

in the State the amount of insurance necessary to protect such risk, and may only procure insurance under such license after he has procured insurance in companies admitted to do business in this State to the full amount which those companies are willing to write on the risk. If the person licensed under the provisions of this section procures insurance on risks of others in such nonadmitted companies he shall stamp or print in not less than 10 point regular type and in contrasting color upon the filing face and the first page of each policy so issued the words "This company is not licensed to do business in North Carolina."

(b) Account and Report. — Each person so licensed must keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the Commissioner, showing the exact amount of such insurance placed by any person, firm or corporation, the gross premium charged thereon, the companies in which the same is placed, the date and terms of the policies, and also a report in the same detail of all such policies canceled and the gross return premium thereon.

(c) Bond Filed. — Before receiving such license the applicant therefor shall execute and deliver to the Commissioner a bond in the penal sum of one thousand dollars ($1,000), with such sureties as the Commissioner may approve, with a condition that the licensee will faithfully comply with all the requirements of G.S. 58-53.1, 58-53.2 and 58-53.3, and will file with the Commissioner in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross returned premiums on such insurance canceled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the State a sum equal to five per centum (5%) of such gross premiums, less return premiums, so reported, or pay such tax at the time of taking out and delivering such policy or policies.

(d) Exemption. — A nuclear insured shall be exempt from the requirements of this and other sections of Article 3, and nothing contained in Article 3 shall be interpreted as prohibiting a nuclear insured from procuring policies of insurance on risks on its own nuclear electric generating plants and other facilities at such plants in this State in foreign or alien insurance companies not authorized to transact business in this State. (1899, c. 54, ss. 68, 95; 1903, c. 438, s. 7; c. 680; Rev., ss. 4715, 4769; C. S., s. 6425; 1945, c. 378; 1961, c. 1150, s. 1; 1971, c. 510, s. 2.)

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).

§ 58-53.2. Punishment for failure to file affidavit and statements. — If any person licensed to procure insurance in an unauthorized foreign or alien company shall procure, or act in any manner in the procurement or negotiation of, insurance in any unauthorized foreign or alien company, and shall neglect to make and file the affidavit and statements required by the preceding section [G.S. 58-53.1], he shall forfeit his license and be punished by a fine of not less than one hundred ($100.00) nor more than five hundred dollars ($500.00), or by imprisonment for not more than one year, or by both. (1899, c. 54, ss. 68, 95; Rev., ss. 3483, 4769; C. S., s. 6426; 1945, c. 378.)

Cited in State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-53.3. Tax deducted from premium; reports filed. — When any person procures insurance on any risk located in this State with an insurance company

not licensed to do business in this State, it shall be the duty of such person to deduct from the premium charged on the policy or policies issued for such insurance five per centum (5%) of the premium and remit the same to the Commissioner of Insurance of the State, at the same time reporting to the Commissioner of Insurance the name of the company or companies issuing the policy or policies, the location of the risks insured, and the premium charged. The Commissioner of Insurance shall pay the said amounts to the Treasurer of the State. If such report is not made on or before the thirtieth days of July and January of each year for the business done prior to July 1 and January 1 preceding, there shall be added to the amount of taxes thereon the sum of one per centum (1%) on the first day of each month thereafter. (1915, c. 109, s. 8; C. S., s. 6427; 1945, c. 378; 1961, c. 1150, s. 2.)

§ 58-54. Forms to be approved by Commissioner of Insurance. — It is unlawful for any insurance company doing business in this State to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the Commissioner of Insurance of North Carolina, and copies filed in the Insurance Department. (1907, c. 879; 1913, c. 139; C. S., s. 6312; 1945, c. 377.)

Validity of Unapproved Policy. — The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company. It does not say a policy shall be void unless approved by the Commissioner, but that it shall be unlawful for the company to issue such policy. Blount v. Royal Fraternal Ass'n, 163 N.C. 167, 79 S.E. 299 (1913).

ARTICLE 3A.

Unfair Trade Practices.

§ 58-54.1. Declaration of purpose. — The purpose of this Article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined. (1949, c. 1112.)

Editor's Note. — For brief discussion of this Article, see 27 N.C.L. Rev. 461.

§ 58-54.2. Definitions. — When used in this Article:

(1) "Commissioner" shall mean the Commissioner of Insurance of this State.

(2) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. (1949, c. 1112.)

§ 58-54.3. Unfair methods of competition or unfair and deceptive acts or practices prohibited. — No person shall engage in this State in any trade practice which is defined in this Article as or determined pursuant to this Article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance. (1949, c. 1112.)

§ 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined. — The following are hereby defined as unfair methods of

competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts. — Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) False Information and Advertising Generally. — Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation. — Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, Coercion and Intimidation. — Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(5) False Financial Statements. — Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock Operations and Insurance Company Advisory Board Contracts. — Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or

securities or any special or any insurance company advisory board contracts or other contracts of any kind promising returns and profit as an inducement to insurance.

(7) Unfair Discrimination.

a. Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

b. Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates.

a. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

b. Nothing in subdivision (7) or paragraph a of subdivision (8) of this section shall be construed as including within the definition of discrimination or rebates any of the following practices:

1. In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided, that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

2. In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense;

3. Readjustment of the rate of premium for a group insurance policy based on the loss or expense experienced thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

c. No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of

the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance. Nothing herein contained shall be construed as prohibiting the payment of commissions or other compensation to regularly appointed and licensed agents and to brokers duly licensed by this State; nor as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits.

(9) Advertising of Health, Accident or Hospitalization Insurance. — In all advertising of policies, certificates or service plans of health, accident or hospitalization insurance, except those providing group coverage, where details of benefits provided by a particular policy, certificate or plan are set forth in any advertising material, such advertising material shall contain reference to the major exceptions or major clauses limiting or voiding liability contained in the policy, certificate or plan so advertised. The references to such exceptions or clauses shall be printed in a type no smaller than that used to set forth the benefits of the policy, certificate or plan. In all advertising of such policies, certificates or plans which contain a cancellation provision or a provision that the policies, certificates or plans may be renewed at the option of the company or medical service corporation only, such advertising material shall contain clear and definite reference to the fact that the policies, certificates or plans are cancellable or that the same may be renewed at the option of the company only.

(10) Soliciting, etc., Unauthorized Insurance Contracts in Other States. — Soliciting, advertising or entering into insurance contracts in foreign states and any other jurisdiction in which such domestic insurer is not licensed in accordance with the laws of such state or jurisdiction, except as provided in G.S. 58-54.27. (1949, c. 1112; 1955, c. 850, s. 3; 1967, c. 935, s. 2.)

Editor's Note. — Section 12, c. 850, Session Laws 1955, made the amendment applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

§ 58-54.5. Power of Commissioner. — The Commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this State in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by G.S. 58-54.3 of this Article. (1949, c. 1112.)

§ 58-54.6. Hearings, witnesses, appearances, production of books and service of process. — (a) Whenever the Commissioner shall have reason to believe that any such person has been engaged or is engaging in this State in any unfair method of competition or any unfair or deceptive act or practice defined in G.S. 58-54.4, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of the hearing thereon to be held at the time and place fixed in the notice, which shall not be less than 10 days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the Commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the

Commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) Nothing contained in this Article shall require the observance at any such hearing of formal rules of pleading or evidence.

(d) The Commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The Commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the Commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the Superior Court of Wake County, on application of the Commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

(e) Statements of charges, notices, orders, and other processes of the Commissioner under this Article may be served by anyone duly authorized by the Commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return postcard receipt for such statement, notice, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same. (1949, c. 1112.)

Stated in State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-54.7. Cease and desist orders and modifications thereof. — (a) If, after such hearing, the Commissioner shall determine that the method of competition or the act or practice in question is defined in G.S. 58-54.4 and that the person complained of has engaged in such method of competition, act or practice in violation of this Article, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under G.S. 58-54.8(a) of this Article for filing a petition for review (by appeal) if no such petition has been duly filed within such time or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the superior court, as hereinafter provided, the Commissioner may at any time, upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the Commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require. (1949, c. 1112.)

§ 58-54.8. Judicial review of cease and desist orders. — (a) Any person required by an order of the Commissioner under G.S. 58-54.7 to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice defined in G.S. 58-54.4 may obtain a review of such order by filing in the Superior Court of Wake County, within 30 days from the date of the service of such order, a written petition praying that the order of the Commissioner be set aside. A copy of such petition shall be forthwith served upon the Commissioner, and thereupon the Commissioner forthwith shall certify and file in such court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commissioner. Upon such filing of the petition and transcript such court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the Commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the Commissioner, in whole or in part. The findings of the Commissioner as to the facts, if supported by substantial evidence, shall be conclusive.

(b) To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner, the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which, if supported by substantial evidence shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the Commissioner under G.S. 58-54.7 shall become final:

(1) Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the Commissioner may thereafter modify or set aside his order to the extent provided in G.S. 58-54.7(b); or

(2) Upon the final decision of the court if the court directs that the order of the Commissioner be affirmed or the petition for review dismissed.

(d) No order of the Commissioner under this Article or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this State. (1949, c. 1112.)

§ 58-54.9. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined. — (a) Whenever the Commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this State in any method of competition or in any act or practice in the conduct of such business which is not defined in G.S. 58-54.4, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 10 days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in G.S. 58-54.6. The Commissioner shall, after such hearing, make a report in writing in which he

shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this Article and if such method of competition, act or practice has not been discontinued, the Commissioner may, through the Attorney General of this State, at any time after 10 days after the service of such report cause a petition to be filed in the superior court of this State of the county wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite. To the extent that the order of the Commissioner is affirmed, the court shall thereupon issue its order commanding obedience to the terms of such order of the Commissioner.

(c) A transcript of the proceedings before the Commissioner including all evidence taken and the report and findings shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commissioner, the court may order such additional evidence to be taken before the Commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the Commissioner with respect thereto is to the interest of the public and that the findings of the Commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice. (1949, c. 1112.)

§ 58-54.10. Judicial review by intervenor. — If the report of the Commissioner does not charge a violation of this Article, then any intervenor in the proceedings may within 10 days after the service of such report, cause a notice of appeal to be filed in the Superior Court of Wake County for a review of such report. Upon such review, the court shall have authority to issue appropriate orders and decrees in connection therewith, including, if the court finds that it is to the interest of the public, orders enjoining and restraining the continuance of any method of competition, act or practice which it finds, notwithstanding such report of the Commissioner, constitutes a violation of this Article. (1949, c. 1112.)

§ 58-54.11. Penalty. — Any person who willfully violates a cease and desist order of the Commissioner under G.S. 58-54.7, after it has become final, and while such order is in effect, shall forfeit and pay to the Commissioner for the use of the public schools of the county or counties in which the act or acts complained of occurred a sum to be determined by the Commissioner not to exceed one thousand dollars ($1,000) for each violation, which if not paid may be recovered in a civil action instituted in the name of the Commissioner in a court of competent jurisdiction in Wake County. (1949, c. 1112.)

§ 58-54.12. Provisions of Article additional to existing law. — The powers vested in the Commissioner by this Article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive. (1949, c. 1112.)

§ 58-54.13. Immunity from prosecution. — If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must nonetheless comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this State. Any such individual may execute, acknowledge and file in the office of the Commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced. (1949, c. 1112.)

ARTICLE 3B.

Unauthorized Insurers False Advertising Process Act.

§ 58-54.14. Purpose; construction. — (a) The purpose of this Article is to subject to the jurisdiction of the Commissioner of Insurance and to the jurisdiction of the courts of this State, insurers not authorized to transact business in this State which place in or send into this State any false advertising designed to induce residents of this State to purchase insurance from insurers not authorized to transact business in this State. The General Assembly declares it is in the interest of the citizens of this State who purchase insurance from insurers which solicit insurance business in this State in the manner set forth in the preceding sentence that such insurers be subject to the provisions of this Article. In furtherance of such interest, the General Assembly in this Article provides a method of substituted service of process upon such insurers and declares in so doing, it exercises its power to protect its residents and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, 1st Session, section 340, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states; the authority provided herein to be in addition to any existing powers of this State.

(b) The provisions of this Article shall be liberally construed. (1965, c. 910.)

§ 58-54.15. Definitions. — As used in this Article:

(1) "Residents" shall mean and include person, partnership or corporation, domestic, alien or foreign.

(2) "Unfair Trade Practice Act" shall mean Article 3A of this Chapter. (1965, c. 910.)

§ 58-54.16. Unlawful advertising; notice to unauthorized insurer and domiciliary insurance supervisory official. — No unauthorized foreign or alien

insurer shall make, issue, circulate or cause to be made, issued or circulated, to residents of this State any estimate, illustration, circular, pamphlet, or letter, or cause to be made in any newspaper, magazine or other publication or over any radio or television station, any announcement or statement to such residents misrepresenting its financial condition or the terms of any contracts issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon in violation of the Unfair Trade Practice Act, and whenever the Commissioner shall have reason to believe that any such insurer is engaging in such unlawful advertising, it shall be his duty to give notice of such fact by registered mail to such insurer and to the insurance supervisory official of the domiciliary state of such insurer. For the purpose of this section, the domiciliary state of an alien insurer shall be deemed to be the state of entry or the state of the principal office in the United States. (1965, c. 910.)

§ 58-54.17. Action by Commissioner under Unfair Trade Practice Act. — If after 30 days following the giving of the notice mentioned in G.S. 58-54.16 such insurer has failed to cease making, issuing, or circulating such false misrepresentations or causing the same to be made, issued or circulated in this State, and if the Commissioner has reason to believe that a proceeding by him in respect to such matters would be to the interest of the public, and that such insurer is issuing or delivering contracts of insurance to residents of this State or collecting premiums on such contracts or doing any of the acts enumerated in G.S. 58-54.18, he shall take action against such insurer under the Unfair Trade Practice Act. (1965, c. 910.)

§ 58-54.18. Acts appointing Commissioner as attorney for service of statement of charges, notices and process; manner of service; limitation on entry of order or judgment. — (a) Any of the following acts in this State, effected by mail or otherwise, by any such unauthorized foreign or alien insurer:

(1) The issuance or delivery of contracts of insurance to residents of this State,

(2) The solicitation of applications for such contracts,

(3) The collection of premiums, membership fees, assessments or other considerations for such contracts, or

(4) Any other transaction of insurance business,

Is equivalent to and shall constitute an appointment by such insurer of the Commissioner of Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all statements of charges, notices and lawful process in any proceeding instituted in respect to the misrepresentations set forth in G.S. 58-54.16 hereof under the provisions of the Unfair Trade Practice Act, or in any action, suit or proceeding for the recovery of any penalty therein provided, and any such act shall be signification of its agreement that such service of statement of charges, notices or process is of the same legal force and validity as personal service of such statement of charges, notices or process in this State, upon such insurer.

(b) Service of a statement of charges and notices under said Unfair Trade Practice Act shall be made by any deputy or employee of the Insurance Department delivering to and leaving with the Commissioner or some person in apparent charge of his office, two copies thereof. Service of process issued by any court in any action, suit or proceeding to collect any penalty under said act provided, shall be made by delivering and leaving with the Commissioner, or some person in apparent charge of his office, two copies thereof. The Commissioner shall forthwith cause to be mailed by registered mail one of the copies of such statement of charges, notices or process to the defendant at its last known principal place of business, and shall keep a record of all statements, charges, notices and process so served. Such service of statement of charges,

notices or process shall be sufficient provided they shall have been so mailed and the defendant's receipt or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the person mailing such letter showing a compliance herewith are filed with the Commissioner in the case of any statement of charges or notices, or with the clerk of the court in which such action is pending in the case of any process, on or before the date the defendant is required to appear or within such further time as may be allowed.

(c) Service of statement of charges, notices and process in any such proceeding, action or suit shall in addition to the manner provided in subsection (b) of this section be valid if served upon any person within this State who on behalf of such insurer is

(1) Soliciting insurance, or

(2) Making, issuing or delivering any contract of insurance, or

(3) Collecting or receiving in this State any premium for insurance;

And a copy of such statement of charges, notices or process is sent within 10 days thereafter by registered mail by or on behalf of the Commissioner to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter, the name and address of the person to whom the letter is addressed, and the affidavit of the person mailing the same showing a compliance herewith, are filed with the Commissioner in the case of any statement of charges or notices, or with the clerk of the court in which such action is pending in the case of any process, on or before the date the defendant is required to appear or within such further time as the court may allow.

(d) No cease or desist order or default judgment under this section shall be entered until the expiration of 30 days from the date of the filing of the affidavit of compliance.

(e) Service of process and notice under the provisions of this Article shall be in addition to all other methods of service provided by law, and nothing in this Article shall limit or prohibit the right to serve any statement of charges, notices or process upon any insurer in any other manner now or hereafter permitted by law. (1965, c. 910.)

§ 58-54.19. Short title. — This Article may be cited as the Unauthorized Insurers False Advertising Process Act. (1965, c. 910.)

ARTICLE 3C.

Unauthorized Insurers.

§ 58-54.20. Purpose of Article. — It is the purpose of this Article to abate and prevent the practices of unauthorized insurers within the State of North Carolina, and to provide methods for effectively enforcing the laws of this State against such practices. The General Assembly finds that there is within this State a substantial amount of insurance business being transacted by insurers who have not complied with the laws of this State and have not been authorized by the Commissioner of Insurance to do business. These practices by unauthorized insurers are deemed to be harmful and contrary to public welfare of the citizens of this State. The difficulties which arise from the acts and practices of unauthorized insurers is compounded by the fact that such companies are licensed in foreign jurisdictions and conduct a long-range business without having personal representatives or agents in proximity to insureds. The General Assembly further declares that it is a subject of vital public interest to the State that unlicensed and unauthorized companies have

been and are now engaged in soliciting by way of direct mail and other advertising media, insurance risks within this State, and that such companies enjoy the many benefits and privileges provided by the State as well as the protection afforded to citizens under exercise of the police powers of the State, without themselves being subject to the laws designed to protect the insurance consuming public. The provisions of this Article are in addition to all other statutory provisions of Chapter 58 relating to unauthorized insurers and do not replace, alter, modify or repeal such existing provisions. (1967, c. 909, s. 1.)

Editor's Note. — Section 4, c. 909, Session Laws 1967, provides: "This act shall be effective on and after July 1, 1967, but the same shall not apply to any contracts of insurance in effect before the effective date of this act."

§ 58-54.21. Transacting business without certificate of authority prohibited; exceptions. — Except as hereinafter provided, it shall be unlawful for any company to enter into a contract of insurance as an insurer or to transact insurance business in this State as set forth in G.S. 58-54.22 of this Article, without a certificate of authority issued by the Commissioner of Insurance. This section shall not apply to the following acts or transactions:

(1) The procuring of a policy of insurance upon a risk within this State where the applicant is unable to procure coverage in the open market with admitted companies and is otherwise in compliance with G.S. 58-53.1;
(2) Contracts of reinsurance;
(3) Transactions in this State involving a policy lawfully solicited, written and delivered outside of this State covering only subjects of insurance not resident, located or expressly to be performed in this State at the time of issuance, and which transactions are subsequent to the issuance of such policy;
(4) Transactions in this State involving group or blanket insurance and group annuities where the master policy of such group insurance was lawfully issued and delivered in a state where the company was authorized to transact business;
(5) Transactions in this State involving all policies of insurance issued prior to July 1, 1967;
(6) The procuring of contracts of insurance issued to an "industrial insured" as hereinafter defined, or to a nuclear insured.

For the purposes of this section, an "industrial insured" is an insured (i) who procures the insurance of any risk or risks by use of the services of a full-time employee acting as an insurance manager or buyer, (ii) whose aggregate annual premiums for insurance on all risks total at least twenty-five thousand dollars ($25,000), and (iii) who has at least 25 full-time employees: Provided, nothing herein shall relieve such industrial insured from complying with the provisions of G.S. 58-53.1. (1967, c. 909, s. 1; 1971, c. 510, s. 3.)

§ 58-54.22. Acts or transactions deemed to constitute transacting insurance business in this State. — The following acts, if performed in this State, shall be included among those deemed to constitute transacting insurance business in this State:

(1) a. Maintaining any agency or office where any acts in furtherance of an insurance business are transacted, including, but not limited to the execution of contracts of insurance with citizens of this or any other state;
b. Maintaining files or records of contracts of insurance; or
c. Receiving payments of premiums for contracts of insurance.

(2) Likewise, any of the following acts in this State, whether effected by mail or otherwise by an unauthorized insurer, is included among those deemed to constitute transacting insurance business in this State:

a. The issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein;

b. The soliciting of applications for contracts of insurance through the use of the United States mail or any other media, method or device;

c. The collections of premiums, membership fees, assessments or other considerations for such contracts; or

d. The transaction of any matters prior to or subsequent to the execution of such contracts in contemplation thereof or arising out of them.

Any company violating any of the provisions of this section, by doing any of the foregoing acts or transactions while not authorized to do business within this State, shall be subject to penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense; such penalty shall be payable to the Commissioner of Insurance, who shall in turn forward the same to the county or counties wherein the violation or violations occur, for the use of the public schools of such county or counties: Provided, that each day in which a violation occurs shall constitute a separate offense. The Attorney General of the State of North Carolina at the request of and upon information from the Commissioner of Insurance shall initiate a civil action in behalf of the Commissioner in any county of the State wherein a violation under this section occurs to recover the penalty provided. Service of process upon the unauthorized insurer shall be had as is provided in G.S. 58-54.25. (1967, c. 909, s. 1.)

§ 58-54.23. Validity of acts or contracts of unauthorized company shall not impair obligation of contract as to the company; maintenance of suits; right to defend. — The failure of a company to obtain a certificate of authority shall not impair the validity of any acts or contracts of the company. Any person or insured holding contracts of insurance of an unauthorized insurer may bring an action in the courts of this State under the provisions of G.S. 58-153.1, known as the "Unauthorized Insurers Process Act," for the enforcement of any rights pursuant to the contract of insurance. The failure of the insurance company to obtain a certificate of authority shall not prevent such company from defending any action at law or suit in equity in any court of this State so long as the said company fully complies with the provisions of G.S. 58-153.1(c), but no company transacting insurance business in this State without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State to enforce any right, claim or demand arising out of the transaction of such business until such company shall have obtained a certificate of authority. Nor shall an action at law or in equity be maintained in any court of this State by any successor or assignee of such company on any such right, claim or demand originally held by such company until a certificate of authority shall have been obtained by the company or by a company which has acquired all or substantially all of its assets. Nothing in this section shall be construed to abrogate the conditions of admission into this State nor to impair the authority of the Commissioner of Insurance with respect to the issuance of certificates of authority. The Commissioner of Insurance in considering the issuance of a certificate of authority shall take into consideration the acts or transactions which an unauthorized company has engaged in in this State prior to its application for a certificate of authority. (1967, c. 909, s. 1.)

§ 58-54.24. Commissioner empowered to enjoin unauthorized companies. — Whenever the Commissioner of Insurance, from evidence satisfactory to him, has reasonable grounds for believing that any foreign or alien company is

violating or is about to violate the provisions of G.S. 58-54.21, the Commissioner may through the Attorney General of this State cause a complaint to be filed in the Superior Court of Wake County to enjoin and restrain such company from continuing such violations or engaging therein, or doing any act in furtherance thereof. The court shall have jurisdiction of the proceedings and shall have the power to make and enter an appropriate order or judgment granting preliminary or final injunctive relief as in its discretion is proper: Provided, however, that the company alleged to be in violation shall have been served with process as is provided hereinafter. (1967, c. 909, s. 1.)

§ 58-54.25. Service of process upon unauthorized company by Commissioner of Insurance. — (a) Any act of entering into a contract of insurance as an insurer or transacting insurance business in this State, as set forth in G.S. 58-54.22 by an unauthorized, foreign or alien company, shall be equivalent to and shall constitute an appointment by such company of the Secretary of State to be its true and lawful attorney upon whom may be served all lawful process in any action or proceeding against it arising out of a violation of G.S. 58-54.21, and any of said acts shall be a signification of its agreement that any such process against it, which is so served, shall be of the same legal force and validity as if in fact served upon the company.

(b) Service of process on the Secretary of State shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. Service shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered mail, with return receipt requested, to such insurer at its last known principal place of business as shown on the process, notice or demand served on the Secretary of State. The Commissioner of Insurance and the Attorney General shall see that such address is included on the process, notice or demand which is served upon the Secretary of State. A copy of the complaint or order of the clerk extending the time for filing the complaint must be mailed to the insurer with the copy of the summons. When a copy of the complaint is not mailed with the summons, the Secretary of State shall mail a copy of the complaint when it is served on him in the same manner as the copy of summons is required to be mailed.

(c) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of such registered mail, or upon the return of such registered mail showing refusal thereof by such foreign or alien insurer, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(d) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such foreign or alien insurer to accept delivery of the registered mail provided for in subsection (b) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign or alien insurer refusing to accept delivery of such registered mail shall be charged with knowledge of the contents of any process, notice or demand contained therein.

(e) Whenever service of process is made upon the Secretary of State as herein provided the defendant foreign or alien insurer shall have 30 days from the date when the defendant receives or refuses to accept the registered mail containing the copy of the complaint sent as in this section provided in which to appear and answer the complaint in the action or proceeding so instituted. Entries on the

defendant's return receipt or the refused registered mail shall be sufficient evidence of such date. If the date of acceptance or refusal to accept the registered mail cannot be determined from the entries on the return receipt or from notations of the postal authorities on the envelope, then the date when the defendant accepted or refused to accept the registered mail shall be deemed to be the date that the return receipt or the registered mail was received back by the Secretary of State.

(f) The court in any action or proceeding in which service is made in the manner provided in the above paragraph may, in its discretion, order such postponement as may be necessary to afford such company reasonable opportunity to defend such action or proceeding.

(g) The Secretary of State shall keep a summarized record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(h) Nothing herein contained shall limit or affect the right to serve any process, notice or demand to be served upon an insurer in any other manner now or hereafter permitted by law.

(i) No judgment by default shall be entered in any such action or proceeding until the expiration of 30 days from the date of the filing of the affidavit of compliance. (1967, c. 909, s. 1.)

§ 58-54.25:1: Repealed by Session Laws 1971, c. 1204.

ARTICLE 3D.

Unauthorized Insurance by Domestic Companies.

§ 58-54.26. Purpose of Article. — It is the purpose of this Article to effectively control and regulate the activities of domestic insurance companies so as to prevent them from engaging in and transacting insurance business in states and jurisdictions in which they are not authorized to do a business of insurance. The General Assembly recognizes that insofar as domestic companies of this State engage in transacting insurance business in states and jurisdictions in which they are not authorized to do business that such activity subjects the domestic companies of this State to the penalties for such unlawful activities in other states and jurisdictions, and that such activities tend to substantially impair the effectiveness of the domestic companies in this State. The General Assembly also recognizes that the practices of unauthorized insurers could be largely corrected if each state would effectively regulate the activities of its domestic companies. The provisions of this Article are in addition to all other statutory provisions designed to control the activities of domestic companies and nothing herein shall be construed to amend, modify or repeal the provisions of existing laws. (1967, c. 935, s. 1.)

Editor's Note. — Section 5, c. 935, Session Laws 1967, provides that the act shall be effective on and after July 1, 1967, but shall not apply to any contracts of insurance in effect before that date.

§ 58-54.27. Domestic insurers prohibited from transacting business in foreign states without authorization; exceptions. — Except as hereinafter provided, no domestic insurer organized under the laws of this State shall transact or attempt to transact or solicit business in any manner or accept risks in any jurisdiction in which such insurer is not licensed in accordance with the laws of such jurisdiction. There is excepted from the terms of this section the following acts and transactions:

(1) Contracts entered into by a domestic company insuring a risk within a foreign state or jurisdiction, where the law of the foreign state or jurisdiction permits an unauthorized insurer to so contract;
(2) Contracts entered into where the prospective insured is personally present in the state in which the insurer is authorized to transact business when he signs the application;
(3) Contracts of reinsurance between a licensed insurer of the foreign state or jurisdiction and a domestic company;
(4) The issuance of certificates under a lawfully transacted group life or group disability policy, where the master policy was entered into in a state in which the insurer was then authorized to transact business;
(5) The renewal or continuance in force, with or without modification, of contracts otherwise lawful and which were not originally executed in violation of this section. (1967, c. 935, s. 1.)

§ 58-54.28. Domestic insurers; advertising; exceptions. — No domestic insurer shall knowingly solicit or advertise its insurance business in a state or jurisdiction in which it is not licensed as an authorized insurer. Provided, however, that this section shall not prohibit a domestic insurer from advertising through publications, radio or television if such advertising is not expressly directed toward the residents or subjects of insurance in a foreign state or other jurisdiction. Nor shall this section apply to trade journals or directories. (1967, c. 935, s. 1.)

§ 58-54.29. Penalties provided for unauthorized acts. — Whenever any domestic insurer shall knowingly engage in the practice of soliciting, advertising or making contracts for insurance in states or jurisdictions in which it is not licensed, the North Carolina Commissioner of Insurance shall be authorized, as hereinafter provided, to issue an order requiring such company to cease and desist from engaging in such activities and, for the purposes of this section, the acts prohibited by G.S. 58-54.28 and the foregoing sections, are declared to be an unfair trade practice within the meaning of G.S. 58-54.4 and 58-54.9. Provided, whenever the Commissioner shall have reason to believe that any domestic company has been engaged or is engaging in the practice of knowingly soliciting, advertising or writing contracts of insurance on risks within a state or jurisdiction in which it is not licensed, he shall proceed to serve such company with notice of hearing and the hearing shall in all respects conform with the hearing procedure set forth in G.S. 58-54.6. Any action taken by the Commissioner of Insurance after such hearing shall be in compliance with G.S. 58-54.7, and any company aggrieved by an order of the Commissioner shall be entitled to that judicial review as is provided in G.S. 58-54.8. (1967, c. 935, s. 1.)

ARTICLE 4.

Insurance Premium Financing.

§ 58-55. Definitions. — When used in this Article:
(1) An insurance premium finance company is hereby defined to be:
a. Any person engaged, in whole or in part, in the business of entering into insurance premium finance agreements with insureds; or
b. Any person engaged, in whole or in part, in the business of acquiring insurance premium finance agreements from other insurance premium finance companies.
(2) "Insurance premium finance agreement" means a promissory note or other written agreement by which an insured promises or agrees to pay to, or to the order of, an insurance premium finance company the amount advanced or to be advanced under the agreement to an insurer

or to an insurance agent, in payment of premiums on an insurance contract, together with a service charge as authorized and limited by this Article. (1963, c. 1118.)

Editor's Note. — Former Article 4, "Deposit of Securities," consisting of §§ 58-55 to 58-61, was transferred to §§ 58-188.1 to 58-188.7 by Session Laws 1945, c. 384.

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56. License required; fees. — (a) No person except an authorized insurer shall engage in the business of an insurance premium finance company without obtaining a license from the Commissioner, as provided in this Article.

(b) Application for license required under this Article shall be in writing, and in the form prescribed by the Commissioner.

(c) When an applicant has more than one office, separate applications for license shall be made for each such office.

(d) At the time of filing an application for a license, the applicant shall pay to the Commissioner the license fee. Upon original application or upon application subsequent to denial of application, or revocation, suspension or surrender of a license, an examination fee may be required.

(e) There shall be two types of licenses issued to an insurance premium finance company:

(1) An "A" type license shall be issued to insurance premium finance companies whose business of insurance premium financing is limited to the financing of insurance premiums of one insurance agent or agency and whose primary function is to finance only the insurance premium of such agent or agency. The license fee for an "A" type license shall be two hundred dollars ($200.00) for each license year or part thereof.

(2) A "B" type license shall be issued to an insurance premium finance company whose business of insurance premium financing is not limited to the financing of insurance premiums of one insurance agent or agency and whose primary function is to finance the insurance premiums of more than one insurance agent or agency. The license fee for a "B" type license shall be nine hundred fifty dollars ($950.00) for each license year or part thereof.

A branch office license may be issued for either an "A" type or "B" type license. The fee for the branch office license shall be fifty dollars ($50.00) for each license year or part thereof. The examination fee when required by this section shall be one hundred dollars ($100.00) per application. (1963, c. 1118; 1967, c. 1232, s. 1.)

Cross Reference. — As to exemption of insurance premium finance companies licensed under this Article from the license tax on loan agencies or brokers, see § 105-88 (b).

Fees Are Intended to Pay Expenses of Supervision. — The fees exacted of insurance premium financiers by this section and of persons engaged in business under the Consumers Finance Act by § 53-167 are intended to pay the necessary expenses of licensing, regulating, and supervising the business. Although any surplus collected under this section reverts to the general treasury of the State under § 58-61.1, this is merely an incidental budgetary provision. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56.1. Exceptions to license requirements. — (a) Any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, installment paper dealers, auto finance companies, savings and loan associations, cooperative credit unions,

agricultural credit corporations or associations, organized under the laws of North Carolina or any person, firm or corporation subject to the provisions of the North Carolina Consumer Finance Act and the North Carolina Motor Vehicle Dealers and Manufacturers Licensing Law, Article 12, Chapter 20, of the General Statutes of North Carolina are exempt from the provisions of this Article.

(b) An insurance company duly licensed in this State may make an installment payment charge as set forth in the rate filings and approved by the Commissioner and are thereby exempt from the provisions of this Article.

(c) A fire and casualty insurance agent or an insurance broker duly licensed in this State who extends credit to and only to his own policyholders may charge and collect finance charges or other fees at a periodic (monthly) rate as provided in G.S. 24-11(a), after said amount has been outstanding for 30 days, and is hereby exempt from the provisions of this Article. Notwithstanding the exceptions set forth in subsections (a), (b) and (c) of this section, when any person, firm, or corporation shall exercise a power of attorney taken in connection with the financing of an insurance premium, such person, firm or corporation shall comply with the requirements of G.S. 58-60, as if it were an insurance premium financing company. (1963, c. 1118; 1967, c. 942, s. 1; 1971, c. 1186, ss. 1, 2.)

Editor's Note. — Section 3, c. 942, Session Laws 1967, provides that it "shall be effective on and after July 1, 1967, and shall apply to contracts of insurance premium financing entered into on or after said date."

Those Subject to This Article Are Not Intended to Be Subject to Consumer Finance Act. — Had the legislature intended to subject to the provisions of the Consumer Finance Act those who make loans solely to finance insurance premiums, surely it would not have enacted this Article in the first instance since it exempts from its provisions those subject to the Consumer Finance Act. The legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-56.2. Issuance or refusal of license; bond; duration of license; renewal; one office per license; display of license; notice of change of location. — (a) Within 60 days after the filing of an application for a license accompanied by payment of the fees for license and examination, the Commissioner shall issue the license or may refuse to issue the license and so advise the applicant. The applicant shall submit with such application any and all information which the Commissioner may require to assist him in determining the financial condition, business integrity, method of operation and protection to the public offered by the person filing such application. The Commissioner may require a bond not to exceed twenty-five thousand dollars ($25,000) on applications and any renewal thereof. Such license to engage in business in accordance with the provisions of this Article at the location specified in the application shall be executed in duplicate by the Commissioner and he shall transmit one copy to the applicant and retain a copy on file.

(b) If the Commissioner refuses to issue a license, he shall notify the applicant of the denial, return to the applicant the sum paid as a license fee, but retain the examination fee to cover the cost of examining the applicant.

(c) Each license issued hereunder shall remain in full force and effect until the last day of June unless earlier surrendered, suspended, or revoked pursuant to this Article, and may be renewed for the ensuing license year upon the filing of an application and conforming with G.S. 58-56, but subject to all of the provisions of this Article. If an application for a renewal of a license is filed with the Commissioner before July 1 of any year, the license sought to be renewed shall be continued in full force and effect either until the issuance by the

Commissioner of the renewal license applied for or until five days after the Commissioner refuses to issue such renewal license under the provisions of this Article.

(d) Only one office may be maintained under each license, but more than one license may be issued to the same licensee pursuant to this Article.

(e) Such license shall state the name and address of the licensee and shall at all times be prominently displayed in the office of the licensee and shall not be transferable or assignable.

(f) Before any licensee changes any office of his to another location, he shall give written notice thereof to the Commissioner. (1963, c. 1118; 1965, c. 1039.)

§ 58-56.3. Grounds for refusal, suspension or revocation of licenses; surrender of licenses; reinstatement. — (a) The Commissioner may forthwith deny, suspend, revoke, or refuse to renew or continue any license hereunder if he shall find that:

(1) The licensee has failed to pay the annual license fee or any sum of money lawfully demanded under authority of any section of this Article or has violated or failed to comply with any demand, ruling, provision or requirement of the Commissioner lawfully made pursuant to or within the authority of this Article.

(2) Any fact or condition exists which, if it had been known to exist at the time of the original application, would have caused the original license to have been refused.

(b) The Commissioner may revoke or suspend only the particular license with respect to which grounds for revocation or suspension may occur or exist; or if he shall find that such grounds for revocation or suspension are of general application to all offices, or to more than one office, operated by such licensee, he shall revoke or suspend all of the licenses issued to such licensee or such number of licenses as such grounds apply to, as the case may be.

(1) Any licensee may surrender any license by delivering to the Commissioner written notice that he thereby surrenders such license, but such surrender shall not affect such licensee's civil or criminal liability for acts committed prior to such surrender.

(2) No revocation or suspension or surrender of any license shall impair or affect the obligation of any insured under any lawful insurance premium finance agreement previously acquired or held by the licensee.

(3) Every license issued hereunder shall remain in force and effect until the same shall have been surrendered, revoked, suspended, or expires in accordance with the provisions of this Article; but the Commissioner shall have authority to reinstate suspended licenses or to issue new licenses to a licensee whose license or licenses shall have been revoked, if no fact or condition then exists which clearly would have warranted the Commissioner in refusing originally to issue such license under this Article. (1963, c. 1118.)

§ 58-57. Investigations; hearings. — For the purpose of conducting investigations and holding hearings on insurance premium finance companies, the Commissioner shall have the same authority as that vested in him by G.S. 58-9.2 and 58-44.6. (1963, c. 1118.)

§ 58-57.1. Licensee's books and records; reports; refusing to exhibit records; making false statements. — (a) The licensee shall keep and use in his business such books, accounts, and records as will enable the Commissioner to determine whether such licensee is complying with the provisions of this Article and with the rules and regulations lawfully made by the Commissioner hereunder. Every licensee shall preserve such books, accounts, and records, including cards used in a card system, if any, for at least three years after making the final entry in respect to any insurance premium finance agreement

recorded therein; provided, however, the preservation of photographic reproductions thereof or records in photographic form shall constitute compliance with this requirement. The Commissioner may require of licensees under oath and in the form prescribed by him regular or special reports as he may deem necessary to the proper supervision of licensees under this Article.

(b) Any person who shall refuse, on demand, to exhibit to the Commissioner of Insurance or to any deputy, or person acting with or for the Commissioner, the books, accounts or records as above provided, or who shall knowingly or willfully make any false statement in regard to the same shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1963, c. 1118.)

§ 58-57.2. Excessive insurance premium finance charges; penalty. — The knowingly taking, receiving, reserving, [or] charging a greater insurance premium finance charge than that authorized in this Article shall be held and adjudged a forfeiture of the entire insurance premium finance charge which the insurance premium finance agreement carries with it, or which has been agreed to be paid thereon; and if a greater insurance premium finance charge has been paid, the person paying the same or his legal representative may recover from the insurance premium finance company twice the entire amount of the insurance premium finance thus paid if action therefor is brought within two years from the time of such payment. (1963, c. 1118.)

§ 58-57.3. Rebates and inducements prohibited; assignment of insurance premium finance agreements. — (a) No insurance premium finance company, and no employee of such a company shall pay, allow, or offer to pay or allow in any manner whatsoever to an insurance agent or any employee of an insurance agent, or to any other person, or as an inducement to the financing of an insurance policy with the insurance premium finance company or after any such policy has been financed, any rebate whatsoever, either from the service charge for financing specified in the insurance premium finance agreement or otherwise, or shall give or offer to give any valuable consideration or inducement of any kind directly or indirectly, other than an article of merchandise not exceeding one dollar ($1.00) in value which shall have thereon the advertisement of the insurance premium finance company; but an insurance premium finance company may purchase or otherwise acquire an insurance premium finance agreement provided that it conforms to this Article in all respects, from another insurance premium finance company with recourse against the insurance premium finance company on such terms and conditions as may be mutually agreed upon and such terms and conditions shall be subject to the approval of the Commissioner.

(b) No filing of the assignment or notice thereof to the insured shall be necessary to the validity of the written assignment of an insurance premium finance agreement as against creditors or subsequent purchases, pledges, or encumbrancers of the assignor. (1963, c. 1118.)

§ 58-58. Filing and approval of forms and service charges. — (a) No insurance premium finance agreement form or related form shall be used in this State unless it has been filed with and written approval given by the Commissioner.

(b) In addition each insurance premium finance company shall file with the Commissioner the service charge rate plan to be used in insurance premium financing including all modifications of service charges to be paid by the insured or others under the insurance premium finance agreement. Such filings shall not be used in this State until written approval has been given by the Commissioner. (1963, c. 1118.)

§ 58-58.1. Form, contents and execution of insurance premium finance agreements. — (a) An insurance premium finance agreement shall be in writing, dated, signed by the insured, and the printed portion thereof shall be in at least eight point type. It shall contain the entire agreement of the parties with respect to the insurance contract, the premiums for which are advanced or to be advanced under it, and:

(1) At its top, the words "INSURANCE PREMIUM FINANCE AGREEMENT" or similar wording in at least 10 point bold type; and the insurance premium finance company license number shall also appear, and:

(2) A notice in at least eight point bold type, reading as follows: "NOTICE":

a. Do not sign this agreement before you read it.

b. You are entitled to a copy of this agreement.

c. Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the service charge.

(b) An insurance premium finance agreement shall:

(1) Contain the name and place of business of the insurance agent negotiating the related insurance contract, the name and residence or the place of business of the insured as specified by him, the name and place of business of the insurance premium finance company to which installments or other payments are to be made, a description of the insurance contract, the premiums for which are advanced or to be advanced under the agreement, and the amount of the premiums for such insurance contract; and

(2) Set forth the following items:

a. The total amount of the premiums;

b. The amount of the down payment;

c. The principal balance, which is the difference between items a and b;

d. The amount of the service charge;

e. The balance, which is the sum of items c and d, payable by the insured, the number of installments required, the amount of each installment expressed in dollars and the due date or period thereof.

(c) The items need not be stated in the sequence or order set forth above, inapplicable items may be omitted; additional items may be included to explain the computations made in determining the amount to be paid by the insured.

(d) No insurance premium finance agreement shall be signed by an insured when it contains any blank space to be filled in after it has been signed; however, if the insurance contract, the premiums for which are advanced or to be advanced under the agreement, has not been issued at the time of its signature by the insured and it so provides, the name of the authorized insurer by whom such insurance contract is issued and the policy number and the due date of the first installment may be left blank and later inserted in the original of the agreement after it has been signed by the insured. (1963, c. 1118.)

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 58-59. Limitations on service charges; computation; minimum charges. — (a) An insurance premium finance company shall not directly or indirectly except as otherwise provided by law, impose, take, receive from, reserve, contract for, or charge an insured greater service charges than are permitted by this Article. No insurance premium finance company shall be permitted to charge or finance any membership fees, dues, registration fees or any other

charges except the service charges provided for in this Article for financing insurance premiums on policies of insurance lawfully placed in this State.

(b) An insurance premium finance company may, in an insurance premium finance agreement, contract for, charge, receive, and collect a service charge for financing the premiums under the agreement computed as provided in subsection (c).

(c) The service charge provided for in this section shall be computed on the principal balance of the insurance premium finance agreement from the inception date of the insurance contract, the premiums for which are advanced or to be advanced under the agreement unless otherwise provided under rules and regulations prescribed by the Commissioner, to and including the date when the final installment of the insurance premium finance agreement is payable, at a rate not exceeding ten dollars ($10.00) per one hundred dollars ($100.00) per annum; provided that when the principal balance is one hundred twenty dollars ($120.00) or less, a licensee may charge, in lieu of the charge specified above, rates not exceeding, two dollars ($2.00) for each ten dollars ($10.00) on that part of the principal balance not exceeding forty dollars ($40.00); one dollar ($1.00) for each ten dollars ($10.00) on that part of the principal balance exceeding forty dollars ($40.00) but not exceeding seventy dollars ($70.00); fifty cents (50¢) for each ten dollars ($10.00) on that part of the principal balance exceeding seventy dollars ($70.00) but not exceeding one hundred twenty dollars ($120.00). All service charges may be rounded off to the nearest dollar and are subject to a minimum charge as follows: three dollars ($3.00) when the principal balance is less than twenty dollars ($20.00); six dollars ($6.00) when the principal balance is twenty dollars ($20.00) or more, but less than one hundred twenty dollars ($120.00); fourteen dollars ($14.00) when the principal balance is one hundred twenty dollars ($120.00) or more.

(d) The provisions of subsection (c) apply if the premiums under only one insurance contract are advanced or are to be advanced under an insurance premium finance agreement; if premiums under more than one insurance contract are advanced or are to be advanced under an insurance premium finance agreement, the service charge shall be computed from the inception date of such insurance contracts, or from due date of such premiums; however, not more than one minimum service charge shall apply to each insurance premium finance agreement.

(e) No insurance agent or insurance premium finance company shall induce an insured to become obligated under more than one insurance premium finance agreement for the purpose of or with the effect of obtaining service charges in excess of those authorized by this Article. (1963, c. 1118; 1967, c. 824.)

§ 58-59.1. Prohibited provisions in insurance premium finance agreements. — No insurance premium finance agreement shall contain any provisions by which:

(1) In the absence of default of the insured, the insurance premium finance company holding the agreement may, arbitrarily and without reasonable cause, accelerate the maturity of any part or all of the amount owing thereunder;

(2) A power of attorney is given to confess judgment in this State; or

(3) The insured relieves the insurance agent or the insurance premium finance company holding the agreement from liability for any legal rights or remedies which the insured may otherwise have against him. (1963, c. 1118.)

§ 58-59.2. Delivery of copy of insurance premium finance agreement to insured. — Before the due date of the first installment payable under an insurance premium finance agreement, the insurance premium finance company holding the agreement or the insurance agent shall deliver to the insured, or mail

to him at his address as shown in the agreement, a copy of the agreement. (1963, c. 1118.)

§ 58-59.3. Payments by insured without notice of assignment of agreement. — Unless the insured has notice of actual or intended assignment of the insurance premium finance agreement, payment thereunder by him to the last known holder of the agreement shall be binding upon all subsequent holders or assignees. (1963, c. 1118.)

§ 58-59.4. Statement of account; release on payment in full. — (a) At any time after its execution, but not later than one year after the last payment thereunder, an insurance premium finance company holding an insurance premium finance agreement shall, upon written request of the insured, give or mail to him a written statement of the dates and amounts of payments and the total amount, if any, unpaid thereunder.

(b) After the payment of all sums for which an insured is obligated under an insurance premium finance agreement, and upon his written demand, the insurance premium finance company holding the agreement shall deliver, or mail to the insured at his last known address, such one or more good and sufficient instruments as may be necessary to acknowledge payment in full and to release all interest in or rights to the insurance contracts, the premiums for which were advanced or are to be advanced under the agreement. (1963, c. 1118.)

§ 58-59.5. Credit upon anticipation of payments. — (a) Notwithstanding the provisions of any insurance premium finance agreement to the contrary, any insured may pay it in full at any time before the maturity of the final installment of the balance thereof; and, if he does so and the agreement included an amount for service charge, he shall receive and be entitled to receive for such anticipation a refund credit thereon.

(b) The amount of any such refund credit shall represent at least as great proportion of the service charge, if any, as the sum of the periodic balances after the month in which prepayment is made bears to the sum of all periodic balances under the schedule of installments in the agreement. Where the amount of the refund credit for anticipation of payment is less than one dollar ($1.00), no refund need be made. Where the earned service charge amounts to less than twelve dollars ($12.00) or where the minimum service charge permitted is less than twelve dollars ($12.00), the refund credit shall be an amount equal to the total service charge less twelve dollars ($12.00) or such minimum service charge. As used in this subsection, the term "earned service charge" shall mean the total service charge less the refund credit as computed in accordance with the first sentence of this subsection. (1963, c. 1118.)

§ 58-60. Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value. — When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions:

(1) Not less than 10 days' written notice be mailed to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. A notice thereof shall also be mailed to the insurance agent.

(2) After expiration of such period, the insurance premium finance company shall mail the insurer a request for cancellation, including a copy of the power of attorney, and shall mail a copy of the request for cancellation

to the insured at his last known address as shown on the insurance premium finance agreement.

(3) Upon receipt of a copy of such request for cancellation notice by the insurer or insurers, the insurance contract shall be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself, without requiring the return of the insurance contract or contracts.

(4) All statutory, regulatory, and contractual restrictions providing that the insured may not cancel his insurance contract unless he or the insured first satisfies such restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, an individual, or a person designated to receive such notice for said governmental agency, insurance carrier, or individual shall apply where cancellation is effected under the provisions of this section.

(5) Whenever an insurance contract is cancelled in accordance with this section, the insurer shall promptly return whatever gross unearned premiums are due under the contract to the insurance premium finance company effecting the cancellation for the benefit of the insured or insureds. Whenever the return premium is in excess of the amount due the insurance premium finance company by the insured under the agreement, such excess shall be remitted promptly to the order of the insured, subject to the minimum service charge provided for in this Article.

(6) The provisions of this section relating to request for cancellation by the insurance premium finance company of an insurance contract and the return by an insurer of unearned premiums to the insurance premium finance company, also, apply to the surrender by the insurance premium finance company of an insurance contract providing life insurance and the payment by the insurer of the cash value of the contract to the insurance premium finance company, except that the insurer may require the surrender of the insurance contract. (1963, c. 1118; 1967, c. 825; 1969, c. 941.)

Authority to Cancel Policy and Collect Unearned Premium Is Security. — The authority given by a borrower to an insurance premium finance company to cancel the policy and collect the unearned premium upon the borrower's default, is security analogous to a chattel mortgage or a conditional sale. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

The burden is upon the insurance company to show that all statutory requirements have been complied with, including the 10 days' written notice by the premium finance company to the insured together with said notice to the insurance agent, prior to the premium finance company requesting cancellation of the policy. Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

The burden of proving cancellation by the insured or his agent is on the insurance company. Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969).

To avoid liability to a third-party beneficiary of an assigned risk automobile insurance policy, the insurer must allege and prove cancellation and termination of the policy in accordance with the applicable statutes. Grant v. State Farm Mut. Auto. Ins. Co., 1 N.C. App. 76, 159 S.E.2d 368 (1968).

Redress of Insurance Company Where Finance Company Wrongfully Requests Cancellation. — If the premium finance company misleads the insurance company wrongfully by requesting cancellation of the policy, the insurance company can seek redress from the premium finance company. Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969).

Stated in Hayes v. Hartford Accident & Indem. Co., 274 N.C. 73, 161 S.E.2d 552 (1968).

§ 58-61. Violations; penalties. — Any person who shall engage in the business referred to in this Article without first receiving a license, or who shall fail to secure a renewal of his license upon the expiration of the license year,

or shall engage in the business herein referred to after the license has been suspended or revoked as herein provided, or who shall fail or refuse to furnish the information required of the Commissioner, or who shall willfully and knowingly enter false information on an insurance premium finance agreement, or who shall fail to observe the rules and regulations made by the Commissioner pursuant to this Article, shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or be imprisoned, or both, at the discretion of the court. (1963, c. 1118; 1965, c. 1040.)

§ 58-61.1. Disposition of fees. — All fees collected hereunder shall be credited to the account of the Insurance Commissioner for the specific purpose of providing the personnel, equipment and supplies necessary to enforce this Article, but the Director of the Budget shall have the right to budget the revenues received in accordance with the requirements of the Commissioner for the purposes herein required, and at the end of the fiscal year, if any sum whatever shall remain to the credit of the Commissioner, derived from the sources herein referred to, the same shall revert to the general treasury of the State to be appropriated as other funds. (1963, c. 1118.)

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 4A.

Insurance Business through Credit Cards Prohibited.

§ 58-61.2. Solicitation, negotiation or payment of premiums on insurance policies through credit card facilities prohibited; exceptions. — Except as otherwise provided herein, no authorized insurer and no representative of such insurer or insurance broker shall employ or avail itself of the facilities of any person, firm or corporation engaged in the credit card business to solicit or negotiate any contract of insurance upon any life or risk within the State of North Carolina, or accept the payment of premiums upon a policy of insurance, insuring any life or risk in the State of North Carolina, through the use of any credit card facility. Except as otherwise provided herein, no person, firm or corporation engaged in the business of extending credit through a credit card system shall, on behalf of any insurer, its representative of any insurance broker, utilize his or its credit card facilities to solicit for, negotiate contracts of insurance or accept the payment of premiums upon any contract of insurance from credit card holders or prospective credit card holders who reside in this State. The solicitation for and the negotiation of policies of insurance prohibited by this section shall include, but shall not be limited to, the transmittal of applications for insurance, premium rate schedules, circulars, letters or sales literature pertaining to insurance to credit card holders or prospective credit card holders who reside in this State. Credit card business as used in this section shall mean the business of extending credit to persons who are holders of credit cards issued by the credit card facility or organization entitling the holder to pay charges for purchases or other transactions through the use of credit card facilities.

Nothing in this Article shall prohibit an authorized insurer, the representative of such insurer, or an insurance broker from accepting payment of an insurance premium through a credit card facility provided and operated by a banking corporation principally domiciled in this State and doing business under the laws of the State of North Carolina or the United States. No such bank shall be prohibited from making such credit card facility available for this limited purpose, provided, that all records relating to the payment of insurance

premiums through such credit card facility are maintained within the State of North Carolina.

Nothing in this Article shall prohibit an authorized insurer, the representative of such insurer, or an insurance broker from notifying its or his customers or prospective customers through means other than credit card facilities of the availability of credit card facilities for the payment of insurance premiums. (1967, c. 1245.)

ARTICLE 5.

License Fees and Taxes.

§ 58-62. Commissioner to report and pay monthly. — On or before the tenth day of each month the Commissioner of Insurance shall furnish to the Auditor a statement in detail of the taxes and license fees received by him during the previous month, and shall pay to the Treasurer the amount in full of such taxes and fees. The Auditor may examine the accounts of the Commissioner of Insurance and check them up with said statement. (1899, c. 54, s. 82; 1901, c. 391, s. 7; 1905, c. 430, s. 4; Rev., s. 4714; C. S., s. 6317.)

Payment of Penalty Imposed by § 58-44.6. — By clear implication of this section and § 58-63, the amount of any monetary civil penalty imposed and collected as authorized by § 58-44.6 should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-63. Schedule of fees and charges. — The Commissioner of Insurance shall collect and pay into the State treasury fees and charges as follows:

(1) For filing and examining statement preliminary to admission, twenty dollars ($20.00); for filing and auditing annual statement, ten dollars ($10.00); for filing any other papers required by law, one dollar ($1.00); for each certificate of examination, condition, or qualification of company or association, two dollars ($2.00); for each seal when required, one dollar ($1.00); for filing charter and other papers of a fraternal order, preliminary to admission, twenty-five dollars ($25.00).

(2) To be paid to the publisher, for the publication of each financial statement, twelve dollars ($12.00).

(3) The Commissioner shall receive for copy of any record or paper in his office fifty cents (50¢) per copy sheet and one dollar ($1.00) for certifying same, or any fact or data from the records of his office; for examination of any foreign company, not less than forty dollars ($40.00) per diem and all expenses or the fees as prescribed by the Examination Committee of the National Association of Insurance Commissioners, and for examining any domestic company, actual expenses incurred; for the examination and approval of charters of companies, five dollars ($5.00). The traveling and other expenses of accountants, and other examiners when engaged in the work of examination shall be paid by the companies, associations, or orders under investigation. For the investigation of tax returns and the collection of any delinquent taxes disclosed by such investigation, the Commissioner may, in lieu of the above per diem charge, assess against any such delinquent company the expense of the investigation and collection of such delinquent tax, a reasonable percentage of such delinquent tax, not to exceed ten per centum (10%) of such delinquency, and in addition thereto.

(4) He shall collect all other fees and charges due and payable into the State treasury by any company, association, order, or individual under his

Department. (1899, c. 54, ss. 50, 68, 80, 81, 82, 87, 90, 92; 1901, c. 391, s. 7, c. 706, s. 2; 1903, c. 438, ss. 7, 8, c. 536, s. 4, cc. 680, 774; 1905, c. 588, s. 68; Rev., s. 4715; 1913, c. 140, s. 1; 1919, c. 186, s. 6; C. S., s. 6318; 1921, c. 218; 1935, c. 334; 1939, c. 158, s. 208; 1945, c. 386; 1947, c. 721; 1957, cc. 133, 1047; 1959, c. 911; 1963, c. 692.)

Payment of Penalty Imposed by § 58-44.6. — By clear implication of this section and § 58-62, the amount of any monetary civil penalty imposed and collected as authorized by § 58-44.6 should be paid over to the State Treasurer. State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968).

§ 58-64: Repealed by Session Laws 1945, c. 386.

§ 58-65. Licensing of underwriters reinsurance agencies. — An underwriters agency, composed of two or more companies, proposing to do a reinsurance business only in the State may be licensed without a separate license for each company, upon filing with the Commissioner of Insurance a statement of each company, the amount proposed to be assumed by them, and such other information as he may call for, showing that the companies are solvent and propose to conduct the business in a way that would be safe and fair to the citizens of the State. (1919, c. 186, s. 6; C. S., s. 6318.)

§ 58-66. Licenses run from July 1; pro rata payment. — The license required of insurance companies shall continue for the next ensuing 12 months after July 1 of each year, unless revoked as provided in this Chapter; but the Commissioner of Insurance may, when the annual license tax exceeds twenty-five dollars ($25.00), receive from applicants after July 1 so much of the license fee required by law as may be due pro rata for the remainder of the year, beginning with the first day of the current month. Application for renewal of the company license must be submitted on or before the first day of March on a form to be supplied by the Commissioner of Insurance. Upon satisfying himself that the company has met all requirements of law and appears to be financially solvent he shall forward renewal license to the company. Any company which does not qualify for renewal license before July 1 shall cease to do business in the State of North Carolina as of July 1, unless license is sooner revoked by the Commissioner.

Before issuing any license for the year, beginning July 1, 1955, the Commissioner shall collect, in addition to the annual license fee, a pro rata fee for the three months of April, May and June, 1955, collection of which fee shall extend licenses expiring April 1, 1955, until July 1, 1955, if accepted by the Commissioner of Insurance.

Nothing contained in this section shall be interpreted as applying to licenses issued to individual representatives of insurance companies, as listed in G.S. 105-228.7, which licenses shall run from April 1 of each year. (1899, c. 54, s. 78; Rev., s. 4718; C. S., s. 6321; 1955, c. 179, s. 1.)

Cited in National Home Life Assurance Co. v. Ingram, 21 N.C. App. 591, 205 S.E.2d 313 (1974).

§ 58-67. Statements of gross receipts filed and tax paid. — Every general agent shall, within the first 30 days of January and July of each year, make a full and correct statement, under oath of himself and of the president, secretary, or some officer at the home or head office of the company in this country, of the amount of the gross receipts derived from the insurance business under this Chapter obtained from residents of this State, or on property located therein during the preceding six months, and shall, within the first 15 days of February

and August of each year, pay to the Commissioner of Insurance the tax imposed upon such gross receipts. (1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; Rev., s. 4719; C. S., s. 6322.)

§ 58-68. Policyholders to furnish information. — To enable the Commissioner of Insurance the better to enforce the payment of the taxes imposed by this Chapter and by G.S. 105-121 every corporation, firm, or individual doing business in the State shall, upon demand of the Commissioner, furnish to him, upon blanks to be provided by him, a statement of the amount of all insurance held by them, giving the name of the company, number, and amount of policies and the premiums paid on each, and such other information as the Commissioner calls for, or shall file an affidavit with the Commissioner that all their insurance is placed in companies licensed to do business in this State. (1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; Rev., s. 4720; C. S., s. 6323.)

Editor's Note. — Section 105-121, referred to in this section, has been repealed.

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 6.

General Domestic Companies.

§ 58-69. Application of this Chapter and general laws. — The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies or with their charters. All insurance companies of this State shall be governed by this Chapter, notwithstanding anything in their special charters to the contrary, provided notice of the acceptance of this Chapter is filed with the Commissioner of Insurance. (1899, c. 54, s. 19; Rev., s. 4721; C. S., s. 6324.)

§ 58-70. Extension of existing charters. — Domestic insurance companies incorporated by special acts, whose charters are subject to limitation of time, shall, after the limitation expires, and upon filing statement and paying the taxes and fees required for an amendment of the charter, continue to be bodies corporate, subject to all general laws applicable to such companies. (1899, c. 54, s. 20; Rev., s. 4722; C. S., s. 6325.)

§ 58-71. Certificate required before issuing policies. — No domestic insurance company may issue policies until upon examination of the Commissioner of Insurance, his deputy or examiner, it is found to have complied with the laws of the State, and until it has obtained from the Commissioner of Insurance a certificate setting forth that fact and authorizing it to issue policies. The issuing of policies in violation of this section renders the company liable to the forfeiture prescribed by law, but such policies are binding upon the company. (1899, c. 54, ss. 21, 99; 1903, c. 438, s. 10; Rev., s. 4723; C. S., s. 6326.)

§ 58-72. Kinds of insurance authorized. — The kinds of insurance which may be authorized in this State, subject to the other provisions of this Chapter, are set forth in the following paragraphs. Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom; but no kind of insurance shall be deemed to include life insurance or insurance against legal liability for personal injury or death unless specified herein. In

addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this Chapter, any insurer authorized to do business in this State may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this State. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein:

(1) "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured, including industrial sick benefit; and optional modes of settlement of proceeds.

(2) "Annuities," meaning all agreements to make periodical payments, whether in fixed or variable dollar amounts, or both, where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of subdivision (1).

(3) "Accident and health insurance," meaning

a. Insurance against death or personal injury by accident or by any specified kind or kinds of accident and insurance against sickness, ailment or bodily injury except as specified in paragraph b following; and

b. Noncancellable disability insurance, meaning insurance against disability resulting from sickness, ailment or bodily injury (but not including insurance solely against accidental injury), under any contract which does not give the insurer the option to cancel or otherwise terminate the contract at or after one year from its effective date or renewal date.

(4) "Fire insurance," meaning insurance against loss of or damage to any property resulting from fire, including loss or damage incident to the extinguishment of a fire or to the salvaging of property in connection therewith.

(5) "Miscellaneous property insurance," meaning loss of or damage to property resulting from

a. Lightning, smoke or smudge, windstorm, tornado, cyclone, earthquake, volcanic eruption, rain, hail, frost and freeze, weather or climatic conditions, excess or deficiency of moisture, flood, the rising of the waters of the ocean or its tributaries, or

b. Insects, or blights, or from disease of such property other than animals, or

c. Electrical disturbance causing or concomitant with a fire or an explosion in public service or public utility property, or

d. Bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, any order of a civil authority made to prevent the spread of a conflagration, epidemic or catastrophe, vandalism or malicious mischief, strike or lockout, or explosion; but not including any kind of insurance specified in subdivision (9), except insurance against loss or damage to property resulting from

1. Explosion of pressure vessels (except steam boilers of more than 15 pounds pressure) in buildings designed and used solely for residential purposes by not more than four families,

2. Explosion of any kind originating outside of the insured building or outside of the building containing the property insured,
3. Explosion of pressure vessels which do not contain steam or which are not operated with steam coils or steam jackets,
4. Electrical disturbance causing or concomitant with an explosion in public service or public utility property.

(6) "Water damage insurance," meaning insurance against loss or damage by water or other fluid or substance to any property resulting from the breakage or leakage of sprinklers, pumps or other apparatus erected for extinguishing fires or of water pipes or other conduits or containers, or resulting from casual water entering through leaks or openings in buildings or by seepage through building walls, but not including loss or damage resulting from flood or the rising of the waters of the ocean or its tributaries; and including insurance against accidental injury of such sprinklers, pumps, fire apparatus, conduits or containers.

(7) "Burglary and theft insurance," meaning

a. Insurance against loss of or damage to any property resulting from burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation or wrongful conversion, disposal or concealment by any person or persons, or from any attempt at any of the foregoing, and

b. Insurance against loss of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances or any other valuable papers or documents, resulting from any cause, except while in the custody or possession of and being transported by any carrier for hire or in the mail.

(8) "Glass insurance," meaning insurance against loss of or damage to glass and its appurtenances resulting from any cause.

(9) "Boiler and machinery insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the explosion of or injury to

a. Any boiler, heater or other fired pressure vessel;
b. Any unfired pressure vessel;
c. Pipes or containers connected with any of said boilers or vessels;
d. Any engine, turbine, compressor, pump or wheel;
e. Any apparatus generating, transmitting or using electricity;
f. Any other machinery or apparatus connected with or operated by any of the previously named boilers, vessels or machines;

and including the incidental power to make inspections of and to issue certificates of inspection upon, any such boilers, apparatus, and machinery, whether insured or otherwise.

(10) "Elevator insurance," meaning insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance or use of elevators, except loss or damage by fire.

(11) "Animal insurance," meaning insurance against loss of or damage to any domesticated or wild animal resulting from any cause.

(12) "Collision insurance," meaning insurance against loss of or damage to any property of the insured resulting from collision of any other object with such property, but not including collision to or by elevators or to or by vessels, craft, piers or other instrumentalities of ocean or inland navigation.

(13) "Personal injury liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, and including an obligation of the insurer to pay medical, hospital, surgical and funeral benefits and in the case of automobile liability insurance including also disability and death

benefits to injured persons, irrespective of legal liability of the insured, arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as a result of negligence in rendering expert, fiduciary or professional service, but not including any kind of insurance specified in subdivision (15).

(14) "Property damage liability insurance," meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, arising out of the loss or destruction of, or damage to, the property of any other person, but not including any kind of insurance specified in subdivision (13) or (15).

(15) "Workmen's compensation and employer's liability insurance," meaning insurance against the legal liability, whether imposed by common law or by statute or assumed by contract, of any employer for the death or disablement of, or injury to, his or its employee.

(16) "Fidelity and surety insurance," meaning

a. Guaranteeing the fidelity of persons holding positions of public or private trust;

b. Becoming surety on, or guaranteeing the performance of, any lawful contract except the following:

1. A contract of indebtedness secured by title to, or mortgage upon, or interest in, real or personal property;

2. Any insurance contract except reinsurance;

c. Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts;

d. Guaranteeing contracts of indebtedness secured by any title to, or interest in, real property, only to the extent required for the purpose of refunding, extending, refinancing, liquidating or salvaging obligations heretofore lawfully made and guaranteed;

e. Indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against loss resulting from any cause of bills of exchange, notes, bonds, securities, evidences of debts, deeds, mortgages, warehouse receipts, or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger, but not including any other risks of transportation or navigation; also against loss or damage to such an insured's premises, or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

(17) "Credit insurance," meaning indemnifying merchants or other persons extending credit against loss or damage resulting from the nonpayment of debts owed to them; and including the incidental power to acquire and dispose of debts so insured, and to collect any debts owed to such insurer or to any person so insured by him including without limiting the foregoing, mortgage guaranty insurance which is insurance against financial loss by reason of the nonpayment of principal, interest and other sums agreed to be paid under the terms of any note or bond, or other evidence of indebtedness secured by a security interest, mortgage, deed of trust, or other instrument constituting a lien or charge on real estate, or on such personal property as the Commissioner may from time to time approve.

(18) "Title insurance," meaning insuring the owners of real property and chattels real and other persons lawfully interested therein against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property, including the power to procure and furnish information relative thereto, and such other incidental powers as are specifically granted in this Chapter.

(19) "Motor vehicle and aircraft insurance," meaning insurance against loss of or damage resulting from any cause to motor vehicles or aircraft and their equipment, and against legal liability of the insured for loss or damage to the property of another resulting from the ownership, maintenance or use of motor vehicles or aircraft and against loss, damage or expense incident to a claim of such liability.

(20) "Marine insurance," meaning insurance against any and all kinds of loss or damage to:

a. Vessels, craft, aircraft, cars, automobiles and vehicles of every kind, as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks, and

b. Person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles), and

c. Precious stones, jewels, jewelry, gold, silver and other precious metals, whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise, and

d. Bridges, tunnels and other instrumentalities of transportation and communication (excluding buildings, their furniture and furnishings, fixed contents and supplies held in storage) unless fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion are the only hazards to be covered; piers, wharves, docks and slips, excluding the risks of fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion; other aids to navigation and transportation, including dry docks and marine railways against all risks.

(21) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

(22) "Miscellaneous insurance," meaning insurance against any other casualty authorized by the charter of the company, not included in subdivisions (1) to (21) inclusive of this section, which is a proper subject of insurance. No corporation so formed may transact any other business than that specified in its charter and articles of association. (1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; Rev., s. 4726; 1911, c. 111, s. 1; C. S., s. 6327; 1945, c. 386; 1947, c. 721; 1953, c. 992; 1967, c. 624, s. 1; 1969, c. 616, s. 1.)

Editor's Note. — The 1945 amendment which amended, inserted or repealed a large number of sections in this Chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or to associations of such common carriers administering such departments, plans or organizations."

§ 58-73. Manner of creating such corporations. — The procedure for organizing such corporations is as follows: The proposed incorporators, not less than 10 in number, a majority of whom must be residents of the State, shall subscribe articles of association setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an existing corporation doing business under the laws of this State as to be likely to mislead the public, and must be approved by the Commissioner of Insurance; the class of insurance it proposes to transact and on what business plan or principle; the place of its location within the State, and if on the stock plan, the amount of its capital stock. The words "insurance company," "insurance association," or "insurance society" or "life" or "casualty" or "indemnity" must be a part of the title of any such corporation, and also the word "mutual," if it is organized upon the mutual principle. The certificate of incorporation must be subscribed and sworn to by the incorporators before an officer authorized to take acknowledgment of deeds, who shall forthwith certify the certificate of incorporation, as so made out and signed, to the Commissioner of Insurance of the State at his office in the City of Raleigh. The Commissioner of Insurance shall examine the certificate, and if he approves of it and finds that the requirements of the law have been complied with, shall certify such facts, by certificate on such articles, to the Secretary of State. Upon the filing in the office of the Secretary of State of the certificate of incorporation and attached certificates, and the payment of a charter fee in the amount required for private corporations, and the same fees to the Secretary of State, the Secretary of State shall cause the certificate and accompanying certificates to be recorded in his office, and shall issue a certificate in the following form:

Be it known that, whereas (here the names of the subscribers to the articles of association shall be inserted) have associated themselves with the intention of forming a corporation under the name of (here the name of the corporation shall be inserted), for the purpose (here the purpose declared in the articles of association shall be inserted), with a capital (or with a permanent fund) of (here the amount of capital or permanent fund fixed in the articles of association shall be inserted), and have complied with the provisions of the statute of this State in such case made and provided, as appears from the following certified articles of association: (Here copy articles of association and accompanying certificates). Now, therefore, I (here the name of the Secretary shall be inserted), Secretary of State, hereby certify that (here the names of the subscribers to the articles of association shall be inserted), their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (here the name of the corporation shall be inserted), with such articles of association, and have all the powers, rights, and privileges and are subject to the duties, liabilities, and restrictions which by law appertain thereto.

Witness my official signature hereunto subscribed, and the seal of the State of North Carolina hereunto affixed, this the . . . . . day of . . . . . ., in the year . . . . . (in these blanks the day, month, and year of execution of this certificate shall be inserted; and in the case of purely mutual companies, so much as relates to capital stock shall be omitted).

The Secretary of State shall sign the certificate and cause the seal of the State to be affixed to it, and such certificate of incorporation and certificate of the Secretary of State has the effect of a special charter and is conclusive evidence of the organization and establishment of the corporation. The Secretary of State shall also cause a record of his certificate to be made, and a certified copy of this record may be given in evidence with the same effect as the original certificate. (1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; Rev., s. 4727; C. S., s. 6328; 1957, c. 98.)

§ 58-74. First meeting; organization; license. — The first meeting for the purpose of organization under such charter shall be called by a notice signed by one or more of the subscribers to the certificate of incorporation, stating the time, place, and purpose of the meeting; and at least seven days before the appointed time a copy of this notice shall be given to each subscriber, left at his usual place of business or residence, or duly mailed to his post-office address, unless the signers waive notice in writing. Whoever gives the notice must make affidavit thereof, which affidavit shall include a copy of the notice and be entered upon the records of the corporation. At the first meeting, or any adjournment thereof, an organization shall be effected by the choice of a temporary clerk, who shall be sworn; by the adoption of bylaws; and by the election of directors and such other officers as the bylaws require; but at this meeting no person may be elected director who has not signed the certificate of incorporation. The temporary clerk shall record the proceedings until the election and qualification of the secretary. The directors so chosen shall elect a president, secretary, and other officers which under the bylaws they are so authorized to choose. The president, secretary, and a majority of the directors shall forthwith make, sign, and swear to a certificate setting forth a copy of the certificate of incorporation, with the names of the subscribers thereto, the date of the first meeting and of any adjournments thereof, and shall submit such certificate and the records of the corporation to the Commissioner of Insurance, who shall examine the same, and who may require such other evidence as he deems necessary. If upon his examination the Commissioner of Insurance approves of the bylaws and finds that the requirements of the law have been complied with, he shall issue a license to the company to do business in the State, as is provided for in this Chapter. (1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; Rev., s. 4728; C. S., s. 6329.)

§ 58-75. Bylaws; classification and election of directors. — A domestic company may adopt bylaws for the conduct of its business not repugnant to law or its charter, and therein provide for the division of its board of directors into two, three, or four classes, and the election thereof at its annual meetings so that the members of one class only shall retire and their successors be chosen each year. Vacancies in any such class may be filled by election by the board for the unexpired term. (1899, c. 54, s. 22; Rev., s. 4724; C. S., s. 6330.)

§ 58-76: Repealed by Session Laws 1945, c. 386.

§ 58-77. Amount of capital and/or surplus required; impairment of capital or surplus. — The amount of capital and/or surplus requisite to the formation and organization of companies under the provisions of this Chapter shall be as follows:

(1) Stock Life Insurance Companies.

a. A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do the business of life insurance, only

when it shall have paid-in capital of at least three hundred thousand dollars ($300,000) and a paid-in initial surplus of an amount at least equal to such capital, and it may in addition do the kind of business specified in subdivision (2) of G.S. 58-72, without having additional capital or surplus. Every such company shall at all times thereafter maintain a minimum capital of not less than three hundred thousand dollars ($300,000) and a minimum surplus of at least seventy-five thousand dollars ($75,000). Provided that, any such corporation may do either or both of the kinds of insurance authorized for stock, accident and health insurance companies, as set out in paragraphs a and b of subdivision (3) of G.S. 58-72 where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in subdivision (2) hereof as applicable and maintains the same as required therein.

b. If the Commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do the business of life insurance, or the writing of annuities or both, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit the organization of a stock corporation to do on such restricted plan either or both kinds of business specified in subdivisions (1) and (2) of G.S. 58-72, with the minimum paid-in capital and a minimum paid-in surplus in an amount to be prescribed by him, but in no event to be less than a paid-in capital of two hundred thousand dollars ($200,000) and a paid-in surplus of two hundred thousand dollars ($200,000). Every such company shall at all times thereafter maintain such prescribed minimum capital and a minimum surplus of at least fifty thousand dollars ($50,000).

(2) Stock Accident and Health Insurance Companies.

a. A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do only the kind of insurance specified in subdivision (3) a of G.S. 58-72, when it shall have a paid-in capital of not less than two hundred thousand dollars ($200,000), and a paid-in surplus at least equal to such capital. Every such company shall at all times thereafter maintain a minimum capital of not less than two hundred thousand dollars ($200,000) and a minimum surplus of at least fifty thousand dollars ($50,000).

b. Any company organized under the provisions of paragraph a of this subdivision may, by the provisions of its original charter or any amendment thereto, acquire the power to do the kind of business specified in paragraph b of subdivision (3) of G.S. 58-72, if it has a paid-in capital at least equal to three hundred thousand dollars ($300,000), and a paid-in initial surplus at least equal to such capital. Every such company shall at all times maintain a minimum capital of not less than three hundred thousand dollars ($300,000) and a minimum surplus of at least fifty thousand dollars ($50,000).

(3) Stock Fire and Marine Companies. — A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72 only when it shall have a paid-in capital of not less than four hundred thousand dollars ($400,000) and a contributed surplus equivalent to not less than such paid-in capital. Every such company shall at all times thereafter maintain a minimum capital of not less than four hundred thousand dollars ($400,000) and a minimum surplus of at least one hundred

thousand dollars ($100,000) provided that, any such corporation may do all the kinds of insurance authorized for casualty, fidelity and surety companies, as set out in subdivision (4) hereof where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in said section, and maintains the same.

(4) Stock Casualty and Fidelity and Surety Companies. — A stock corporation may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) of G.S. 58-72 only when it shall have a paid-in capital of not less than five hundred thousand dollars ($500,000) and a contributed surplus equivalent to not less than such paid-in capital. Every such company shall at all times thereafter maintain a minimum capital of not less than five hundred thousand dollars ($500,000) and a minimum surplus of at least one hundred and twenty-five thousand dollars ($125,000). If the Commissioner, after such investigation as he may deem it expedient to make, finds that a corporation may be organized to do one or more of such kinds of insurance, that its operations are restricted solely to one state, and that the organization of such corporation is in the public interest, he may permit such corporation to be organized and licensed to write the lines set out in this section with a paid-in capital of not less than three hundred thousand dollars ($300,000) and a contributed surplus equivalent to not less than such paid-in capital, and every such company shall hereafter maintain a minimum capital of not less than three hundred thousand dollars ($300,000) and a minimum surplus of at least seventy-five thousand dollars ($75,000) provided that, any casualty, fidelity and surety corporation may do all the kinds of insurance authorized for fire and marine companies, as set out in subdivision (3) hereof where its charter so permits, when and if it meets all additional requirements as to capital and surplus as fixed in said section, and maintains the same.

(5) Mutual Fire and Marine Companies.

a. Limited assessment companies. — A limited assessment mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21), and (22) of G.S. 58-72 only when it has no less than five hundred thousand dollars ($500,000) of insurance in not fewer than five hundred separate risks subscribed with a contributed initial surplus of at least one hundred thousand dollars ($100,000), which surplus shall at all times be maintained. The assessment liability of a policyholder of a company organized in accordance with the provisions of this paragraph shall not be limited to less than five annual premiums provided, such limited assessment company may reduce the assessment liability of its policyholders from five annual premiums as set out herein to one additional annual premium when the free surplus of such company amounts to not less than two hundred thousand dollars ($200,000), which surplus shall at all times be maintained.

b. Assessable mutual companies. — An assessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5), and (6) of G.S. 58-72 with an unlimited assessment liability of its policyholders only when it shall have not less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks subscribed with contributed

surplus equal to twice the amount of the maximum net retained liability under the largest policy of insurance issued by such company; but not less than twenty thousand dollars ($20,000), which surplus shall at all times be maintained. Provided such company, when its charter so permits, in addition may be licensed to do one or more of the kinds of insurance specified in subdivisions (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72, with an unlimited assessment liability of its policyholders, when its free surplus amounts to not less than fifty thousand dollars ($50,000), which surplus shall at all times be maintained.

c. Nonassessable mutual companies. — A nonassessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21), and (22) of G.S. 58-72 and may be authorized to issue policies under the terms of which a policyholder is not liable for any assessments in addition to the premium set out in the policy only when it shall have not less than five hundred thousand dollars ($500,000) of insurance in not fewer than 500 separate risks subscribed with a contributed initial surplus of not less than four hundred thousand dollars ($400,000) which surplus shall at all times be maintained.

d. Town or county mutual insurance companies. — A town or county mutual insurance company, with unlimited assessment liability, may be organized in the manner prescribed in this Chapter and licensed to do the kinds of insurance specified in subdivision (4) of G.S. 58-72 only when it shall have not less than fifty thousand dollars ($50,000) of insurance in not fewer than 50 separate risks subscribed with a contributed surplus at all times not less than the maximum net retained liability under the largest risk written or to be written whichever is the greater sum, which surplus shall at all times be maintained. A town or county mutual insurance company may, in addition to writing the business specified in subdivision (4) of G.S. 58-72, cover in the same policy the hazards usually insured against under an extended coverage endorsement when such company has and at all times maintains in addition to the surplus hereinbefore required, an additional surplus of not less than twenty-five thousand dollars ($25,000) or not less than an amount equivalent to one percent (1%) of the total amount of net retained insurance in force, whichever is the larger sum: Provided, that such company may not operate in more than three adjacent counties in this State.

(6) Mutual Life, Accident and Health Insurance Companies. — A nonassessable mutual insurance company may be organized in the manner prescribed in this Chapter, and licensed to do only one or more of the kinds of insurance specified in subdivisions (1), (2) and (3) of G.S. 58-72 when it has complied with the requirements of this Chapter and with those hereinafter set forth in paragraphs a to d, inclusive, of this subdivision, whichever shall be applicable.

a. If organized to do only the kinds of insurance specified in subdivisions (1) and (2) of G.S. 58-72, such company shall have not less than 500 bona fide applications for life insurance in an aggregate amount not less than five hundred thousand dollars ($500,000), and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him, in an aggregate amount at least equal to ten thousand dollars ($10,000), and shall in addition have a contributed surplus

of one hundred thousand dollars ($100,000), and shall have and maintain at all times a minimum surplus of fifty thousand dollars ($50,000).

b. If organized to do only the kind of insurance specified in paragraph a of subdivision (3) of G.S. 58-72 such company shall have not less than 250 bona fide applications for such insurance, and shall have received from each such applicant in cash the full amount of one annual premium on the policy applied for by him in an aggregate amount of at least ten thousand dollars ($10,000), and shall have a contributed surplus of one hundred thousand dollars ($100,000) and shall have and maintain at all times a minimum surplus of fifty thousand dollars ($50,000).

c. If organized to do the kinds of insurance specified in subdivision (1) and in paragraph a of subdivision (3) of G.S. 58-72, such company shall have complied with the provisions of both paragraph a and b hereof.

d. If organized to do the kind of insurance specified in paragraph b of subdivision (3) of G.S. 58-72, in addition to the kind or kinds of insurance designated in any one of the foregoing paragraphs of this subdivision, such company shall have a contributed surplus, and shall maintain a minimum surplus, each in an amount of at least fifty thousand dollars ($50,000) in excess of the respective amounts required by paragraphs a, b and c hereof where applicable.

(7) Organization of Mutual Casualty, Fidelity and Surety Companies.

a. Nonassessable mutual companies. — A mutual insurance company with no assessment liability provided for its policyholders may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) of G.S. 58-72 when it has a minimum contributed surplus of five hundred thousand dollars ($500,000) and not less than five hundred thousand dollars ($500,000) in insurance subscribed in not less than 500 separate risks. The surplus of such company shall at all times be maintained at or above the amount required hereinabove for organization of such company.

b. Assessable mutual companies. — A mutual insurance company with assessment liability provided for its policyholders may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (3), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (21) and (22) of G.S. 58-72 when it has a minimum contributed surplus of two hundred thousand dollars ($200,000) and not less than five hundred thousand dollars ($500,000) of insurance subscribed in not less than 500 separate risks. Such company shall at all times maintain a surplus in an amount not less than two hundred thousand dollars ($200,000). The assessment liability of a policyholder of such company shall not be limited to less than one annual premium.

(8) a. A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph a of subdivision (5), and paragraph b of subdivision (7) where its charter so permits when and if it meets the combined maximum requirements of said paragraphs. The assessment liability of policyholders of such a company shall not be limited to less than one annual premium within any one policy year.

b. A company may do all the kinds of insurance authorized to be done by a company organized under the provisions of paragraph c of subdivision (5), and paragraph a of subdivision (7) where its charter so permits when and if it meets the combined maximum requirements of said paragraphs. The policyholders of such a company shall not be subject to any assessment liability.

(9) Any domestic, foreign or alien company licensed to do business in North Carolina prior to July 1, 1965, shall be permitted to continue to do the same kinds of business which it was authorized to do on such date without being required to increase its capital and/or surplus, provided, however, such insurers shall increase the capital and surplus requirements to the amounts set forth herein on or before July 1, 1975, but the requirements of this section as to capital and surplus shall apply to such companies as a prerequisite to writing additional lines of business.

(10) Whenever the Commissioner finds from a financial statement made by any such company, or from a report of examination of any such company, that its admitted assets are less than the aggregate amount of its liabilities and its outstanding capital stock and/or required minimum surplus, he shall determine the amount of such impairment of capital and/or surplus and issue an order in writing requiring the company to eliminate the impairment within such period of not more than 90 days as he shall designate. The Commisisioner may, by order served upon the company, prohibit the company from issuing any new policies while such impairment exists. If at the expiration of the designated period the company has not satisfied the Commissioner that the impairment has been eliminated, an order for the rehabilitation or liquidation of the company may be entered as provided in Article 17A, Chapter 58 of the General Statutes of North Carolina. (1899, c. 54, s. 26; 1903, c. 438, s. 4; Rev., s. 4729; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; C. S., s. 6332; 1929, c. 284, s. 1; 1945, c. 386; 1947, c. 721; 1963, c. 943; 1965, c. 947; 1967, c. 300; 1971, c. 536; 1973, c. 686.)

Editor's Note. — The 1973 amendment substituted "July 1, 1975," for "July 1, 1973," in subdivision (9).

Cited in American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959).

§ 58-78. Capital stock fully paid in cash. — The capital stock shall be paid in cash within 12 months from the date of the charter or certificate of organization, and no certificate of full shares and no policies may be issued until the whole capital is paid in. A majority of the directors shall certify on oath that the money has been paid by the stockholders for their respective shares and is held as the capital of the company invested or to be invested as required by G.S. 58-77. (1899, c. 54, s. 27; Rev., s. 4730; C. S., s. 6333; 1945, c. 386.)

§ 58-79. Investments; life. — (a) Investments Specified. — Every domestic stock and mutual life insurance company must have and continually keep to the extent of an amount equal to its entire reserves, as hereinafter defined, and entire capital, if any, and minimum required surplus, invested in:

(1) Coin or currency of the United States of America, on hand or on deposit in a national or state bank or trust company or invested in the shares of any building and loan or savings and loan association, or invested in the shares of any federal savings and loan association.

(2) Interest-bearing bonds, notes, certificates of indebtedness, bills or other direct interest-bearing obligations of the United States of America or of the Dominion of Canada or other interest-bearing obligations fully

guaranteed both as to principal and interest by the United States of America, or by the Dominion of Canada.

(3) Interest-bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or of any province of the Dominion of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(4) Interest-bearing bonds of any commission, authority or political subdivision having legal authority to issue the same of any state, District of Columbia, territory or possession of the United States of America or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America.

(5) Federal farm loan bonds issued by federal land banks organized under the provisions of the act of Congress known as the Federal Farm Loan Act. Any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended. Interest-bearing bonds, notes or other interest-bearing obligations of any solvent corporation organized under the laws of the United States of America or of the Dominion of Canada, or under the laws of any state, District of Columbia, territory or possession of the United States of America, or obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development, Asian Development Bank and Inter-American Development Bank. Equipment trusts obligations or certificates or other secured instruments evidencing an interest in transportation equipment wholly or in part within the United States of America and a right to receive determined portions of rental, purchases or other fixed obligatory payments for the use or purchase of such transportation equipment.

(6) Dividend-paying stocks or shares of any corporation created or existing under the laws of the United States of America or of any state, District of Columbia, territory or possession of the United States of America; notwithstanding any provisions in this section to the contrary no company may invest more than ten percent (10%) of its total admitted assets in common stocks; and further provided, that no company may invest more than three percent (3%) of its admitted assets in the stock or shares of any one corporation, and provided further, except as the Commissioner shall permit, that such investment in any one corporation not engaged solely in the business of insurance shall not result in the acquisition of more than twenty percent (20%) of the outstanding voting stock or shares of such corporation. The restrictions in this section do not apply to shares of building and loan or savings and loan associations or federal savings and loan associations.

(7) Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple or improved leasehold real estate in the District of Columbia or in any state, territory or possession of the United States of America, to an amount not exceeding seventy-five percent (75%) of the fair market value of such fee simple or improved leasehold real estate. No loan may be made on leasehold real estate unless the lease has at least 30 years to run before its termination and the loan matures at least 20 years before expiration of the lease. Whenever such loans are made upon fee simple, or improved leasehold real estate which is improved by a building or buildings, the said improvements shall be insured against loss by fire, and the fire insurance policies shall contain a

standard mortgage clause and shall be delivered to the mortgagee as additional security for the said loan.

Loans secured by first mortgages which the Federal Housing Administrator has insured or has made a commitment to insure, or invested in mortgage notes or bonds so insured, and neither the limitations of this section nor any other law of this State requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured mortgage loans.

Loans secured by first mortgages, or deeds of trust, on unencumbered fee simple real estate in connection with which the Veterans Administration of the United States has guaranteed, or has made a commitment to guarantee, a portion of the loan pursuant to the Servicemen's Readjustment Act of 1944, and amendments thereto, provided the amount of any such loan, less the portion thereof guaranteed by said Veterans Administration, shall not exceed seventy-five percent (75%) of the fair market value of such real estate.

In all investments made upon mortgages, the evidence of the debt, if any, shall accompany the mortgage or deed of trust.

(8) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premiums paid, if any, shall be amortized over the period between date of acquisition and earliest redemption date or charged off at any time prior to redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

(9) Collateral loans secured by pledge of any security named in subdivisions (1), (2), (3), (4), (5), (6), (7) and (8) of this subsection; provided that the current market value of such pledged securities shall be at all times during the continuance of such loans at least twenty-five percent (25%) more than the unpaid balance of the amount loaned on them.

(10) Loans upon the policies of the company; provided that the total indebtedness against any policy shall not be greater than the loan value of such policy.

(11) No domestic company may directly or indirectly acquire or hold real property except as follows:

a. Such land and buildings thereon in which it has its principal office and such real estate as shall be requisite for the convenient transaction of its own business; the amount invested in such real property shall not exceed ten per centum (10%) of the investing company's admitted assets, but the Commissioner may grant permission to the company to invest in real property for such purpose in such increased amount as he may deem proper upon a hearing held before him.

b. Property mortgaged to it in good faith as security for loans previously contracted for money due.

c. Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

d. Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it under paragraphs b and c of this subdivision and subject to the prior written approval of the Commissioner.

e. 1. Real estate acquired for the purpose of leasing the same to any person, firm, or corporation, or real estate already leased under the following conditions:

I. A. Where there has already been erected on said property a building or other improvements satisfactory to the purchaser, or

B. Where the lessee shall at its own cost erect thereon, free of liens, a building or other improvements satisfactory to the lessor, or

C. Where the lessor under the terms and conditions of a lease executed and entered into simultaneously with the purchase of the property agrees to erect a building or other improvements on said property;

II. That the said improvements shall remain on the said property during the period of the lease, and in cases where the said improvements are put upon said property at the cost of the lessee the said improvements at the termination of the lease shall vest, free of liens, in the owner of the real estate;

III. That during the term of the lease the tenant shall keep and maintain the said improvements in good repair. Real estate acquired pursuant to the provisions of this subparagraph (a)(11)e1 shall not be treated as an admitted asset unless and until the improvements herein required shall have been constructed and the lease agreement entered into in accordance with the terms of this subparagraph, nor shall real estate acquired pursuant to this subparagraph (a)(11)e1 be treated as an admitted asset in an amount exceeding the amount actually invested reduced each year by at least two percent (2%) of the investment allocable to the improvements on such real estate. The total investments of any company under this subparagraph (a)(11)e1 shall not exceed six percent (6%) of its assets, nor more than fifty percent (50%) of its capital and surplus whichever is less.

2. Subject to approval of the Commissioner, real estate for recreation, hospitalization, convalescent and retirement purposes of its employees. Such investment under this subparagraph (a)(11)e2 shall not exceed five percent (5%) of the company's surplus.

3. Subject to the approval of the Commissioner, real estate for public or private housing developments. Such investment under this subparagraph (a)(11)e3 shall be subject to and not exceed the limitation provided for in the last sentence of subparagraph (a)(11)e1 III hereof.

4. No investment shall be made by any company pursuant to this paragraph e which will cause such company's investment in all real property owned or held by it directly or indirectly to exceed ten percent (10%) of its assets.

f. It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose. Real estate acquired under paragraph (a)(11)a and subparagraph (a)(11)e2 of this section which has ceased to be used or to be necessary for the purposes stated therein shall be sold within five years thereafter, unless the company procures a certificate from the Commissioner that the interest of the company will materially suffer by a forced

sale of such real estate in which event the time for the sale may be extended to such a time as the Commissioner may direct in the certificate. Any real estate acquired under paragraphs b, c, and d of this subdivision (11) shall be sold within five years after the company has acquired title thereto; provided, that the Commissioner may in his discretion extend the five-year period as provided hereinabove. Any real estate acquired under subparagraph (a)(11)e1 of this section shall within five years after the termination or expiration of such lease be sold or released for an additional term pursuant to the provisions of subparagraph (a)(11)e1; provided, that the Commissioner may in his discretion extend the five-year period as provided hereinabove. Nothing contained herein prevents any insurance company from improving or conveying its real estate, notwithstanding the lapse of five years without having procured such certificate from the Commissioner.

(12) Electronic and mechanical machines constituting a data processing and accounting system if the cost of such system is at least twenty-five thousand dollars ($25,000), but not more than two percent (2%) of its admitted assets, which cost shall be amortized in full over a period not to exceed 10 calendar years.

(13) Interest, rents or other fixed income due and accrued on any of the investments named in subdivisions (1), (2), (3), (4), (5), (7), (8), (9), (10) and (11) of this subsection pursuant to regulations promulgated by the Commissioner.

(14) Notwithstanding any expressed or implied prohibitions, a company may, after the date of the enactment of this subdivision, invest in investments which do not otherwise qualify under any other provision of this subsection; provided, however, that the investments authorized by this subdivision shall not exceed the lesser of (i) five percent (5%) of its admitted assets or (ii) the amount by which total admitted assets exceed total liabilities (except capital) plus six hundred thousand dollars ($600,000) as shown on its last annual statement preceding the date of the acquisition of such investment as filed with the Commissioner of Insurance.

(15) To the extent necessary to satisfy the investment requirements as to reserves and entire capital, if any, and minimum required surplus, no company shall make any investment in or loan on any of the securities mentioned in this section, which are in default as to principal or interest or as to which the dividend on the last preceding dividend date has been passed.

(b) General Provisions.

(1) The entire reserves of a domestic life insurance company, as used in this section, shall be the sum of:

Net present value of all outstanding policies in force (less reinsurance); reserves for accidental death benefits and total and permanent disability benefits (less reinsurance); present value of supplementary contracts and including dividends left with the company to accumulate at interest; liability on policies canceled and not included in "net reserve" upon which a surrender value may be demanded, and policy claims and losses outstanding, less amount of net uncollected and deferred premiums.

(2) No investment or loan, except loans made on the company's own policies, shall be made by any domestic insurer unless the same be authorized or approved by the board of directors, or by a committee appointed by the board and charged with the duty of supervising or making such

investment or loan. The minutes of any such committee shall be recorded and a report shall be submitted to the board of directors.

(3) No life insurance company doing business in this State shall make any loan to any director or officer of such insurer, either directly or indirectly; nor shall such insurer make any loan to any other corporation or business unit in which such officer or director is substantially interested; nor shall any such director or officer accept any such loan directly or indirectly.

No director or officer of any such insurance company doing business in this State shall receive any money or valuable thing either directly or indirectly, or through any substantial interest in any other corporation or business unit, for negotiating, procuring, recommending or aiding in any purchase or sale of property or loan from such insurer nor be pecuniarily interested either as principal, coprincipal, agent or beneficiary, in any such purchase, sale or loan, nor shall any financial obligation of any such director or officer be guaranteed by such insurer.

Nothing contained in this section shall be construed as prohibiting a director or officer of any such insurance company or fraternal benefit society from receiving the usual salary, compensation or emoluments for services rendered in the ordinary course of his duties as a director or officer, if such salary, compensation or emoluments be authorized by vote of the board of directors of such insurer, nor as prohibiting the payment to a director or officer of any such insurer who is a licensed attorney-at-law of a fee or fees in connection with loans made by any such insurer if and when such fees are paid by the borrower and do not constitute a charge against any such insurer; and, provided, that nothing herein contained shall prevent a life insurance corporation from making a loan upon a policy held therein by the borrower not in excess of the net value thereof.

A substantial interest in any corporation or business unit is defined to mean an interest equivalent to ownership or control by a director or officer or the aggregate ownership or control by all directors and officers of the same insurance or surety company or fraternal benefit society, of ten percentum (10%) or more of the stock of such corporation or business unit.

(4) When any of the investments mentioned in this section and held by any domestic insurer are of doubtful value, or without ascertainable value on a public exchange, unless the company by placing some of them upon the market and obtaining a bona fide offer therefor shall so establish a value, the Commissioner shall have the authority to cause the same to be appraised and such appraisement shall be taken to be the true value thereof. In such case, the appraisement shall be made by two disinterested and competent persons, one to be appointed by the Commissioner and one to be appointed by the company; in the event these two fail to agree, they shall appoint a third disinterested and competent person and the estimate of the value of such investment as arrived at by these three shall be taken to be the true value thereof.

(5) When any of the investments mentioned in this section shall default in the payment of interest or dividends after having been purchased by the company, such investments shall thereafter be carried at their respective market values or at valuations fixed in accordance with regulations promulgated by the Commissioner.

(6) The investments made by domestic companies on and after March 6, 1945, shall be in accordance with the provisions of this section, and any investments made prior to March 6, 1945, shall be made to conform to the requirements of this Article by not later than three years after

March 6, 1945, but the Commissioner may, on application by the company extend the time for such conformance for each period or periods as he may deem proper on the showing made, if he is satisfied that such company will suffer materially by the forced sale of any securities or property not conforming; and the Commissioner shall grant a hearing to the company upon request.

(7) Notwithstanding any provision of this Chapter to the contrary, domestic insurance companies may be authorized by their charter to own, maintain and operate radio and television stations; provided, no such company may make any investment in the ownership, maintenance and operation of such stations in an amount greater than fifty percent (50%) of the excess of its surplus over the minimum surplus required for the organization of such company.

(c) Other Investments; Investments Unlawfully Acquired. — After satisfying the requirements hereinbefore set forth any funds of any domestic company in excess of its entire capital, if any, and minimum required surplus and reserves as defined in subdivision (b)(1) of this section shall be invested in such other securities or in any such safe manner as may be approved by the Commissioner.

Whenever it appears by examination as authorized by law that an insurance company organized under the laws of this State has acquired any investments in violation of the law in force at the date of such acquisition it is the duty of the Commissioner to disallow the amount of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in the law and to deduct such amount as a nonadmitted asset of such company. In any determination of the financial condition of any such company such amount shall be deducted as a nonadmitted asset of such company.

(d) Investments of Foreign and Alien Companies.

(1) The Commissioner may refuse a new or renewal license to any foreign company if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this section upon like domestic companies wherever authorized to do the same kind or kinds of insurance business.

(2) No alien company shall be authorized to do business in this State unless its general State deposits and its trusteed assets comply in substance with the requirements and limitations of this section applicable to like domestic companies wherever authorized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

a. Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien company was organized or by any province or other major political subdivision thereof and not in default as to principal or interest in an amount not exceeding the minimum capital required of a domestic stock company wherever authorized to do the same kind or kinds of insurance business.

b. Bonds, notes or other valid and legally authorized obligations issued assumed or guaranteed by the Dominion of Canada or any province thereof or other political subdivisions, and such securities of corporations of the Dominion of Canada as may be approved by the Commissioner which are not in default as to principal or interest not exceeding ten percent (10%) of the total admitted assets of the United States branch of such company. (1899, c. 54, s. 27; Rev., s. 4731; 1907, cc. 798, 998; 1911, c. 32; 1913, c. 200; C. S., s. 6334; 1923, c. 73; 1925, c. 187; 1945, c. 386; 1947, c. 721; 1951, c. 284; c. 781, s. 8; 1955, c. 178, s. 1; 1959, c. 286; 1961, cc. 263, 378; 1967, c. 842; 1969, c. 1199; 1971, c. 386, s. 1; 1973, c. 239, s. 5.)

Cross References. — As to authority to invest in bonds guaranteed by the United States, see § 53-44. As to authority to invest in bonds or notes secured by mortgages insured by the Federal Housing Administrator, see § 53-45. See also § 53-60 as to investments in federal farm loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

Editor's Note. — The 1973 amendment inserted in subdivision (5) of subsection (a) the provisions as to obligations issued by a farm credit institution pursuant to the Farm Credit Act of 1971.

For brief comment on the second 1951 amendment, see 29 N.C.L. Rev. 398.

Cited in Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

§ 58-79.1. Investments; fire, casualty and miscellaneous. — (a) Minimum Capital Investments. — Before investing any of its funds in any other classes of securities or types of investments, every domestic stock insurance company other than a life insurance company or a fraternal benefit association, shall to the extent of an amount equal in value to the minimum capital required by law for a domestic stock corporation authorized to transact the same kinds of insurance, invest its funds only in securities of the classes described in this section and which are not in default as to principal or interest. Every domestic mutual insurance company, other than a life insurance company, before investing any of its funds in any other classes of securities or types of investment, shall invest its funds only in such securities to the extent of an amount equal in value to the minimum assets or surplus required of such company by the laws of North Carolina. Investments equal in value to such an amount and of the kind or kinds hereinafter prescribed in this section shall at all times be maintained free and clear from any lien or pledge other than as impressed upon a deposit with any government within the United States or upon trusteed assets held in trust for the security of all its policyholders and creditors. Minimum capital investments of such an insurer shall consist of the following classes of securities and not less than sixty percent (60%) of the total amount of the required minimum capital investments shall consist of the classes specified in subdivisions (1) and (2) following:

(1) Bonds, or other evidences of indebtedness of the United States of America or of any of its agencies when such obligations are guaranteed as to principal and interest by the United States of America.

(2) Bonds, or stocks or other evidences of indebtedness which are direct obligations of the State of North Carolina or of any county, district or municipality thereof.

(3) Bonds, or other evidences of indebtedness which are direct obligations of any state of the United States.

(4) Mortgage loans or deeds of trust as specified in paragraphs a or c of subdivision (6) of subsection (c) on property located in this State.

(5) Ground rents as specified in subdivision (7) of subsection (c).

(6) Obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development, Asian Development Bank and Inter-American Development Bank.

(b) Reserve Investments Required.

(1) After satisfying requirements for minimum capital investments specified in subsection (a), any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, may invest its funds in, or otherwise acquire, or loan upon, only the classes of reserve investments as specified in subsection (c), unless it shall at all times have and maintain cash and such reserve investments (including its minimum capital investments), free from any lien or pledge, which, when valued in accordance with the provisions of this section, shall be at least equal in amount to fifty per centum (50%) of the aggregate amount of its unearned premium and loss

reserves as shown by its last sworn statement, annual or quarterly on file with the Commissioner. The term "lien or pledge" as used in this subsection shall not include any deposit of securities or cash with any government, nor trusteed assets, held in trust for the benefit or protection of all or any class of the policyholders, or policyholders and creditors, of such insurer.

(2) No securities or other investments shall be eligible for purchase or acquisition under this section unless they are interest bearing or income paying, but defaults in interest or income occurring subsequent to such purchase or acquisition shall not affect the allowance thereof as an admitted asset at the market value thereof unless otherwise specifically provided in this section.

(3) Nothing contained in this subsection shall prohibit the acquisition by an insurer of other securities of property if distributed to it as a dividend or if acquired by it pursuant to a lawful plan of reorganization, or if acquired by it pursuant to a lawful and bona fide agreement of bulk reinsurance or consolidation.

(4) Any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, which has investments fully complying with the requirements of subdivision (1) of this subsection may acquire investments eligible under the provisions of subsection (d). Any such insurer whose investments do not fully comply with such requirements may, during a period of 10 years from March 6, 1945, acquire such additional kinds of securities if acquired in substitution for other securities heretofore lawfully acquired by it and if such substitution results in a net reduction in the aggregate amount of the insurer's investments in securities not eligible under subsection (c).

(c) Classes of Reserve Investments. — The reserve investments of every domestic stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, shall consist of the following:

(1) Bonds or other evidences of indebtedness, not in default as to principal or interest, which are valid and legally authorized obligations issued, assumed or guaranteed by the United States of America or by any state thereof or by any territory or possession of the United States or by the District of Columbia, or by any county, city, town, village, municipality or district therein or by any political subdivision thereof or by any civil division or public instrumentality of one or more of the foregoing, if by statutory or other legal requirements applicable thereto, such obligations are payable, as to both principal and interest, from taxes levied or by such law required to be levied upon all taxable property or all taxable income within the jurisdiction of such governmental unit or from adequate special revenues pledged or otherwise appropriated or by such law required to be provided for the purpose of such payment, but not including any obligations payable solely out of special assessments on properties benefited by local improvements.

(2) Obligations, other than those eligible for investment under subdivision (6), issued, assumed, or guaranteed by any solvent institution created or existing under the laws of the United States or of any state, district or territory thereof, which are not in default as to principal or interest, and which are qualified under any of the following paragraphs:

a. Obligations which are secured by adequate collateral security and bear fixed interest and if during each of any three, including the last two, of the five fiscal years next preceding the date of acquisition by such insurer, the net earnings of the issuing, assuming or guaranteeing institution available for its fixed

charges, as hereinafter defined, shall have been not less than one and one-quarter times the total of its fixed charges for such year, or obligations which, at the date of acquisition by such insurer, are adequately secured and have investment qualities and characteristics wherein the speculative elements are not predominant. In determining the adequacy of collateral security, not more than one third of the total value of such required collateral shall consist of stock other than stock meeting the requirements of subsection (c).

b. Fixed interest-bearing obligations, other than those described in paragraph a if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times its average annual fixed charges applicable to such period and if during the last year of such period such net earnings shall have been not less than one and one-half times its fixed charges for such year.

c. Adjustment, income or other contingent interest obligations if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges and its average annual maximum contingent interest applicable to such period and if during each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges and maximum contingent interest for such year.

Within the meaning of this section the term "obligation" shall include bonds, debentures, notes or other evidences of indebtedness; the term "institution" shall include a corporation, a joint stock association and a business trust. The term "net earnings available for fixed charges" shall mean net income after deducting operating and maintenance expenses, taxes other than federal and State income taxes, depreciation and depletion, but excluding extraordinary nonrecurring items of income or expense appearing in the regular financial statements of the issuing, assuming or guaranteeing institutions. The term "fixed charges" shall include interest on funded and unfunded debt amortization of debt discount, and rentals for leased properties. If net earnings are determined in reliance upon consolidated earnings statements of parent and subsidiary institutions, such net earnings shall be determined after provision for income taxes of subsidiaries and after proper allowance for minority stock interest, if any; and the required coverage of fixed charges shall be computed on a basis including fixed charges and preferred dividends of subsidiaries other than those payable by such subsidiaries to the parent corporation or to any other of such subsidiaries, except that if the minority common stock interest in the subsidiary corporation is substantial, the fixed charges and preferred dividends may be apportioned in accordance with regulations prescribed by the Commissioner.

In applying the earnings tests under this section to any issuing, assuming or guaranteeing institution, whether or not in legal existence during the whole of such five years next preceding the date of investment by such insurer, which has at any time or times during such five-year period acquired the assets of any other institution or institutions by purchase, merger, consolidation or otherwise,

substantially as an entirety, or has been reorganized pursuant to the bankruptcy law, the earnings of such other predecessor or constituent institutions, or of the institution so reorganized, available for interest and dividends for such portion of such period as shall have preceded such acquisition, or such reorganization may be included in the earnings of such issuing, assuming or guaranteeing institution for such portion of such period as may be determined in accordance with adjusted or pro forma consolidated earnings statements covering such portion of such period and giving effect to all stocks or shares outstanding and all fixed charges existing, immediately after such acquisition, or such reorganization.

(3) Preferred or guaranteed stocks or shares of any solvent institution, created or existing under the laws of the United States or of any state, district or territory thereof, if all of the prior obligations, and prior preferred stocks, if any, of such institution at the date of acquisition by such insurer are eligible as investments under this section; and if qualified under paragraph a or paragraph b following:

a. Preferred stocks or shares shall be deemed qualified if both of the following requirements are met:

1. The net earnings of such institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by such insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges, if any, its average annual maximum contingent interest if any, and its average annual preferred dividend requirements applicable to such period; and

2. During each of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges, contingent interest and preferred dividend requirements for such year. The term "preferred dividend requirements" shall be deemed to mean cumulative or noncumulative dividends whether paid or not.

b. Guaranteed stocks or shares shall be deemed qualified if the assuming or guaranteeing institution meets the requirements of paragraph b of subdivision (2) of subsection (c) construed so as to include as a fixed charge the amount of guaranteed dividends of such issue or the rental covering the guarantee of such dividends.

(4) a. Certificates, notes or other obligations issued by trustees or receivers of any institution created or existing under the laws of the United States or of any state, district or territory thereof, which, or the assets of which, are being administered under the direction of any court having jurisdiction, if such obligation is adequately secured as to principal and interest.

b. Equipment trust obligations or certificates which are adequately secured or other adequately secured instruments evidencing an interest in transportation equipment wholly or in part within the United States and a right to receive determined portions of rental, purchase or other fixed obligatory payments for the use or purchase of such transportation equipment.

(5) Bank and banker's acceptances and other bills of exchange of the kind of maturities made eligible, pursuant to law, for purchase in the open market by federal reserve banks.

(6) a. Bonds or evidences of indebtedness other than those described in subdivision (2) of subsection (c) which are secured by first mortgages or deeds of trust upon unencumbered fee simple or improved leasehold real property located in the United States. Real

property shall not be deemed to be encumbered within the meaning of this section, by reason of the existence of instruments reserving mineral, oil or timber rights, rights-of-way, sewer rights, rights in walls, nor by reason of any liens for taxes or assessments not yet due, nor by reason of building restrictions or other restrictive covenants, nor when such real property is subject to lease under which rents or profits are reserved to the owner, if in any event the security for such loan is a first lien upon such real property and if there is no condition or right of reentry or forfeiture, under which such lien can be cut off, subordinated or otherwise disturbed. No such mortgage loan or loans made or acquired by any insurer on any one property shall, at the time of investment by the insurer, exceed two thirds of the value of the real property securing the same. No such mortgage loan or loans shall be made or acquired by an insurer except after an appraisal made by an appraiser for the purpose of such investment. No such mortgage loan made or acquired by an insurer which is a participation or a part of a series or issue secured by the same mortgage or deed of trust shall be a lawful investment under this paragraph unless the entire series or issue which is secured by the same mortgage or deed of trust is held by such insurer or unless the insurer holds a senior participation in such mortgage or deed of trust giving it substantially the rights of a first mortgagee. Except as otherwise provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, shall invest in or loan upon the security of any one property more than twenty-five thousand dollars ($25,000) or more than two per centum (2%) of its total admitted assets, whichever is the greater. In no event shall the total investments of any such insurer in the kinds permitted under this subdivision exceed forty per centum (40%) of its total admitted assets.

b. Purchase money mortgages or like securities received by it upon the sale or exchange of real property acquired pursuant to subdivision (8) of this subsection (c).

c. Bonds or notes secured by mortgage or trust deed guaranteed or insured by the Federal Housing Administration under the terms of an act of Congress of the United States of June 27, 1934, entitled the "National Housing Act," as heretofore or hereafter amended.

(7) Ground rents in the District of Columbia or any state of the United States of America, provided, that in the case of unexpired redeemable ground rents the premium paid, if any, shall be amortized over the period between date of acquisition and redemption date; and in the case of expired redeemable ground rents the premium paid, if any, shall be charged off at the time of acquisition. Redeemable ground rents purchased at a discount shall be carried at an amount not greater than the cost of acquisition.

(8) Real estate only if acquired or used for the following purposes in the following manner:

a. The land and the building thereon in which it has its principal office or offices.

b. Such as shall be requisite for its convenient accommodation in the transaction of its business.

c. Such as shall have been acquired in satisfaction of loans, mortgages, liens, judgments, decrees or other debts previously owing to such insurer in the course of its business or in connection with the

default in payment of a loan insured under any mortgage guaranty policy of credit insurance.

d. Such as shall have been acquired in part payment of the consideration on the sale of real property owned by it, if each such transaction shall have effected a net reduction in the company's investment in real property.

e. Additional real property and equipment incident to real property, if necessary or convenient for the purpose of enhancing the sale value of real property previously acquired or held by it pursuant to the provisions of paragraph c or d of this subdivision (8).

All real property acquired pursuant to paragraphs a and b of this subdivision shall be disposed of within five years after it shall have ceased to be necessary for the convenient accommodation of such insurer in the transaction of its business, and all real property acquired pursuant to paragraphs c, d and e of this subdivision shall be disposed of within five years after the date of acquisition, unless in either case the Commissioner shall certify that the interests of the insurer will suffer materially by the forced sale thereof, in which event the time for disposal of such real property may be extended for such time as the Commissioner shall prescribe in such certificate. No real property shall be acquired by any domestic stock or mutual insurance company other than a life insurance company or a fraternal benefit association, pursuant to paragraphs a, b, d or e of this subdivision (8), except with the approval of the Commissioner.

(9) a. Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, may invest in, or otherwise acquire or loan upon, bonds, notes or other evidences of indebtedness which are valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof and which are not in default as to principal or interest; but the aggregate amount of such investments which are held at any time by any such insurer, together with all Canadian investments held by it pursuant to the following paragraph b shall not exceed ten percent (10%) of its total admitted assets, except where a greater amount is permitted pursuant to the following paragraph b, in which case the provisions of this subdivision shall not be applicable.

b. Any domestic stock or mutual insurance company, other than a life insurance company or a fraternal benefit association, which is authorized to do business in a foreign country or possession of the United States or which has outstanding insurance or reinsurance contracts on risks located in a foreign country or possession of the United States, may invest in, or otherwise acquire or loan upon securities and investments in such foreign country or possession which are substantially of the same kinds, classes and investment grades as those eligible for investment under the foregoing subdivisions of this subsection; but the aggregate amount of such investments in a foreign country or a possession of the United States and of cash in the currency of such country or possession which is at any time held by such insurer shall not, except as provided in the next preceding paragraph a, exceed one and one-half times the amount of its reserves and other obligations under such contracts or the amount which such insurer is required by law to invest in such country or possession, whichever shall be greater.

(10) Stock and debentures, or either, of any housing company organized under the public housing law of this State, to the extent and upon such

conditions as may be authorized by the Commissioner, provided all of the stock of such housing company has been or is to be originally issued to one or more insurance companies.

(d) Residue and Surplus Fund Investments. — After satisfying the requirements for minimum capital investments, any domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, which has accumulated and maintains reserve investments as required in subsection (b), may invest any portion of the remainder of its funds in, or otherwise acquire or loan upon, any of the classes of investments eligible under subsection (c) and any stock or shares, bonds or obligations, including voting trust certificates, certificates of deposit, interim receipts, and other similar instruments representing stock or shares, bonds or obligations eligible hereunder, or in investments in loans made by banks or trust companies secured by the assignment of cash surrender values of at least equal amount, in life insurance policies issued by life insurance companies licensed to do business in the State of North Carolina, except the following prohibited investments:

(1) Obligations, stock or other securities of any corporation, association or other business unit which is insolvent at the time of such acquisition or loan, except securities eligible for investment under subsection (c).

(2) Any mortgage or deed of trust, or any real property or any interest therein, which does not come within the class of investments specified in subdivisions (6) and (7) of subsection (c).

(3) Any capital stock of the investing insurer.

(4) Stocks, bonds or other securities issued by any corporation, if a majority of the outstanding stock of such corporation, or a majority of the stock having voting powers of such corporation is, or will be after such acquisition, directly or indirectly owned by such insurer or by or through one or more of its officers or directors holding the same, for the benefit of such insurer or of its stockholders, or owned by a parent corporation or subsidiary of such insurer, parent corporation or subsidiary thereof, or owned by any combination of the insurer, its parent corporation, its subsidiaries or its stockholders. Nothing contained in this subdivision shall be deemed to prevent any investment in the stock, bonds or other securities of a corporation organized exclusively to hold and operate real estate acquired by such insurer in accordance with and subject to the provisions of subsection (c), nor an investment in the stock of another insurance corporation nor an investment in stocks, bonds or other securities of any corporation which is engaged exclusively in a kind of business properly incidental to the insurance business of such insurer, including an investment in securities of any corporation engaged in the financing of insurance premiums, or in such incidental business and the business of holding and operating real estate.

(5) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, having more than twenty per centum (20%) of its assets invested in insurance company stocks directly or indirectly, including proportionate equities or interest in insurance company stocks held through any intermediate subsidiary or subsidiaries of such issuing corporation.

(6) Stocks, bonds or other securities issued by a corporation, other than an insurance corporation, if a majority of the stock having voting powers of such issuing corporation is owned directly or indirectly by or for the benefit of one or more officers or directors of such insurer.

(7) Foreign investments, meaning stocks or shares, bonds or obligations of any person or governmental or business unit of or in a foreign country or any subdivision thereof, except such as conform substantially with

the limitations imposed by this subsection upon like domestic investments; but the aggregate amount of foreign investments held by such insurer under this subdivision of subsection (d) and under subdivision (9) of subsection (c) shall not exceed ten per centum (10%) of its total admitted assets or one and one-half times the amount of its reserves and other obligations under such contracts or the amount necessary to enable it to establish and carry on an insurance business in such foreign country, directly or through a subsidiary corporation, whichever shall be greater.

(8) Any investment which is found by the Commissioner to be against public policy or designed to evade any prohibition of this section. Nothing contained herein shall be deemed to prohibit any such insurer from accepting securities, otherwise ineligible, which may be distributed pursuant to any plan of reorganization or dissolution.

(e) Limitation of Investments. — Except as more specifically provided in this section, no domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association, shall have more than ten percent (10%) of its total admitted assets invested in, or loaned upon the securities of any one institution; but this restriction shall not apply to the classes of governmental obligations (including those eligible under paragraph c, subdivision (6) of subsection (c)) eligible for minimum capital investments of such insurer nor to investments in stocks of other insurance companies. No domestic stock or mutual insurance company, other than a life insurance company or fraternal benefit association shall hereafter acquire any real property of the kind or kinds specified in paragraphs a and b of subdivision (8) of subsection (c), if the value of such real property, together with the value of all such real property then held by it, exceeds ten per centum (10%) of its total admitted assets except as more specifically provided in this section.

(f) Disposal or Reduction of Investments Unlawfully Acquired. — Every domestic stock and mutual insurance company, other than a life insurance company or fraternal benefit association, shall dispose of any investments acquired in violation of the law in force at the date of such acquisition, and in any determination of the financial condition of any such insurer, the amount of the value of such investments, if wholly ineligible, or the amount of the value thereof in excess of any limitation prescribed in this section, shall be deducted as an unadmitted asset of such insurer.

(g) Investments of Foreign and Alien Insurers.

(1) The Commissioner may refuse a new or renewal license to any foreign insurer, if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this section upon like domestic insurers hereafter organized to do the same kind or kinds of insurance business. The Commissioner may recognize like securities of the home state of a foreign insurer as minimum capital investments in lieu of the securities specified in subdivisions (2) and (4) of subsection (a).

(2) No alien insurer shall be authorized to do business in this State unless its general State deposits and its trusteed assets comply in substance with the requirements and limitations of this section applicable to like domestic insurers hereafter organized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

a. Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien insurer was organized or by any province or other major political subdivision thereof and not in default as to principal or interest, may be recognized as reserve investments under subsection (c) in

an amount not exceeding the minimum capital required of a domestic stock insurer hereafter organized to do the same kind or kinds of insurance business.

b. Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof which are not in default as to principal or interest may be included in the trusteed assets of such alien insurer in an amount not exceeding ten percent (10%) of the total admitted assets of the United States branch of such insurer.

(h) Valuation of Investments.

(1) The investments of every stock and mutual insurance company, other than a life insurance company or a fraternal benefit association, authorized to do business in this State, except securities subject to amortization and except as otherwise provided in this section, shall be valued, in the discretion of the Commissioner, at their market value, or at their appraised value, or at prices determined by him as representing their fair market value. If the Commissioner finds that in view of the character of investments of any such insurer authorized to do business in this State it would be prudent for such insurer to establish a special reserve for possible losses or fluctuations in the values of its investments, he may require such insurer to establish such reserve, reasonable in amount, and may require that such reserve be maintained and reported in any statement or report of the financial condition of such insurer. The Commissioner may, in connection with any examination or required financial statement of an authorized insurer require such insurer to furnish him a complete financial statement and audited report of the financial condition of any corporation of which the securities are owned wholly or partly by such insurer and may cause an examination to be made of any subsidiary or affiliate of such insurer.

(2) The stock of an insurance company shall be valued at its book value as shown by its last annual statement or the last report on examination, whichever is more recent. The book value of a share of common stock of an insurance company shall be ascertained by dividing (i) the amount of its capital and surplus less the value of all of its preferred stock, if any, outstanding, by (ii) the number of shares of its common stock issued and outstanding. Notwithstanding the foregoing provisions, an insurer may, at its option, value its holdings of stock in a subsidiary insurance company in an amount not less than acquisition cost if such acquisition cost is less than the value determined as hereinbefore provided.

(3) Real estate acquired by foreclosure or by deed in lieu thereof, or in connection with the default in payment of a loan insured under any mortgage guaranty policy of credit insurance, in the absence of a recent appraisal deemed by the Commissioner to be reliable, shall not be valued at an amount greater than the unpaid principal of the defaulted loan at the date of such foreclosure or deed, together with any taxes and expenses paid or incurred by such insurer at such time in connection with such acquisition (but not including any uncollected interest on such loan); and the cost of additions or improvements thereafter made by such insurer and any amount or amounts thereafter paid by such insurer on any assessments levied for improvements in connection with the property; provided, that the value of any property conveyed to any mortgage guaranty insurance company in satisfaction of debts or guarantees previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees or mortgages obtained or

made for such debts or guaranties, or acquired upon tender of the named insured, whether such property be held by it directly or indirectly, together with the value of all such real property then held by it shall not exceed thirty percent (30%) of its total admitted assets; provided, however, that the Commissioner of Insurance shall have authority from time to time by regulation to fix a lesser percentage of admitted assets than provided by this statute, and when so fixed, the property so held by such company, directly or indirectly, shall not exceed such percentage of its admitted assets.

(4) Purchase money mortgages shall be valued in an amount not exceeding the acquisition cost of such real property or ninety percent (90%) of the value of such real property, whichever is less.

(5) The stock of a subsidiary of an insurer shall be valued on the basis of the value of only such of the assets of such subsidiary as would constitute lawful investments for the insurer if acquired or held directly by the insurer.

(i) Interest, Dividends and Rent. — In any determination of the financial condition of every stock and mutual insurance company, domestic or foreign, other than a life insurance company or a fraternal benefit association, authorized to do business in this State, amounts due to such insurer may be allowed as an admitted asset of such insurer as follows:

(1) Interest due or accrued on any bond or evidence of indebtedness qualifying as an admitted asset which is not in default and which is not valued on a basis including accrued interest.

(2) Declared and unpaid dividends on stocks and shares unless such amount has otherwise been allowed as an admitted asset.

(3) Interest due or accrued upon a collateral loan in an amount not to exceed one year's interest thereon.

(4) Interest due or accrued on deposits in solvent banks and trust companies, and interest due or accrued on other admitted assets if such interest is in the judgment of the Commissioner a collectible asset.

(5) Interest due or accrued on any real estate mortgage loan which is an admitted asset, in amount not exceeding in any event the amount, if any, obtained by subtracting the amount of the principal remaining unpaid from the value of the property less delinquent taxes thereon; but if any interest on such loan is in default more than 18 months, or if any interest on such loan is in default and any taxes or any installment thereof on such property are and have been due and unpaid for more than 18 months, no allowance shall be made for any interest on such loan.

(6) Rent due or accrued on real property if such rent is not in arrears for more than three months.

(j) Application of G.S. 58-79, Subdivision (b)(3). — The provisions of subdivision (b)(3) of G.S. 58-79 shall apply to all insurance companies doing business in this State. (1945, c. 386; 1955, c. 178, s. 2; 1967, c. 624, ss. 2-4; 1971, c. 386, s. 2.)

Investment in the common stock of a subsidiary represents the ownership of real property. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Investment in Wholly Owned Subsidiary Not Admitted Asset. — Where the petitioner's investment in the wholly owned subsidiary would enable the petitioner to convert unadmitted assets into admitted assets, and in so doing evade the real property limitation provided by the law for appellant insurance company, under these circumstances it would not be in the public interest to consider the company's investment in its wholly owned subsidiary as an admitted asset. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Reserve Investment Can Consist of Real Estate. — Subsection (c)(8) provides that a company's reserve investment can consist of real estate but only if used for the company's princi-

pal office or for its convenient accommodation in the transaction of its business. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Subsection (d)(4) allows a company to invest in the stock of its wholly owned subsidiary subject to the provisions of subsection (c). In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

Value of Property May Not Exceed 10% of Admitted Assets. — Under subsection (e), a company cannot even acquire real property for the purposes stated in subsection (c)(8)a and b if the value of the acquired property, together with all the real property held by the company, exceeds 10% of its total admitted assets. In re Hardware Mut. Ins. Co., 278 N.C. 670, 180 S.E.2d 840 (1971).

§ 58-79.2. Establishment of separate accounts by life insurance companies. — (a) When used in this section, "variable contract" shall mean any individual or group contract issued by an insurance company providing for life insurance or annuity benefits or contractual payments or values which vary so as to reflect investment results of any segregated portfolio of investments or of a designated separate account or accounts in which amounts received or retained in connection with any of such contracts have been placed.

(b) Any domestic life insurance company may, pursuant to resolution of its board of directors, establish one or more separate accounts and may allocate to such account or accounts amounts received or retained in connection with variable contracts (including without limitation proceeds applied under optional modes of settlement or under dividend options) to provide for life insurance or annuities (and benefits incidental thereto) payable in fixed or variable amounts or both.

(c) In addition to the amounts allocated under subsection (b), such company may allocate from its general accounts to such separate account or accounts additional amounts, which may include an initial allocation to establish such account; provided, that the aggregate amount so allocated shall not exceed one per centum (1%) of its admitted assets as of the preceding December 31, or one million dollars ($1,000,000), whichever is less, and, provided further, that such company shall be entitled to withdraw at any time, in whole or in part, its participation in any separate account to which funds have been allocated as provided in this subsection (c), and to receive, upon withdrawal, its proportionate share of the value of the assets of the separate account at the time of withdrawal.

(d) Except as hereinafter provided, the amounts allocated to any separate account and accumulations thereon may be invested and reinvested without regard to any requirements or limitations prescribed by the laws of this State governing the investments of life insurance companies; provided, that to the extent that the company's reserve liability with regard to (i) benefits guaranteed as to amount and duration, and (ii) funds guaranteed as to principal amount or stated rate of interest is maintained in any separate account, a portion of the assets of such separate account at least equal to such reserve liability shall be, except as the Commissioner may otherwise approve, invested in accordance with the laws of this State governing the investments of life insurance companies. The investments in such separate account or accounts shall not be taken into account in applying the investment limitations applicable to other investments of the company.

(e) With respect to seventy-five percent (75%) of the market value of the total assets in a separate account no company shall purchase or otherwise acquire the securities of any issuer, other than securities issued or guaranteed as to principal or interest by the United States, if immediately after such purchase or acquisition the market value of such investment, together with prior investments of such separate account in such security taken at market, would exceed ten percent (10%) of the market value of the assets of said separate account; provided, however, that the Commissioner may waive such limitation

if, in his opinion, such waiver will not render the operation of such separate account hazardous to the public or the policyholders in this State.

(f) Unless otherwise permitted by law or approved by the Commissioner, no company shall purchase or otherwise acquire for its separate accounts the voting securities of any issuer if as a result of such acquisition the insurance company and its separate accounts, in the aggregate, will own in excess of ten percent (10%) of the total issued and outstanding voting securities of such issuer provided that the foregoing shall not apply with respect to securities held in separate accounts, the voting rights in which are exercisable only in accordance with instructions from persons having interests in such accounts.

(g) The limitations provided in subsections (e) and (f) above shall not apply to the investment with respect to a separate account in the securities of an investment company registered under the Investment Company Act of 1940, provided that the investments of such investment company comply in substance with subsections (e) and (f) hereof.

(h) The income, if any, and gains and losses, realized or unrealized, from assets allocated to each account shall be credited to or charged against the account without regard to other income, gains or losses of the company.

(i) Unless otherwise approved by the Commissioner, assets allocated to a separate account shall be valued at their market value on the date of valuation, or if there is no readily available market, then as provided under the terms of the contract or the rules or other written agreement applicable to such separate account; provided, that unless otherwise approved by the Commissioner that portion of the assets of such separate account equal to the company's reserve liability with regard to the guaranteed benefits and funds referred to in subsection (d) hereof, if any, shall be valued in accordance with the rules otherwise applicable to the company's assets. The reserve liability for variable contracts shall be determined in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees.

(j) If and to the extent so provided under the applicable contracts, that portion of the assets of any such separate account equal to the reserves and other contract liabilities with respect to such account shall not be chargeable with liabilities arising out of any other business the company may conduct.

(k) The life insurance company shall have the power and the company's charter shall be deemed amended to authorize such company to do all things necessary under any applicable state or federal law in order that variable contracts may be lawfully sold or offered for sale. To the extent such company deems it necessary to comply with any applicable federal or state laws, such company, with respect to any separate account, including without limitation any separate account which is a management investment company or a unit investment trust, may provide, for persons having an interest therein, appropriate voting and other rights and special procedures for the conduct of the business of such account, including without limitation special rights and procedures relating to investment policy, investment advisory services, selection of independent public accountants, and the selection of a committee, the members of which need not be otherwise affiliated with such company, to manage the business of such account. This provision shall not affect existing laws pertaining to the voting rights of the life insurance company's policyholders.

(l) Amounts allocated to a separate account in the exercise of the power granted by this section shall be owned by the company, and the company shall not be, or hold itself out to be, a trustee with respect to such amounts.

(m) The company shall not, in connection with the allocation of investments or expenses, or in any other respect, discriminate unfairly between separate

accounts or between separate and other accounts, but this provision shall not require the company to follow uniform investment policies for its accounts.

(n) No sale, exchange or other transfer of assets may be made by a company between any of its separate accounts or between any other investment account and one or more of its separate accounts unless, in case of a transfer into a separate account, such transfer is made solely to establish the account or to support the operation of the contracts with respect to the separate account to which the transfer is made, and unless such transfer, whether into or from a separate account, is made (i) by a transfer of cash, or (ii) by a transfer of securities having a readily determinable market value, provided that such transfer of securities is approved by the Commissioner. The Commissioner may approve other transfers among such accounts if, in his opinion, such transfers would not be inequitable.

(o) Any contract providing benefits payable in variable amounts delivered or issued for delivery in this State shall contain a statement of the essential features of the procedure to be followed by the company in determining the dollar amount of such variable benefits. Any such contract under which the benefits vary to reflect investment experience, including a group contract and any certificate in evidence of variable benefits issued thereunder, shall state that such dollar amount will so vary and shall contain on its first page a statement to the effect that the benefits thereunder are on a variable basis.

(p) Any variable annuity contract providing benefits payable in variable amounts issued under this section may include as an incidental benefit provision for payment on death during the deferred period of an amount not in excess of the greater of the sum of the premiums or stipulated payments paid under the contract or the value of the contract at time of death; such contracts will be deemed not to be contracts of life insurance and therefore not subject to the provisions of the insurance law governing life insurance contracts. Provision for any other benefit on death during the deferred period will be subject to such insurance provisions.

(q) No domestic life insurance company and no other life insurance company shall deliver or issue for delivery within this State any contracts under this section unless it is licensed or organized to do a life insurance or annuity business in this State, and the Commissioner of Insurance is satisfied that its financial condition and its methods of operation in connection with the issuance of such contracts will not render its operation hazardous to the public or its policyholders in this State. In determining the qualification of a company requesting authority to deliver such contracts within this State, the Commissioner of Insurance shall consider, among other things:

(1) The history and financial condition of the company;

(2) The character, responsibility and general fitness of the officers and directors of the company; and

(3) The law and regulations under which the company is authorized in the state of domicile to issue variable annuity contracts. The state of entry of an alien company shall be deemed its place of domicile for this purpose.

If the company is a subsidiary of an admitted life insurance company, or affiliated with such company through common management or ownership, it may be deemed by the Commissioner to have met the provisions of this subsection if either it or the parent or affiliated company meets the requirements hereof.

(r) The Commissioner of Insurance shall have sole and exclusive authority to regulate the issuance by life insurance companies and the sale of such contracts and to issue such reasonable rules and regulations as may be necessary to carry out the purposes and provisions of this section, and such contracts and the life

insurance companies which issue them shall not be subject to the Securities Law of North Carolina nor to the jurisdiction of the Secretary of State thereunder.

(s) Except for G.S. 58-207 in the case of a variable annuity contract and G.S. 58-201.2, 58-207 and 58-211(1) in the case of a variable life insurance policy and except as otherwise provided in this section, all pertinent provisions of the insurance laws of this State shall apply to separate accounts and contracts issued in connection therewith. Any individual variable life insurance contract, delivered or issued for delivery within this State, shall contain reinstatement and nonforfeiture provisions appropriate to such a contract. Any group variable life insurance contract, delivered or issued for delivery within this State, shall contain grace provisions appropriate to such a contract. Any individual variable annuity contract, delivered or issued for delivery within this State, shall contain reinstatement provisions appropriate to such a contract. (1965, c. 166; 1969, c. 616, s. 2; 1971, c. 831, s. 2; 1973, c. 490.)

Editor's Note. — The 1973 amendment deleted "annuity" preceding "contract" where the word first appears in subsection (a) and inserted "life insurance or" near the middle of subsection (a), deleted "annuity" preceding "contract" near the middle of subsection (b) and added all of subsection (b) beginning with the first parenthesis. The amendment substituted, at the beginning of subsection (f), the language beginning "Unless otherwise permitted" and ending "will own" for "No separate account shall invest in the voting securities of a single issuer in an amount." The amendment also deleted "annuity" preceding "contracts" in the last sentence of subsection (i), rewrote subsection (k), inserted "under which the benefits vary to reflect investment experience" and substituted "so vary" for "will vary to reflect investment experience" in the second sentence of subsection (o). In subsection (q), the amendment added the second sentence of subdivision (3) and rewrote the last paragraph of the subsection. The amendment also added the first exception clause at the beginning of the first sentence of subsection (s) and added the second, third and fourth sentences of subsection (s).

§ 58-80. Valuation of bonds and other evidences of debt; discretion of Commissioner of Insurance. — All bonds or other evidences of debt having a fixed term and rate held by any life insurance company, assessment life association, or fraternal beneficiary association authorized to do business in this State may, if amply secured and not in default as to principal and interest, be valued as follows: if purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity, and so as to yield in the meantime the effective rate of interest at which the purchase was made: Provided, that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and provided further, that the Commissioner of Insurance shall have full discretion in determining the method of calculating values according to the foregoing rule. (1921, c. 220; C. S., s. 6334(a).)

§ 58-81. Authority to increase or reduce capital stock. — The Commissioner of Insurance shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall issue certificates of authority to such companies to transact business upon such increased or reduced capital: Provided, that in no event shall the said capital stock be reduced to an amount less than that required upon organization of such company in G.S. 58-77. He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral. (1899, c. 54, s. 15; Rev., s. 4732; C. S., s. 6335; 1945, c. 386.)

§ 58-82. Assessment of shares; revocation of license. — When the net assets of a company organized under this Article do not amount to more than the amount required in G.S. 58-77 for its original capital, it may make good its capital

to the original amount by assessment of its stock. Shares on which such an assessment is not paid within 60 days after demand shall be forfeitable and may be canceled by vote of the directors and new shares issued to make up the deficiency. If such company does not, within three months after notice from the Commissioner of Insurance to that effect, make good its capital or reduce the same, as allowed by this Article, its authority to transact new business of insurance shall be revoked by the Commissioner. (1899, c. 54, s. 28; 1903, c. 438, s. 4; Rev., s. 4733; C. S., s. 6336; 1945, c. 386.)

§ 58-83. **Increase of capital stock.** — Any company organized under the provisions of this Chapter may issue pro rata to its stockholders certificates of any portion of its actual net surplus over and above the minimum required by law it deems fit to divide, which shall be considered an increase of its capital to the amount of such certificates. The company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates therefor when paid for in full. In whichever method the increase is made, the company shall, within 30 days after the issue of such certificates, submit to the Commissioner of Insurance a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the Commissioner of Insurance finds that the facts conform to the law, he shall endorse his approval thereof; and upon filing such certificate so endorsed with the Secretary of State, and the payment of a fee of five dollars ($5.00) for filing the same, the company may transact business upon the capital as increased, and the Commissioner of Insurance shall issue his certificate to that effect. (1899, c. 54, s. 29; Rev., s. 4734; C. S., s. 6337; 1945, c. 386.)

§ 58-84. **Reduction of capital stock.** — When the capital stock of a company organized under this Article is impaired, the company may, upon a vote of the majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law, but no part of its assets and property shall be distributed to its stockholders. Within 10 days after such meeting the company must submit to the Commissioner of Insurance a certificate setting forth the proceedings thereof and the amount of the reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary, and a majority of its directors. The Commissioner of Insurance shall examine the facts in the case, and if they conform to law, and in his judgment the proposed reduction may be made without prejudice to the public, he shall endorse his approval upon the certificate. Upon filing the certificate so endorsed with the Secretary of State and paying a filing fee of five dollars ($5.00), the company may transact business upon the basis of the reduced capital as though it were original capital, and its charter shall be deemed to be amended to conform thereto, and the Commissioner of Insurance shall issue his certificate to that effect. The company may, by a majority vote of its directors, after the reduction, require the return of the original certificates of stock held by each stockholder in exchange for new certificates it may issue in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital. (1899, c. 54, s. 30; Rev., s. 4735; C. S., s. 6338.)

§ 58-85. **Dividends not payable when capital stock impaired; liability of stockholders for unlawful dividends.** — No dividend shall be paid by any company incorporated in this State when its capital stock is impaired, or when such payment would have the effect of impairing its capital stock; and any dividend so paid subjects the stockholders receiving it to a joint and several liability to the creditors of said company to the extent of the dividend so paid. (1899, c. 54, s. 31; 1903, c. 536, s. 3; Rev., s. 4736; C. S., s. 6339; 1945, c. 386.)

§ 58-85.1. Payment of dividends impairing financial soundness of company or detrimental to policyholders. — Each domestic insurance company in North Carolina shall be restricted by the Commissioner from the payment of any dividends to its stockholders whenever the Commissioner determines from examination of such company's financial condition that the payment of future dividends would impair the financial soundness of the company or be detrimental to its policyholders, and such restrictions shall continue in force until such future date when the Commissioner may specifically permit the payment of dividends to stockholders by the company through a written authorization. Nothing contained in this section and no action taken by the Commissioner shall in any way restrict the liability of stockholders under the preceding section [G.S. 58-85]. (1945, c. 386.)

§ 58-86. Loans insufficiently secured. — Whenever it appears by examination, as authorized by law, that an insurance company, organized under the laws of this State, holds, as collateral security for the payment of any loan, any stock, bond, or security of whatever description, which has not a cash market value of at least twenty-five per centum (25%) more than the amount of such loan, the Commissioner of Insurance may require the reduction of the loan or an increase of the collateral security, so that the security shall be at least twenty-five per centum (25%) in excess of the amount loaned. If the company fail to comply with this requirement within 10 days after receiving written notice thereof from the Commissioner, it is the duty of the Commissioner to disallow the loan and to deduct the amount thereof from the assets of the company. If it appears, upon examination, that any such insurance company holds, as security for any loan, a mortgage upon real estate which is not a first lien, or that the value of the real estate is less than fifty per centum (50%) in excess of the loan which it is mortgaged to secure, the Commissioner of Insurance may disallow the loan and deduct the amount thereof from the assets of the company holding it, after having given the company at least 20 days' notice, in writing, to change or conform the loan to the requirements of this section. (1903, c. 536, ss. 6, 7, 8; Rev., s. 4737; C. S., s. 6340.)

§ 58-86.1. Certain officers debarred from commissions. — No officer or other person whose duty it is to determine the character of the risk, and upon whose decision the application shall be accepted or rejected by an insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share in the net profits as the directors may determine. Nor shall such officer or person be an employee of any officer or agent of the company. (1899, c. 54, s. 32; 1903, c. 438, s. 4; Rev., s. 4738; C. S., s. 6347; 1945, c. 386.)

Editor's Note. — This section was transferred from § 58-93.

§ 58-86.2. Restrictions on purchase and sale of equity securities of domestic companies. — (a) Statement of Ownership of Equity Securities. — Every person who is directly or indirectly the beneficial owner of more than ten percent (10%) of any class of any equity security of a domestic stock insurance company or who is a director or an officer of such company shall file in the office of the Commissioner on or before the first day of June, 1966, or within 10 days after he becomes such beneficial owner, director or officer, a statement, in such form as the Commissioner may prescribe, of the amount of all equity securities of such company of which he is the beneficial owner, and within 10 days after the close of each calendar month thereafter if there has been a change in such ownership during such month, shall file in the office of the Commissioner a statement, in such form as the Commissioner may prescribe, indicating his

ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) Profit Made from Sale of Equity Security Held Less than Six Months. — For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to such company, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such company within a period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the company, irrespective of any intention on the part of such beneficial owner, director or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the company, or by the owner of any equity security of the company in the name and in behalf of the company, if the company shall fail or refuse to bring such suit within 60 days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This section shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the equity security involved, or any transaction or transactions which the Commissioner by rules and regulations may exempt as not comprehended within the purpose of this section.

(c) Delivery of Security Sold. — It shall be unlawful for any such beneficial owner, director or officer, directly or indirectly, to sell any equity security of such company if the person selling the security or his principal (i) does not own the security sold, or (ii) if owning the security, does not deliver it against such sale within 20 days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this section if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense.

(d) Sales by Dealers. — The provisions of subsection (b) shall not apply to any purchase and sale, or sale and purchase, and the provisions of subsection (c) shall not apply to any sale, of an equity security of a domestic stock insurance company not then or theretofore held by him in an investment account, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market (otherwise than on an exchange as defined in the Securities Exchange Act of 1934) for such security. The Commissioner may, by such rules and regulations as he deems necessary or appropriate in the public interest, define and prescribe terms and conditions with respect to securities held in an investment account and transactions made in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market.

(e) Arbitrage Transactions. — The provisions of subsections (a), (b) and (c) of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of such rules and regulations as the Commissioner may adopt in order to carry out the purposes of this section.

(f) "Equity Security" Defined. — The term "equity security" when used in this section means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commissioner shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as he may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(g) Exemptions from Requirements of Section. — The provisions of subsections (a), (b) and (c) hereof shall not apply to equity securities of a domestic stock insurance company if

(1) Such securities shall be registered, or shall be required to be registered, pursuant to section 12 of the Securities Exchange Act of 1934, as amended, or if

(2) Such domestic stock insurance company shall not have any class of its equity securities held of record by 100 or more persons on the last business day of the year next preceding the year in which equity securities of the company would be subject to the provisions of subsections (a), (b) and (c) hereof except for the provisions of this subdivision (2).

(h) Rules and Regulations of Commissioner. — The Commissioner shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in him by subsections (a) through (g) hereof, and may for such purpose classify domestic stock insurance companies, securities, and other persons or matters within his jurisdiction. No provision of subsections (a), (b) and (c) hereof imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commissioner, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(i) Severability. — If any part or provision of this section or the application thereof to any person or circumstance be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this section or the application thereof to other persons or circumstances. (1965, c. 127, s. 2.)

ARTICLE 6A.

Exchange of Stock.

§ 58-86.3. Exchange of securities. — Any domestic insurance company with capital stock (hereinafter referred to as "domestic company") may adopt a plan of exchange providing for the exchange by its shareholders of their stock in the domestic company for (i) shares of stock issued by any other domestic stock insurance company or other domestic stock corporation organized or reorganized under the laws of this State — such other corporation being hereinafter referred to as the "acquiring corporation"; (ii) other securities issued by the acquiring corporation; (iii) cash; (iv) other consideration; (v) any combination of such stock, such other securities, cash or other consideration. For the purpose of this Article, a "domestic company" or "domestic stock insurance company" shall mean a business corporation or a stock insurance company, respectively, organized and existing under the laws of the State of North Carolina. (1967, c. 938).

§ 58-86.4. Procedure for exchange. — Subject to the provisions of G.S. 58-86.3, any domestic company may adopt a plan of exchange with any acquiring corporation providing for the exchange of the outstanding stock of the domestic company for shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof in the following manner:

(1) Approval of the Boards of Directors. — The boards of directors of the domestic company and of the acquiring corporation by resolutions shall adopt a plan of exchange which shall set forth the terms and conditions

of the exchange and the mode of carrying the same into effect and such other provisions with respect to the exchange as may be deemed necessary or desirable.

(2) Approval of Commissioner of Insurance. — The domestic company and the acquiring corporation shall submit to the Commissioner of Insurance three copies of the plan of exchange certified by an officer of each as having been adopted in accordance with subdivision (1) of this section. Such copies of the plan of exchange shall be accompanied by (i) financial statements of the domestic company and the acquiring corporation for the last preceding fiscal year, (ii) pro forma financial statements of each corporation based on the assumption that the plan of exchange was effective as proposed at the end of the last preceding fiscal year of the domestic company, (iii) an estimate of expenses already incurred and of expenses expected to be incurred in connection with the proposed plan of exchange, (iv) a written statement which sets forth for each corporation the identity of officers and directors of the domestic company and of the acquiring corporation, and (v) any other information which the Commissioner may require with respect to such plan.

No director, officer, member or subscriber of the domestic company or of the acquiring corporation, except as is expressly provided by the plan filed with the Commissioner of Insurance, shall receive any fee, commission, other compensations or valuable considerations whatever, for in any manner aiding, promoting, or assisting in the promotion of the plan of exchange.

The Commissioner of Insurance shall hold a public hearing upon the terms, conditions and provisions of the proposed plan of exchange to determine if the proposed plan of exchange is reasonable, fair and in the public interest. At such hearing the shareholders and the policyholders of the domestic company and the shareholders of the acquiring corporation and also the policyholders of the acquiring corporation, if it is an insurance company, and any other interested parties shall have the right to appear and to become parties to the proceedings.

Such hearing shall be commenced not less than 30 days after the date on which the plan of exchange is presented to the Commissioner. The hearing shall be held at such place, date and time as the Commissioner shall specify. Notice of the hearing shall be published in a newspaper of general circulation in the city or cities wherein are located the registered office of the domestic company and of the acquiring corporation once a week for two successive weeks, the last publication of such notice to be not more than two weeks prior to the hearing date. Written notice of the hearing shall be mailed at least 10 days prior to the hearing by the domestic company and by the acquiring corporation to all of their respective shareholders. All expenses of publication shall be borne by the domestic company or the acquiring corporation or both, as shall be specified in the plan of exchange, and the Commissioner may charge the domestic company or the acquiring corporation, or both, with such of the costs of the hearing as he may deem reasonable.

The Commissioner shall issue a written order approving the plan of exchange as delivered to him by the domestic company and the acquiring corporation and such modification therein as the board of directors of each such corporation shall approve, if he finds (i) that the plan, including all such modification, if effected, will not tend adversely to affect the financial stability or management of the domestic company or the general capacity or intention to continue the safe and prudent

transaction of the insurance business of the domestic company, or of the acquiring corporation, if it is a domestic insurance company; (ii) that the interests of the policyholders and shareholders of the domestic company, and, if the acquiring corporation is a domestic insurance company, the policyholders of the acquiring corporation are protected; (iii) that the terms and conditions of the plan of exchange and the proposed issuance and exchange are fair and reasonable; and (iv) that the plan of exchange is consistent with the law and will not conflict with the public interest. If the Commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.

Any order issued by the Commissioner hereunder shall be subject to court review in accordance with the provisions of G.S. 58-9.3.

(3) Approval of Shareholders. — The plan of exchange as approved by the Commissioner of Insurance shall then be submitted to a vote of the shareholders of the domestic company at an annual or special meeting of the shareholders. Notice of the submission of the plan to the shareholders shall be included in the notice of such annual or special meeting. The plan shall be approved by the shareholders of the domestic company upon receiving the affirmative votes representing at least two thirds of the outstanding capital stock of the domestic company or such larger proportion as may be specified in the plan of exchange. Notwithstanding shareholder adoption of the plan of exchange and at any time prior to the filing of the certificate setting forth the plan of exchange pursuant to G.S. 58-86.5, the plan of exchange may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of exchange.

(4) Objection. — Any shareholder of the domestic company may, by following the procedure set forth in G.S. 55-113(b) object to the plan of exchange and become entitled, if the plan becomes effective, to be paid by the domestic company or the acquiring corporation the fair value of his shares in the domestic company. Such payment and the amount thereof shall be determined in accordance with the provisions of G.S. 55-113(d), (e), (f), (g) and (h). (1967, c. 938.)

§ 58-86.5. Filing plan of exchange. — Not earlier than 31 days after the date of the meeting of shareholders of the domestic company at which the plan of exchange was approved by such shareholders, a certificate setting forth (i) the plan of exchange and (ii) the vote by which such plan was adopted by the shareholders of the domestic company, or (iii) that the plan of exchange has been abandoned, shall be signed on behalf of the domestic company by its president or a vice-president and also by its secretary or an assistant secretary and shall then be presented in triplicate to the Commissioner of Insurance. If the certificate indicates that the plan of exchange has been approved by the domestic company's shareholders as required by G.S. 58-86.4(3) and that the facts otherwise conform to the law, he shall endorse his approval on the certificate and the same shall then be filed as provided in G.S. 55-4. Upon the filing of such certificate, the plan of exchange and the issuance and exchange provided for therein shall become effective, unless a later date and time is specified in the plan of exchange, in which event the plan of exchange and issuance and exchange provided for therein shall become effective upon such later date and time. (1967, c. 938).

§ 58-86.6. Effect of exchange. — Upon the plan of exchange becoming effective, the exchange provided for therein shall be deemed to have been consummated, each shareholder of the domestic company shall cease to be a shareholder of such company and the ownership of all shares of the issued and

outstanding stock of the domestic company shall vest in the acquiring corporation automatically without any physical transfer or deposit of certificates representing such shares.

Certificates representing shares of the domestic company prior to the plan of exchange becoming effective shall, after the plan of exchange becomes effective, represent (i) shares of the issued and outstanding capital sock or other securities issued by the acquiring corporation, and (ii) the right, if any, to receive such cash or other consideration upon such terms as shall be specified in the plan of exchange: Provided, that the plan of exchange (i) shall specify that all certificates representing shares of stock of the domestic company may, after the plan of exchange becomes effective, be exchanged for shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof upon such terms as shall be specified in the plan of exchange, and (ii) may require that all certificates representing shares of stock of the domestic company shall, after the plan of exchange becomes effective, represent only the right to receive shares of stock or other securities issued by the acquiring corporation or cash or other consideration or any combination thereof upon such terms as shall be specified in the plan of exchange. (1967, c. 938.)

§ 58-86.7. Authorized insurance business and regulatory authority. — (a) Nothing contained in this Article shall be construed to authorize any insurance company to engage in any kind or kinds of insurance business not authorized by its articles of incorporation, or to authorize any acquiring corporation which is not an insurance company to engage directly in the business of insurance. Subsequent to the effective date of the plan of exchange, the Commissioner having regard to the findings stated in subdivision (2) of G.S. 58-86.4, shall have the authority to require that the affairs of the domestic company be conducted in such manner as to assure the continuing safe conduct and transaction of the domestic company's business of insurance.

(b) If at any time the Commissioner finds, after due notice and opportunity to be heard as provided by G.S. 58-9.2, that the business and affairs of the acquiring corporation are of such nature or are conducted in such manner as to endanger the continued solvency of any domestic insurance company, to be harmful to any domestic insurance company, or to impair the rights of any policyholder, he shall issue such written order or orders as he deems appropriate to assure that the business and affairs of the acquiring corporation are of such nature and are conducted in such manner as to no longer endanger the solvency of any domestic insurance company, to be harmful to any domestic insurance company, or to impair the rights of any policyholder, including an order requiring the acquiring corporation to divest itself of the stock of the domestic company.

(c) The Commissioner may examine, at such time or times as he may deem appropriate, the financial and business affairs of the acquiring corporation, and in connection with any such examination or examinations the acquiring corporation shall make available its books, records and accounts, and the Commissioner may require from the acquiring corporation and its officers, directors and employees the submission of such written or oral statements as the Commissioner may deem necessary or advisable. The cost of the examination shall be borne by the acquiring corporation at the same rate as is provided for under G.S. 58-63(3).

(d) Any acquiring corporation which owns or controls any domestic insurance company shall be subject to all proxy solicitation and insider trading regulations promulgated from time to time by the Commissioner of Insurance pursuant to statutory authority.

(e) It shall be unlawful for any domestic insurance company which has exercised the privileges allowed by this Article, except upon written approval by the Commissioner and subject to the provisions of G.S. 58-79,

(1) To invest any of its funds in the capital stock, bonds, debentures, or other obligations of any acquiring corporation of which it is a subsidiary, or of any other subsidiary of any such acquiring corporation;

(2) To accept the capital stock, bonds, debentures, or other obligations of any acquiring corporation of which it is a subsidiary or any other subsidiary of any such acquiring corporation, as collateral security for advances made to any person or company;

(3) To purchase securities, other assets or obligations under repurchase agreement from any acquiring corporation of which it is a subsidiary or any other subsidiary of any such acquiring corporation; and

(4) To make any loan, discount or extension of credit to any acquiring corporation of which it is a subsidiary or to any other subsidiary of any such acquiring corporation. (1967, c. 938.)

§ 58-86.8. Powers of Commissioner not affected. — Nothing in this Article shall affect the power of the Commissioner to regulate, supervise and control insurance companies to the extent of and as provided by this Chapter. (1967, c. 938.)

§ 58-86.9. Application of Article to other domestic corporations. — Any such domestic corporation, other than a domestic insurance company, which shall acquire the majority of the voting capital stock of any domestic insurance company shall be subject to the regulations contained in this Article; provided, however, that the provisions of this Article shall not apply to any domestic corporation which has acquired a domestic insurance company or companies prior to June 27, 1967. (1967, c. 938.)

ARTICLE 7.

Guaranty Fund for Domestic Companies.

§ 58-87. Guaranty fund established. — Any insurance company formed as provided in the preceding Article [Article 6], or now existing by virtue of any of the laws of North Carolina, may establish a guaranty fund of not less than twenty-five thousand dollars ($25,000) nor more than two hundred thousand dollars ($200,000), in the following manner: The company may receive from any person, firm, or corporation, money, bonds, or other securities, in such amount as may be agreed upon, for the purpose of providing a guaranty fund, to be used as hereinafter provided, for payment of the claims of policyholders. Upon the receipt of such bonds, money, or other securities by an insurance company, it shall issue its certificate, in writing, authenticated as required by law for certificates of stock, stating the amount, terms, and conditions of repayment of such money or the return of such bonds or other securities, the name of the payee or depositor, and the certificate shall also state upon its face that it is issued under the provisions of this section. The money, bonds, or other securities, when so paid to or deposited with such insurance company, become a part of the guaranty fund of the company, and are liable for all the claims of policyholders after the general assets of the company have been exhausted. This guaranty fund is not liable for the claims or debts due to stockholders or the general creditors of such insurance company. No insurance company shall create a guaranty fund, as provided in this Article, except upon the approval of a majority of its stockholders authorized at any regular or special meeting called for the purpose. (1909, c. 922, s. 1; C. S., s. 6341.)

§ 58-88. Separate accounts; application of fund. — Every insurance company which establishes a guaranty fund under the provisions of this Article must keep a separate account of the same on its books, together with a full and true list of any securities held therefor. The money and securities belonging to the guaranty fund must be invested in the same manner as is now provided by law for the investment of other assets of insurance companies; but any bond or other securities received by any such insurance company as a part of its guaranty fund may be deposited with the Commissioner of Insurance, as is now allowed by law, subject to the further provisions of this Article. An insurance company receiving said money or securities as a part of its guaranty fund, as herein provided, may pay to the person, firm, or corporation from whom the same is received an annual dividend of not more than eight percent (8%) on the amount of said money or securities. The guaranty fund herein provided for shall be applied to the payment of claims of policyholders only when the insurance company has exhausted its cash on hand and the invested assets, exclusive of uncollected premium; and when the guarantee is in any way impaired the directors may make good the whole or any part of such impairment, by assessment upon the contingent funds of the company at the date of such impairment, if any are available. (1909, c. 922, s. 1; C. S., s. 6342; 1945, c. 386.)

§ 58-89. Reduction or retirement of fund. — The guaranty fund shall be retired when the permanent fund of the company equals two per centum (2%) of the amount insured upon all policies in force; and such guaranty fund may be reduced or retired by vote of the directors of the company and the assent of the Commissioner of Insurance, if the net assets of the company above the reinsurance reserve and all other claims and obligations, exclusive of the guaranty fund, for two years immediately preceding and including the date of its last annual statement, are not less than twenty-five per centum (25%) of the fund. Due notice of this proposed action on the part of the directors of the company must be mailed to each director of the company not less than 30 days before the meeting when such action may be taken, and must also be advertised in two newspapers of general circulation, to be approved by the Commissioner of Insurance, not less than twice a week for a period of not less than four weeks before the meeting. No insurance company with a guaranty fund, as hereinbefore provided, which has ceased to do new business, may return or retire any part of the guaranty fund or divide to its stockholders any part of its general assets, except incomes from its investments, until it shall have performed, reinsured, or canceled its policy obligations. (1909, c. 922, s. 1; C. S., s. 6343.)

§ 58-90. Insolvency; return of fund. — In the event of insolvency or voluntary liquidation of any such insurance company, the amount of the guaranty fund shall be returned to the persons, firms, or corporations, their heirs, executors, administrators, successors, or assigns, from which the same was received, in full or pro rata, as the case may be, before any amount shall be paid from the assets of said company to its stockholders. The intention of this section is that the liability of the company for the repayment or the return of its guaranty fund, as evidenced by its certificates therefor, as hereinbefore provided, shall be preferred in the distribution of its assets to the stockholders and general creditors of the company, other than its policy obligations. (1909, c. 922, s. 1; C. S., s. 6344.)

§ 58-91. Conversion to guaranty fund. — Any insurance company now doing business as a domestic insurance company under the laws of this State which has received any money or securities to be held as a guaranty capital, guaranty surplus, or guaranty fund, may convert the same into a guaranty fund, as hereinbefore provided, by mutual agreement between the board of directors of the insurance company and the parties from whom the money or securities have been received, subject, however, to the approval of the Commissioner of

Insurance, and thereupon certificates shall be issued therefor, as hereinbefore provided, and the same shall thereafter be held subject to the rights and liabilities provided in this Article. (1909, c. 922, s. 2; C. S., s. 6345.)

ARTICLE 8.

Mutual Insurance Companies.

§ 58-92. Mutual insurance companies organized; requisites for doing business. — No policy may be issued by a mutual company until the president and the secretary of the company have certified under oath that every subscription for insurance in the list presented to the Commissioner for approval is genuine, and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within 30 days after the granting of a license to the company by the Commissioner to issue policies. (1899, c. 54, ss. 25, 32, 34; 1901, c. 391, s. 3; 1903, c. 438, s. 4; Rev., s. 4738; 1911, c. 93; C. S., s. 6346; 1945, c. 386.)

§ 58-92.1. Manner of amending charter. — (a) A domestic mutual insurance company may hereafter amend its charter in the following manner only:

(1) A meeting of the board of directors shall be called in accordance with the bylaws, specifying the amendment to be voted upon at such meeting;

(2) If at such meeting two thirds of the directors present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, the service of such call upon all directors, and the minutes of the meeting relating to the adoption of the proposed amendment;

(3) Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the company's principal office is located, or posted at the courthouse door if no newspaper be published within the county. Said printed or posted notices shall be in such form and of such size as the Commissioner may approve, and in addition to setting forth in full the certificate required in subdivision (2) shall state that application for amending the company's charter in the manner specified has been proposed by the board of directors, and shall also state the time set for a meeting of policyholders thereby called to be held at the principal office of the company to take action on the proposed amendment. A true copy of such notice shall be filed with the Commissioner, and also with that official who performs the functions of Commissioner of Insurance in each state where the company is licensed to do business. Such publication and filing of notices shall be completed at least 30 days prior to the date set therein for the meeting of policyholders and due proof thereof shall be filed with the Commissioner at least 15 days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of policyholders, such special meeting can be called only after the Commissioner has given his approval in writing, and the published notice shall show the fact of such approval;

(4) If at such policyholders' meeting two thirds of those voting in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within 30 days after such meeting, be submitted to the Commissioner for his approval as conforming to the

requirements of law, and it shall be the duty of the Commissioner to act upon all proposed amendments within 10 days after the filing of such certificate with him.

(b) All charter amendments heretofore issued upon application of the board of directors of any domestic mutual insurance company are hereby validated, if otherwise legally adopted. (1943, c. 170; 1947, c. 721.)

Editor's Note. — For comment on this section, see 25 N.C.L. Rev. 441.

§ 58-93: Transferred to G.S. 58-86.1 by Session Laws 1945, c. 386.

Editor's Note. — This section was repealed but a part of it was rewritten and transferred as stated above.

§ 58-94. Policyholders are members of mutual companies. — Every person insured by a mutual insurance company is a member while his policy is in force, entitled to one vote for each policy he holds, and must be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt, or certificate of renewal, as follows:

The insured is hereby notified that by virtue of this policy he is a member of the . . . . . insurance company, and that the annual meetings of the company are held at its home office on the . . . . . day of . . . . . ., in each year, at . . . . . o'clock.

The blanks shall be duly filled in print and are a sufficient notice. A corporation which becomes a member of such company may authorize any person to represent it, and this representative has all the rights of an individual member. A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance. Members may vote by proxies, dated and executed within three months, and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person as proxy or otherwise may cast more than 20 votes. (1899, c. 54, s. 33; Rev., s. 4739; C. S., s. 6348; 1945, c. 386; 1947, c. 721.)

Protection of Trustee. — This section is an enabling statute to protect a trustee from liability. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

Policyholders in a mutual fire insurance company are not liable for its debts beyond the contingent liability fixed in the policy. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935). See §§ 58-97.1 to 58-97.3.

As to county boards of education as policyholders, see Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-95. Directors in mutual companies. — Every mutual insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the bylaws provide and until their successors are qualified. The directors need not be residents of this State or members of the company. In companies with a guaranty capital, one half of the directors shall be chosen by and from the stockholders. (1899, c. 54, s. 33; Rev., s. 4739; C. S., s. 6349; 1945, c. 386; 1971, c. 751.)

§ 58-96. Mutual companies with a guaranty capital. — A mutual insurance company formed as provided in this Chapter, in lieu of the contributed surplus required for the organization of mutual companies under the provisions of G.S. 58-77, or a mutual insurance company now existing, may establish a guaranty

capital or surplus of not less than twenty-five thousand dollars ($25,000) nor more than one million dollars ($1,000,000), divided into shares of one hundred dollars ($100.00) each, which shall be invested in the same manner as is provided in this Subchapter for the investment of the capital stock of insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to an annual dividend of not more than ten per centum (10%) on their respective shares, if the net profits or unused premiums left after all expenses, losses, and liabilities then incurred, together with the reserve as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus may be reduced or retired by vote of the policyholders of the company and the assent of the Commissioner of Insurance, if the net assets of the company above its reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum (25%) of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than 30 days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the Commissioner of Insurance, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus, except income from investments, until it has performed or canceled its policy obligations. (1899, c. 54, s. 34; Rev., s. 4740; 1911, c. 196, s. 3; C. S., s. 6350; 1945, c. 386; 1971, c. 752.)

§ 58-97. Dividends to policyholders. — Any participating or dividend-paying company, stock or mutual, other than life, may declare and pay a dividend to policyholders from its surplus which shall include only its surplus in excess of any required minimum surplus. No such dividend shall be paid unless fair and equitable and for the best interest of the company and its policyholders. In declaring any dividend to its policyholders, any such company may make reasonable classifications of policies expiring during a fixed period, upon the basis of each general kind of insurance covered by such policies and by territorial divisions of the location of risks by states, except that in fixing the amount of dividends to be paid on each general kind of insurance, which dividends shall be uniform in rate and applicable to the majority of risks within such general kind of insurance, exceptions may be made as to any class or classes of risk and a different rate or amount of dividends paid on such class or classes if the conditions applicable to such class or classes differ substantially from the condition applicable to the kind of insurance as a whole. Every such company shall have an equal rate of dividend for the same term on all policies insuring risks in the same classification. The payment of dividends to policyholders shall not be contingent upon the maintenance or renewal of the policy. All dividends shall be paid to the policyholder unless a written assignment thereof be executed. Neither the payment of dividends nor the rate thereof may be guaranteed by any company, or its agent, prior to the declaration of the dividend by the board of directors of such company. The holders of policies of insurance issued by a company in compliance with the orders of any public official, bureau or committee, in conformity with any statutory requirement or voluntary

arrangement, for the issuance of insurance to risks not otherwise acceptable to the company, may be established as a separate class of risks. (1899, c. 54, s. 35; Rev., s. 4741; C. S., s. 6351; 1935, c. 89; 1945, c. 386; 1947, c. 721; 1955, c. 645.)

Applied, under former statute and as to county boards of education, in Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N.C. 300, 176 S.E. 585 (1934).

§ 58-97.1. Contingent liability of policyholders. — Every insurance company shall in its bylaws and policies prescribe the contingent liability, if any, of its members for the payment of losses, reserves and expenses not provided for by its assets, which contingent liability shall be in accordance with the provisions of G.S. 58-77. Each member is liable for the payment of his proportionate share of any assessments made by the company in accordance with the law, his contract and the bylaws of the company on account of losses incurred while he was a member, if he is notified of such assessment within one year after the expiration of his policy. When any reduction is made in the contingent liability of members, it shall apply proportionately to all policies in force. (1945, c. 386.)

As to county boards of education as policyholders under former statute, see Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-97.2. Contingent liability printed on policy. — Every insurance company licensed to do business in this State shall print upon the filing face of its policies in clear and explicit language the full contingent liability of its members. (1945, c. 386.)

§ 58-97.3. Nonassessable policies; foreign or alien companies. — No foreign or alien insurance company shall be licensed to issue in this State nonassessable policies unless it has a free surplus equal in amount to that required of a domestic insurance company, writing the same kind or kinds of insurance, and in addition thereto has fully complied with the requirements of the government under which it was organized; and no foreign or alien insurance company may be licensed to do business in this State to issue assessable policies if it issues nonassessable policies in any other state or country unless all policies shall state that any assessment shall be for the exclusive benefit of holders of policies which provide for such contingent liability and the holders of policies subject to assessment shall not be liable to assessment in an amount greater in proportion to the total deficiency than the ratio that the deficiency attributable to the assessable business bears to the total deficiency. (1945, c. 386.)

§ 58-98. Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee. — When any policy of insurance is issued by any mutual insurance company or association other than life, organized under the laws of this State and such policy is assigned or pledged as collateral security for the payment of a debt, such company or association, by its president and secretary or other managing officers, may insert in such policy so assigned or pledged, or attach thereto as a rider thereon, a provision or provisions to be approved by the Commissioner of Insurance, whereby any or all conditions of the policy which work a suspension or forfeiture and especially the provisions of the statute which limits such corporation to insure only property of its members, may be waived in such case for the benefit of the assignee or mortgagee. In case any such company or association shall consent to such assignment of any policy or policies, or the

proceeds thereof, it may nevertheless at any time thereafter, by its president and secretary or such other officer as may be authorized by the board of directors, cancel such policy by giving the assignee or mortgagee not less than 10 days' notice in writing: Provided, however, a longer period may be agreed upon by the company or association and such assignee or mortgagee. And the president and secretary of such company or association, with the approval of the Commissioner of Insurance, may agree with the assignee or mortgagee upon an assessment or premium to be paid to the insurer in case the insured shall not pay the same, which shall not be less than such a rate or sum of money as may be produced by the average assessments or premiums made or charged by like company or association during a period of five years next preceding the year of such agreement and assignment. When an assignment is made as herein provided the policy or policies so assigned or pledged, subject to the conditions herein, shall remain in full force and effect for the benefit of the assignee or mortgagee, notwithstanding the title or ownership of the assured to the property insured, or to any interest therein, shall be in any manner changed, transferred or encumbered. (Ex. Sess., 1920, c. 79; C. S., s. 6351(a); 1945, c. 386.)

§ 58-99. Guaranty against assessments prohibited. — If any director, officer, or agent of a mutual insurance company, either officially or privately, shall give a guarantee to a policyholder thereof against an assessment to which such policyholder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars ($100.00) for each offense. (1899, c. 54, s. 100; Rev., s. 3496; C. S., s. 6352; 1945, c. 386.)

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N.C. 300, 176 S.E. 585 (1934).

§ 58-100. Manner of making assessments; rights and liabilities of policyholders. — When a mutual insurance company is not possessed of cash funds above its reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash assets and deposits, notes, or other contingent funds liable to the assessment, the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same. When, by reason of depreciation or loss of its funds or otherwise, the cash assets of such company, after providing for its other debts, are less than the required premium reserve upon its policies, it must make good the deficiency by assessment in the manner above provided. If the directors are of the opinion that the company is liable to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policyholder must equitably pay or receive in case of withdrawal from the company and having his policy canceled; the second, what further sum each must pay in order to reinsure the unexpired term of his policy at the same rate as the whole was insured at first. Each policyholder must pay or receive according to the first assessment, and his policy shall be cancelled unless he pays the sum further determined by the second assessment, in which case his policy continues in force; but in neither case may a policyholder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors

under the bylaws. (1899, c. 54, ss. 36, 37; Rev., s. 4742; C. S., s. 6353; 1945, c. 386.)

Forfeiture and Waiver. — Failure to pay assessments, in accordance with the terms of a contract of insurance works a forfeiture of the policy, but the insurance company may by acts of unequivocal character waive such forfeiture. Perry v. Farmers Mut. Life Ins. Co., 132 N.C. 283, 43 S.E. 837 (1903).

An acceptance of an overdue assessment by a fire insurance company, after the property is burned, the company having notice thereof, is a waiver of the forfeiture of the policy. Perry v. Farmers Mut. Life Ins. Co., 132 N.C. 283, 43 S.E. 837 (1903).

Where mutual fire insurance company relies on failure to pay assessment in order to defeat recovery on policy, it must show that the assessment was legally made in conformity with the provisions of this section, and where it fails to so show and plaintiff insurer testifies that she did not get notice of the assessment or of the cancellation of the policy, peremptory instructions against insurer on the affirmative defense are without error. Abernethy v. Mecklenburg Farmers' Mut. Fire Ins. Co., 213 N.C. 23, 195 S.E. 30 (1938).

Right of Insured to Withdraw. — Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. Perry v. Farmers Mut. Fire Ass'n, 139 N.C. 374, 51 S.E. 1025 (1905).

Payments of Claims. — The right of each policyholder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policyholder. Perry v. Farmers Mut. Fire Ass'n, 139 N.C. 374, 51 S.E. 1025 (1905).

§§ 58-101, 58-102: Repealed by Session Laws 1945, c. 386.

ARTICLE 9.

Conversion of Stock Corporations into Mutual Corporations.

§ 58-103. Domestic stock life insurance corporations authorized to convert into mutual corporations; procedure. — Any domestic stock life insurance corporation may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock: Provided, however, that such plan (i) shall have been adopted by a vote of a majority of the directors of such corporation; (ii) shall have been approved by a vote of the holders of two thirds of the stock outstanding at the time of issuing the call for a meeting for that purpose; (iii) shall have been submitted to the Commissioner of Insurance and shall have been approved by him in writing, and (iv) shall have been approved by a majority vote of the policyholders (including, for the purpose of this Article, the employer or the president, secretary or other executive officer of any corporation or association to which a master group policy has been issued, but excluding the holders of certificates or policies issued under or in connection with a master group policy) voting at said meeting, called for that purpose, at which meeting only such policyholders whose insurance shall then be in force and shall have been in force for at least one year prior to such a meeting shall be entitled to vote; notice of such a meeting shall be given by mailing such notice, postage prepaid, from the home office of such corporation at least 30 days prior to such meeting to such policyholders at their last known postoffice addresses: Provided, that personal delivery of such written notice to any policyholder may be in lieu of mailing the same; and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such plan: Provided, however, that policyholders may vote in person, by proxy, or by mail; that all such votes shall be cast by ballot, and a representative of the Commissioner of Insurance shall supervise and direct the methods and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the

validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the said representative and to the corporation the results thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the Commissioner of Insurance; that all necessary expenses incurred by the Commissioner of Insurance or his representative shall be paid by the corporation as certified to by said Commissioner. Every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the Commissioner: Provided, that neither such plan, nor any payment thereunder, nor any payment not fixed by such plan, shall be a approved by the Commissioner, if the making of such payment shall reduce the assets of the corporation to an amount less than the entire liabilities of the corporation, including therein the net values of its outstanding contracts according to the standard adopted by the Commissioner of Insurance, and also all other funds, contingent reserves and surplus which the corporation is required by order or direction of the Commissioner of Insurance to maintain, save so much of the surplus as shall have been appropriated or paid under such plan. (1937, c. 231, s. 1.)

Editor's Note. — For discussion of act from which this Article is codified, see 15 N.C.L. Rev. 359.

§ 58-104. Stock acquired to be turned over to voting trust until all stock acquired; dividends repaid to corporation for beneficiaries. — If a domestic stock life insurance corporation shall determine to become a mutual life insurance corporation it may, in carrying out any plan to that end under the provisions of G.S. 58-103, acquire any shares of its own stock by gift, bequest or purchase. And until all such shares are acquired, any shares so acquired shall be acquired in trust for the policyholders of the corporation as hereinafter provided, and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees, and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote until all of the capital stock of such corporation is acquired, when the entire capital stock shall be retired and canceled; and thereupon, unless sooner incorporated as such, the corporation shall be and become a mutual life insurance corporation without capital stock. Said trustees shall be appointed and vacancies shall be filled as provided in the plan adopted under G.S. 58-103. Said trustees shall file with the corporation and with the Commissioner of Insurance a verified acceptance of their appointments and declaration that they will faithfully discharge their duties as such trustees. After the payment of such dividends to stockholders or former stockholders as may have been provided in the plan adopted under G.S. 58-103, all dividends and other sums received by said trustees on said shares of stock so acquired, after paying the necessary expenses of executing said trust, shall be immediately repaid to said corporation for the benefit of all who are or may become policyholders of said corporation and entitled to participate in the profits thereof, and shall be added to and become a part of the surplus earned by said corporation, and be apportionable accordingly as a part of said surplus among said policyholders. (1937, c. 231, s. 2.)

ARTICLE 10.

Assessment Companies.

§ 58-105. Copies of charter and bylaws filed. — Every corporation, society, or organization of this or any other state or country, transacting business under this department upon the cooperative or assessment plan, must file with the Commissioner of Insurance, before beginning to do business in this State, a copy of its charter or articles of association, and the bylaws, rules, or regulations referred to in its policies or certificates and made a part of such contract. Bylaws or regulations not so filed with the Commissioner of Insurance will not avoid or affect any policy or certificate issued by such company or association. (1899, c. 54, s. 86; Rev., s. 4790; C. S., s. 6356.)

Cross References. — As to mutual insurance companies generally, see §§ 58-92 to 58-100. As to fraternal orders and societies, see § 58-263 et seq.

§ 58-106. Contracts must accord with charter and bylaws. — Every policy or certificate or renewal receipt issued to a resident of this State by any corporation, association, or order transacting therein the business of insurance upon the assessment plan must be in accord with the provisions of the charter and bylaws of such corporation, association, or order, as filed with the Commissioner of Insurance. It is unlawful for any such domestic or foreign insurance company or fraternal order to transact or offer to transact any business not authorized by the provisions of its charter and the terms of its bylaws, or, through an agent or otherwise, to offer or issue any policy, renewal certificate, or other contract whose terms are not in clear accord with the powers, terms, and stipulations of its charter and bylaws. (1899, c. 54, s. 84; 1903, c. 438, s. 9; Rev., s. 4791; C. S., s. 6357.)

The contract of insurance must conform to the charter and bylaws, and these are as authorized by the state of its origin. Hollingsworth v. Supreme Council of Royal Arcanum, 175 N.C. 615, 96 S.E. 81 (1918), distinguishing Caldwell Land & Lumber Co. v. Commissioners of Caldwell County, 174 N.C. 634, 94 S.E. 406 (1917).

Assessment companies are prohibited from issuing policies or transacting business not authorized by their charters. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

Duty and Liability under Bylaws. — The bylaws of an assessment association when assented to by the members, as provided in the statute, constitute the measure of duty and liability of the parties, provided they are reasonable and not in violation of any principle of public law. Duffy v. Fidelity Mut. Life Ins. Co., 142 N.C. 103, 55 S.E. 79 (1906).

§ 58-107. "Assessment plan" printed on application and policy. — Every policy or certificate issued to a resident of the State by any corporation transacting in the State the business of life insurance upon the assessment plan, or admitted to do business in this State on the assessment plan, shall print in bold type near the top of the front page of the policy, upon every policy or certificate issued upon the life of any such resident of the State, the words "issued upon the assessment plan"; and the words "assessment plan" shall be printed conspicuously upon every application, circular, card, and any and all printed documents issued, circulated, or caused to be circulated by such corporation within the State. (1913, c. 159, s. 1; C. S., s. 6358; 1929, c. 93, s. 1; 1933, c. 34; 1945, c. 386.)

§ 58-108. Revocation for noncompliance. — If any corporation or association transacting insurance business in this State on the assessment plan or issuing any policy upon the life of a resident of North Carolina upon the assessment plan shall fail or refuse to comply with the foregoing section [G.S.

58-107], the Commissioner of Insurance shall forthwith suspend or revoke all authority of such corporation or association and of its agents to do business in this State. (1913, c. 159, s. 2; C. S., s. 6359.)

§ 58-109. Deposits and advance assessments required. — Every domestic insurance company, association, order, or fraternal benefit society doing business on the assessment plan shall collect and keep at all times in its treasury one regular loss assessment sufficient to pay one regular average loss; and no such company, association, order, or fraternal benefit society shall be licensed by the Commissioner of Insurance unless it makes and maintains with him for the protection of its obligations at least five thousand dollars ($5,000) in United States or North Carolina bonds, in farm loan bonds issued by federal loan banks, or in the bonds of some city, county, or town of North Carolina to be approved by the Commissioner of Insurance, or deposit with him a good and sufficient bond , secured by a deed of trust on real estate situated in North Carolina and approved by him, or by depositing with the Commissioner of Insurance a bond in an amount of not less than five thousand dollars ($5,000), issued by any corporate surety company authorized to do business in this State. The Commissioner of Insurance may increase the amount of deposit to the amount of reserve on the contracts of the association or society. The provisions of this section shall not apply to the farmers mutual fire insurance associations now doing business in the State and restricting their activities to not more than three adjacent counties. (Rev., s. 4792; 1913, c. 119, s. 1; 1917, c. 191, s. 2; C. S., s. 6360; 1933, c. 47; 1945, c. 386.)

§ 58-110. Deposits by foreign assessment companies or orders. — Each foreign insurance company, association, order, or fraternal benefit society doing business in this State on the assessment plan shall keep at all times deposited with the Commissioner of Insurance or in its head office in this State, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this State during the time allowed by it for the collection of assessments and payment of losses. It shall notify the Commissioner of Insurance of the place of deposit and furnish him at all times such information as he requires in regard thereto; and no such company, association, order, or fraternal benefit society shall be licensed by the Commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars ($5,000) in United States or North Carolina bonds, in farm loan bonds issued by federal land banks, or in the bonds of some county, city, or town in North Carolina to be approved by the Commissioner of Insurance, or a good and sufficient bond or note, secured by deed of trust on real estate situate in North Carolina, and approved by the Commissioner. (1899, c. 54, s. 84; 1903, c. 438, s. 9; Rev., s. 4713; 1913, c. 119, ss. 2, 3; 1917, c. 191, s. 2; C. S., s. 6361; 1945, c. 386.)

§ 58-111: Repealed by Session Laws 1945, c. 377.

§ 58-112. Revocation of license. — If any such corporation, association, or order at any time fails to comply with the provisions of G.S. 58-109 and 58-110 or shall issue policies or certificates not in accord with its charter and bylaws, as provided in this Article, the Commissioner of Insurance shall forthwith suspend or revoke all authority to it, and of all its agents or officers, to do business in this State, and shall publish such revocation in some newspaper published in this State. (1899, c. 54, s. 85; Rev., s. 4793; C. S., s. 6362.)

§ 58-112.1. Mutual life insurance companies; assessments prohibited. — No domestic mutual life insurance company shall, after March 6, 1945, be organized to issue any policy of life insurance or any annuity contract which provides for the payment of any assessment by any policyholder or member in

addition to the regular premium charged for such insurance; nor shall any such company have power to levy or collect any such assessment. No foreign or alien life insurance company shall be permitted to do business in this State if it does business, in this State or elsewhere, on such or any other assessment plan. (1945, c. 386.)

ARTICLE 11.

Fidelity Insurance Companies.

§§ 58-113 to 58-118: Repealed by Session Laws 1945, c. 743, s. 2.

§ 58-119: Repealed by Session Laws 1945, c. 377.

Editor's Note. — The repealed section was rewritten as § 58-39.2.

ARTICLE 12.

Promoting and Holding Companies.

§ 58-120. Terms defined. — As the terms are used in this Article,

(1) "Holding corporation" means a corporation or joint-stock association, which holds or is engaged in the acquisition of the capital stock or a major portion thereof of one or more insurance corporations for the purpose of controlling the management thereof, as voting trustee or otherwise;

(2) "Promoting corporation" means a corporation or joint-stock association, engaged in the business of organizing or promoting or endeavoring to organize or promote the organization of an insurance corporation or corporations, or in any way assisting therein; and

(3) "Securities" means the shares of capital stock, subscription, certificates, debenture bonds, and any and all other contracts or evidences of ownership of or interest in insurance corporations, or in promoting or holding corporations. (1913, c. 182, s. 1; C. S., s. 6383.)

§ 58-121. Certificate of authority to sell securities required. — No individual, partnership, association, or corporation, as the agent of another or as a broker, shall sell or offer for sale, or in any way assist in the sale in this State of the securities of any promoting or holding corporation, or of any insurance corporation, which is not at that time lawfully engaged or authorized to engage in the transaction of the business of insurance in this State, without first procuring, as hereinafter provided, a certificate of authority from the Insurance Department to sell such securities; nor shall any individual, partnership, association, or corporation sell or offer for sale in this State the securities of any promoting or holding corporation, or of any insurance corporation which is not at the time of such sale or offer of sale lawfully engaged or authorized to engage in the transaction of the business of insurance in the State, unless such corporation has first procured from the Commissioner of Insurance, as hereinafter provided, a certificate that the corporation has fully complied with the provisions of this Article, and is authorized to sell the securities. Every certificate issued by the Commissioner of Insurance pursuant to the provisions of this Article shall state in bold type that the Commissioner in no way recommends the securities thereby authorized to be sold, and shall be renewable annually, upon written application, filed on or before the first day of July of each year, and may be revoked for cause at any time by the Commissioner. The Commissioner shall prepare and furnish upon request

suitable blank forms of application for the certificates required by this Article. (1913, c. 182, s. 2; C. S., s. 6384; 1955, c. 179, s. 2.)

§ 58-122. Application for certificate by agent. — Every individual, partnership, association, or corporation desiring or intending to sell or to offer for sale in this State the securities of insurance corporations or of any holding or promoting corporation shall file with the Commissioner of Insurance an application for a certificate of such authority. This application must contain a statement, verified by oath, setting forth the name and address of the applicant's previous business experience, date and place of birth or organization, and such other information as the Commissioner requires. It is the duty of the Commissioner to examine the application and to make any further inquiry or examination of the applicant as he deems advisable. If upon examination the Commissioner finds the applicant, or if a corporation, the officers and directors thereof, to be trustworthy persons of good business credit, he may issue to the applicant a certificate of authority to sell or offer for sale in this State the securities of any insurance corporation, and of any promoting or holding corporation previously authorized under this Article, which shall be mentioned therein. (1913, c. 182, s. 3; C. S., s. 6385.)

§ 58-123. Application for certificate by corporation. — Every such unauthorized insurance corporation, and every promoting or holding corporation, whose securities are offered for sale in this State, must file with the Commissioner of Insurance copies of all securities to be offered for sale, and an application for certificate of authority under this Article which shall contain a statement in detail of the plans and purposes of such corporation, the amount and par value of the securities to be offered for sale, and the selling price thereof, the manner in which the money paid in therefor is to be spent or employed, the rate of commission to be paid for the sale of such securities, the salaries to be paid to the officers of such corporation, and such other information as the Commissioner of Insurance requires. No change shall thereafter be made in the form or character of the securities to be offered for sale, or in the plans or purposes of any such corporation, without the approval thereof in writing by the Commissioner. It is the duty of the Commissioner to examine the application and other documents filed, and to make any further inquiry or examination of the corporation as he deems advisable. If upon examination the Commissioner finds that the plans and purposes of the corporation are proper, that its condition is satisfactory, that the amount of its securities is reasonable, that the price at which such securities are to be sold is adequate, and that the manner in which the money is paid in therefor, the rate of commissions to be paid and the salaries of officers are fair, he may issue a certificate that the corporation has complied with all the provisions of this Article, and is authorized to sell or offer its securities for sale in this State. (1913, c. 182, s. 4; C. S., s. 6386.)

§ 58-124. Approval of advertising matter; misrepresentation. — No printed matter may be used in connection with the sale of securities of any such promoting, holding, or insurance corporation, for advertising purposes, or in the dissemination of information with reference thereto, unless it is first submitted to the Commissioner of Insurance and approved by him in writing. No such corporation, and no officer, director, or agent thereof, or any other person, copartnership, association, or corporation may issue, circulate, or employ or cause or permit to be used, issued, circulated, or employed any circular or statement, whether printed or oral, misrepresenting or exaggerating the earnings of insurance corporations or the value of their corporate stock or other securities, or the profits to be derived either directly or indirectly from the organization and management of insurance corporations, or of organizing or holding corporations. No insurance or other corporation, and no individual, copartnership, or association transacting business in this State shall place or

offer to place insurance in any corporation in connection with the sale or purchase of the securities of any insurance corporation or of any promoting or holding corporation. (1913, c. 182, s. 5; C. S., s. 6387.)

ARTICLE 12A.

Insurer Holding Registration and Disclosure Act.

§ 58-124.1. Definitions. — As used in this Article, the following terms shall have the respective meanings hereinafter set forth, unless the context shall otherwise require:

(1) Affiliate. — An "affiliate" of, or person "affiliated" with, a specific person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(2) Commissioner. — The term "Commissioner" shall mean the Commissioner of Insurance of North Carolina, his deputies, or the Department of Insurance of North Carolina, as appropriate.

(3) Control. — The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by G.S. 58-124.2(i) that control does not exist in fact. The Commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

(4) Insurance Holding Company System. — An "insurance holding company system" consists of two or more affiliated persons, one or more of which is an insurer.

(5) Insurer. — The term "insurer" shall have the same meaning as set forth in G.S. 58-2(3) except that it shall not include (i) agencies, authorities or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia, or a state or political subdivision of a state, (ii) fraternal benefit societies, (iii) nonprofit medical and hospital service associations, or (iv) nonprofit dental service corporations.

(6) Person. — A "person" is an individual, a corporation, a partnership, an association, a joint-stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert, but shall not include any securities broker performing no more than the usual and customary broker's function.

(7) Subsidiary. — A "subsidiary" of a specified person is an affiliate controlled by such person directly, or indirectly, through one or more intermediaries.

(8) Voting Security. — The term "voting security" shall include any security convertible into or evidencing a right to acquire a voting security. (1971, c. 513, s. 1.)

§ 58-124.2. Registration of insurers. — (a) Registration. — Every insurer which is authorized to do business in this State and which is a member of an insurance holding company system shall register with the Commissioner, except a foreign insurer subject to disclosure requirements and standards adopted by statute or regulation in the jurisdiction of its domicile which are substantially similar to those contained in this section. Any insurer which is subject to registration under this section shall register within 60 days after July 1, 1971, or 15 days after it becomes subject to registration, whichever is later, unless the Commissioner for good cause shown extends the time for registration, and then within such extended time. The Commissioner may require any authorized insurer which is a member of a holding company system which is not subject to registration under this section to furnish a copy of the registration statement or other information filed by such insurance company with the insurance regulatory authority of its domiciliary jurisdiction.

(b) Information and Form Required. — Every insurer subject to registration shall file a registration statement on a form provided by the Commissioner, which shall contain current information about:

(1) The capital structure, general financial condition, ownership and management of the insurer and any person controlling the insurer;

(2) The identity of every member of the insurance holding company system;

(3) The following agreements in force, relationships subsisting, and transactions currently outstanding between such insurer and its affiliates:

a. Loans, other investments, or purchases, sales or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates;

b. Purchases, sales, or exchanges of assets;

c. Transactions not in the ordinary course of business;

d. Guarantees or undertakings for the benefit of an affiliate which result in an actual contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business;

e. All management and service contracts and all cost-sharing arrangements, other than cost-allocation arrangements based upon generally accepted accounting principles; and

f. Reinsurance agreements covering all or substantially all of one or more lines of insurance of the ceding company; and

(4) Other matters concerning transactions between registered insurers and any affiliates as may be included from time to time in any registration forms adopted or approved by the Commissioner.

(c) Materiality. — No information need be disclosed on the registration statement filed pursuant to G.S. 58-124.2(b) if such information is not material for the purposes of this section. Unless the Commissioner by rule, regulation or order provides otherwise, sales, purchases, exchanges, loans or extensions of credit, or investments, involving one half of one percent (½ of 1%) or less of an insurer's admitted assets as of the thirty-first day of December next preceding, shall not be deemed material for purposes of this section.

(d) Amendments to Registration Statements. — Each registered insurer shall keep current the information required to be disclosed in its registration statement by reporting all material changes or additions on amendment forms provided by the Commissioner within 15 days after the end of the month in which it learns of each such change or addition, provided, however, that subject to G.S. 58-124.3(c), each registered insurer shall so report all dividends and other distributions to shareholders within two business days following the declaration thereof.

(e) Termination of Registration. — The Commissioner shall terminate the registration of any insurer which demonstrates that it no longer is a member of an insurance holding company system.

(f) Consolidated Filing. — The Commissioner may require or allow two or more affiliated insurers subject to registration hereunder to file a consolidated registration statement or consolidated reports amending their consolidated registration statement or their individual registration statements.

(g) Alternative Registration. — The Commissioner may allow an insurer which is authorized to do business in this State and which is part of an insurance holding company system to register on behalf of any affiliated insurer which is required to register under subsection (a) above and to file all information and material required to be filed under this section.

(h) Exemptions. — The provisions of this section shall not apply to any insurer, information or transaction if and to the extent that the Commissioner by rule, regulation, or order shall exempt the same from the provisions of this section.

(i) Disclaimer. — Any person may file with the Commissioner a disclaimer of affiliation with any authorized insurer or such a disclaimer may be filed by such insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between such person and such insurer as well as the basis for disclaiming such affiliation. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section which may arise out of the insurer's relationship with such person unless and until the Commissioner disallows such a disclaimer. The Commissioner shall disallow such a disclaimer only after furnishing all parties in interest with notice and opportunity to be heard and after making specific findings of fact to support such disallowance.

(j) Violations. — The failure to file a registration statement or any amendment thereto required by this section within the time specified for such filing shall be a violation of this section. (1971, c. 513, s. 1.)

§ 58-124.3. Standards. — (a) Transactions with Affiliates. — Material transactions by registered insurers with their affiliates shall be subject to the following standards:

(1) The terms shall be fair and reasonable;

(2) The books, accounts and records of each party shall be so maintained as to clearly and accurately disclose the precise nature and details of the transactions; and

(3) The insurer's surplus as regards policyholders following any dividends or distributions to shareholder affiliates shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(b) Adequacy of Surplus. — For purposes of this Article, in determining whether an insurer's surplus as regards policyholders is reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, the following factors, among others, shall be considered:

(1) The size of the insurer as measured by its assets, capital and surplus, reserves, premium writings, insurance in force and other appropriate criteria;

(2) The extent to which the insurer's business is diversified among the several lines of insurance;

(3) The number and size of risks insured in each line of business;

(4) The extent of the geographical dispersion of the insurer's insured risks;

(5) The nature and extent of the insurer's reinsurance program;

(6) The quality, diversification, and liquidity of the insurer's investment portfolio;

(7) The recent past and projected future trend in the size of the insurer's surplus as regards policyholders;

(8) The surplus as regards policyholders maintained by other comparable insurers;

(9) The adequacy of the insurer's reserves; and

(10) The quality and liquidity of investments in subsidiaries. The Commissioner may treat any such investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in his judgment such investment so warrants.

(c) Dividends and Other Distributions. — No insurer subject to registration under G.S. 58-124.2 shall pay any extraordinary dividend or make any other extraordinary distribution to its shareholders until (i) 30 days after the Commissioner has received notice of the declaration thereof and has not within such period disapproved such payment, or (ii) the Commissioner shall have approved such payment within such 30-day period.

For purposes of this section, an extraordinary dividend or distribution includes any dividend or distribution of cash or other property, whose fair market value together with that of other dividends or distributions made within the preceding 12 months exceeds the greater of (i) ten percent (10%) of such insurer's surplus as regards policyholders as of the thirty-first day of December next preceding, or (ii) the net gain from operations of such insurer, if such insurer is a life insurer, or the net investment income, if such insurer is not a life insurer, for the 12-month period ending the thirty-first day of December next preceding, but shall not include pro rata distributions of any class of the insured's own securities.

Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution which is conditional upon the Commissioner's approval thereof, and such a declaration shall confer no rights upon shareholders until (i) the Commissioner has approved the payment of such dividend or distribution or (ii) the Commissioner has not disapproved such payment within the 30-day period referred to above. (1971, c. 513, s. 1.)

§ 58-124.4. Examination. — (a) Power of Commissioner. — Subject to the limitation contained in this section and in addition to the powers which the Commissioner has under G.S. 58-16, relating to the examination of insurers, the Commissioner shall also have the power to order any insurer registered under G.S. 58-124.2 to produce such records, books, or other information papers in the possession of the insurer or its affiliates as shall be necessary to ascertain the financial condition or legality of conduct of such insurer. In the event such insurer fails to comply with such order, the Commissioner shall have the power to examine such affiliates to obtain such information.

(b) Purpose and Limitation of Examination. — The Commissioner shall exercise his power under subsection (a) above only if the examination of the insurer under G.S. 58-16 is inadequate or the interests of the policyholders of such insurer may be adversely affected.

(c) Use of Consultants. — The Commissioner may retain at the registered insurer's expense such attorneys, actuaries, accountants and other experts not otherwise a part of the Commissioner's staff as shall be reasonably necessary to assist in the conduct of the examination under subsection (a) above. Any persons so retained shall be under the direction and control of the Commissioner and shall act in a purely advisory capacity.

(d) Expenses. — Each registered insurer producing for examination records, books and papers pursuant to subsection (a) above shall be liable for and shall pay the expense of such examination in accordance with the provisions of G.S. 58-16. (1971, c. 513, s. 1.)

§ 58-124.5. Confidential treatment. — All information, documents and copies thereof obtained by or disclosed to the Commissioner or any other person in the course of an examination or investigation made pursuant to G.S. 58-124.4, and all information reported pursuant to G.S. 58-124.2, shall be given confidential treatment and shall not be made public by the Commissioner or any other person, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains, unless the Commissioner, after giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard, determines that the interests of policyholders, shareholders or the public will be served by the publication thereof, in which event he may publish all or any part thereof in such manner as he may deem appropriate. (1971, c. 513, s. 1.)

§ 58-124.6. Rules and regulations. — The Commissioner may, upon notice and opportunity for all interested persons to be heard, issue such rules, regulations, and orders as shall be necessary to carry out the provisions of this Article. (1971, c. 513, s. 1.)

§ 58-124.7. Injunctions. — Whenever it appears to the Commissioner that any insurer or any director, officer, employee or agent thereof has committed or is about to commit a violation of this Article or of any rule, regulation, or order issued by the Commissioner hereunder, the Commissioner may apply to the superior court for the county in which the principal office of the insurer is located or if such insurer has no such office in this State then to the Superior Court for Wake County for an order enjoining such insurer or such director, officer, employee or agent thereof from violating or continuing to violate this Article or any such rule, regulation or order, and for such other equitable relief as the nature of the case and the interests of the insurer's policyholders, creditors and shareholders or the public may require. (1971, c. 513, s. 1.)

§ 58-124.8. Criminal proceedings. — Whenever it appears to the Commissioner that any insurer or any director, officer, employee or agent thereof has committed a willful violation of this Article, the Commissioner may cause criminal proceedings to be instituted in the court having criminal jurisdiction for the county in which the principal office of the insurer is located or if such insurer has no such office in the State, then in the criminal court for Wake County against such insurer or the responsible director, officer, employee or agent thereof. Any insurer which willfully violates this Article may be fined not more than five hundred dollars ($500.00). Any individual who willfully violates this Article may be fined not more than five hundred dollars ($500.00) or, if such willful violation involves the deliberate perpetration of a fraud upon the Commissioner, imprisoned not more than two years, or both. (1971, c. 513, s. 1.)

§ 58-124.9. Receivership. — Whenever it appears to the Commissioner that any person has committed a violation of this Article which so impairs the financial condition of a domestic insurer as to threaten insolvency or make the further transaction of business by it hazardous to its policyholders, creditors, shareholders or the public, then the Commissioner may proceed under G.S. 1-507.1 and 58-155.11 to take possession of the property of such domestic insurer and to conduct the business thereof. (1971, c. 513, s. 1.)

§ 58-124.10. Revocation, suspension, or nonrenewal of insurer's license. — Whenever it appears to the Commissioner that any person has committed a violation of this Article which makes the continued operation of an insurer contrary to the interests of policyholders or the public, the Commissioner may, after giving notice and an opportunity to be heard, determine to suspend, revoke or refuse to renew such insurer's license or authority to do business in this State

for such period as he finds is required for the protection of policyholders or the public. Any such determination shall be accompanied by specific findings of fact and conclusions of law. (1971, c. 513, s. 1.)

§ 58-124.11. Judicial review; mandamus. — (a) Any person aggrieved by any order made by the Commissioner pursuant to this Article may appeal therefrom in accordance with the provisions of G.S. 58-9.3.

(b) Any person aggrieved by any failure of the Commissioner to act or make a determination required by this Article may petition the Superior Court of Wake County for a writ in the nature of a mandamus or a peremptory mandamus directing the Commissioner to act or make such determination forthwith. (1971, c. 513, s. 1.)

Editor's Note. — Section 2, c. 513, Session Laws 1971, contains a severability clause.

ARTICLE 13.

Fire Insurance Rating Bureau.

§ 58-125. North Carolina Fire Insurance Rating Bureau created. — There is hereby created a bureau to be known as the "North Carolina Fire Insurance Rating Bureau." (1945, c. 380.)

The purpose of this Article is to provide for the public, at reasonable cost, insurance in financially responsible companies. Not only fair play, but the accomplishment of this legislative purpose as well, requires that the premium be fixed at a level which will enable the insuring company (i.e., the entire insurance industry in this State treated as if it were one company) (1) to pay the losses which will be incurred during the life of the policies to be issued under such rates, (2) to pay other operating expenses, and (3) to retain a "fair and reasonable profit" and no more. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The statutory plan of this Article contemplates a uniform premium rate schedule for all companies operating in the State. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

In the statutory plan, the State has undertaken to make available to its people the economic necessity of fire insurance policies which actually insure by authorizing the Bureau to propose premium rates just as would a single company having a monopoly of the fire insurance business in North Carolina. To protect the public against the danger of exorbitant rates for this economic necessity, which danger is inherent in monopolistic price fixing, the legislature has vested in the Commissioner its own authority to withhold approval of such rates proposed by the Bureau and to fix rates which are fair and reasonable. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Purpose, etc., of Bureau and of State Automobile Rate Administrative Office Compared. — The purpose and duties of the North Carolina Fire Insurance Rating Bureau created by this section are quite similar to the purpose and duties of the North Carolina Automobile Rate Administrative Office created by § 58-246. The Commissioners have similar statutory guidelines in considering adjustment of fire insurance rates and adjustment of automobile bodily injury and property damage insurance rates. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

The Bureau is to be regarded as if it were the only insurance company operating in North Carolina, for rate-making purposes, and as if it had an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of those of the companies actually in operation. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

There is no presumption that a rate filing by the Bureau is correct and proper. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The burden is upon the Bureau to show that the rate schedule proposed by it is fair and reasonable and that it does not discriminate unfairly between risks. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Cited in Garvey v. Old Colony Ins. Co., 153 F. Supp. 755 (E.D.N.C. 1957).

§ 58-126. Scope of Article. — The provisions of this Article shall apply to insurance against loss to property located in this State, or to any valuable interest therein, by fire, lightning, windstorm, explosion, theft of or physical damage to motor vehicles, and all other kinds of insurance which fire insurance companies are authorized to write in this State except

(1) Marine;
(2) Transportation risks and such kinds of insurance as are designated by the Commissioner as inland marine insurance;
(3) Aircraft risks;
(4) Rolling stock of railroad corporations and property of interstate common carriers used or employed by them in their business of carrying freight, merchandise or passengers in interstate commerce;
(5) Reinsurance. (1945, c. 380.)

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-126.1. Policies combining other coverage with fire insurance. — The Commissioner of Insurance is authorized to approve policies combining other coverages with fire insurance on property in North Carolina, either for a divisible or indivisible premium, provided the provisions of the second page of the statutory fire insurance policy as set forth in G.S. 58-176 are included therein and, provided further, that such policies shall be under the supervision of the North Carolina Fire Insurance Rating Bureau.

This section does not apply to insurance policies that include the peril of fire and which are excepted by law from the requirements for the use of the statutory fire insurance policy. (1955, c. 807, s. 1.)

§ 58-127. Rating Bureau. — Under the supervision of the Commissioner of Insurance who shall call a meeting for that purpose and within six months after March 6, 1945, insurance companies authorized to effect insurance in this State against the risk of loss by perils within the scope of this Article, shall organize a Rating Bureau for the purpose of making rates and rules and regulations which affect or determine the price which policyholders shall pay for insurance covered by this Article, on property or risks located in this State; and all companies now or hereafter authorized to transact such business in this State shall become members of such Bureau.

The government of the Rating Bureau shall be vested in its members, and it shall not be subject to the direction or control of any other bureau, association, corporation, company, individual or group of individuals. Each member shall have one vote.

The governing board, executive committee or other governing body of the Rating Bureau shall be provided for in the bylaws which shall provide also that at least one member of such governing body shall be an official of a domestic company and shall be a bona fide resident of the State of North Carolina.

The Rating Bureau shall have power to adopt a constitution and bylaws for its government and to adopt reasonable rules and regulations necessary to carry out its functions, but such constitution, bylaws, rules and regulations shall not be inconsistent with the provisions of this Article, and together with any amendments thereto shall be approved by the Commissioner before becoming effective. No such constitution, bylaws, rules and regulations shall discriminate against any type of insurer because of its plan of operation or otherwise, nor shall any insurer be prevented from returning any unused or unabsorbed premium deposit, savings or earnings to its policyholders or subscribers.

The Rating Bureau shall be empowered to subscribe for or purchase any necessary service. Subject to the approval of the Commissioner it shall apportion

the expenses of its operation among its members equitably in proportion to services rendered by the Bureau; provided, however, the Bureau may fix a minimum annual charge to be paid by each member, not exceeding fifty dollars ($50.00), and a reasonable admission fee, not exceeding fifty dollars ($50.00).

The principal office of the Bureau shall be located in the City of Raleigh, North Carolina, where all records shall be kept and all business of the Bureau transacted; provided that with the approval of the Commissioner branch offices of the Bureau may be established within the State. The Bureau shall furnish without discrimination its service to its members, and any rating schedule, forms or plans of operation which have been approved by the Commissioner and filed with the Rating Bureau shall be available for inspection at any reasonable time by all members of said Bureau.

Any member of the Rating Bureau may appeal to the Commissioner from any decision of such Bureau and the Commissioner shall, after a hearing held on not less than 10 days' written notice to the appellant and to the Bureau, issue an order approving the decision of the Bureau or directing it to give further consideration to such proposal. In the event the Bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 380.)

The problem for the rate maker is to determine what amount, collected as premiums at the inception of the policies hereafter to be issued, will enable the company (1) to pay losses to be incurred during the life of such policies, at replacement costs prevailing at the time of such losses, (2) to pay other proper operating expenses of the company, and (3) to retain a "fair and reasonable profit." In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Cited in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-128. Power to secure information. — The Commissioner, his deputy, or duly authorized examiner is authorized and empowered at all reasonable times and on reasonable notice to examine all records of the said Rating Bureau covering its operations, including its constitution, bylaws, rating schedules, rules, regulations and amendments thereto. (1945, c. 380.)

§ 58-129. Rate information. — Every risk specifically rated in this State shall be rated upon schedule after inspection and a survey of such risk shall be made and filed in the Rating Bureau office. A copy of such survey shall be furnished upon request to the insured or his duly authorized representative without charge. (1945, c. 380.)

§ 58-130. Statistical reports. — Every insurer shall file annually with the Rating Bureau or at its option, with a common agency approved by the Commissioner and representative of either stock or nonstock insurers, its underwriting experience in this State in accordance with classifications approved by the Commissioner. The experience filed with the common agency selected shall be consolidated by such agency and a copy of the consolidated result shall be filed with the Rating Bureau; provided such insurers shall, if directed by the Commissioner, file their individual underwriting experience with such Rating Bureau. Such data shall be kept and reports made in such manner and on such forms as may be prescribed by the Commissioner. (1945, c. 380.)

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Cited in In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

§ 58-131. Reasonableness of rates. — The Rating Bureau in making rates shall not unfairly discriminate between risks involving essentially the same

construction and hazards, and having substantially the same degree of protection. (1945, c. 380.)

Cross Reference. — See note to § 58-131.2.

This section prevents discrimination between unprotected farm and unprotected nonfarm properties similar in location, construction and hazards, and having substantially the same degree of protection. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Separate Classes of Property May Have Same Rate. — Properties need not necessarily be included in the same class in order for them to have the same fire insurance rate, but separate classes may have the same rate provided the location, construction and degree of protection are substantially the same for both. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131.1. Approval of rates. — No rating method, schedule, classification, underwriting rule, bylaw, or regulation shall become effective or be applied by the Rating Bureau until it shall have been first submitted to and approved by the Commissioner. Provided, that a rate or premium used or charged in accordance with a schedule, classification, or rating method or underwriting rule or bylaw or regulation previously approved by the Commissioner need not be specifically approved by the Commissioner. Every rating method, schedule, classification, underwriting rule, bylaw or regulation submitted to the Commissioner for approval shall be deemed approved, if not disapproved by him in writing within 60 days after submission. (1945, c. 380.)

The Commissioner need not approve or disapprove a filing by the Bureau in its entirety. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

There is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The Bureau may amend its filing so as to propose a smaller increase in premium rates than that proposed in the original filing, but, in the absence of such amendment, the Commissioner, upon proper findings of fact supported by substantial evidence, may fix premium rates at a level such as to allow part but not all of the increase proposed by the Bureau. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Applied in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

§ 58-131.2. Reduction or increase of rates. — The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.

If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.

In determining the necessity for an adjustment of rates, the Commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.

Any reduction or increase of rates ordered by the Commissioner shall be applied by the Rating Bureau subject to his approval within 60 days and shall become effective solely to such insurance as is written having an inception date on and after the date of such approval.

Whenever the Commissioner finds, after notice and hearing, that the Bureau's application of an approved rating method, schedule, classification, underwriting rule, bylaw or regulation is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the Bureau to revise or alter the application of such rating method, schedule, classification, underwriting rule, bylaw or regulation in the manner and to the extent set out in the order. (1945, c. 380.)

Insurance rate making is a technical, complicated and involved procedure carried on by trained men. It is not an exact science. Judgment based upon a thorough knowledge of the problem must be applied. Courts cannot abdicate their duty to examine the evidence and the adjudication, and to interpret and apply the law, but they must recognize the value of the judgment of an insurance commissioner who is specializing in the field of insurance and the efficacy of an adjudication supported by evidence of experts who devoted a lifetime of service to rate making. In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

Fixing Premium Rate Is Exercise of Legislative Power. — In fixing by law the premium rate, it is the legislative power of the State which is being exercised. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

A "fair and reasonable profit" varies from time to time, like construction costs and consumer prices. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

And Is the ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a "fair and reasonable profit" in the immediate future (i.e., treating the Bureau as if it were an operating company whose experience in the past is the composite of the experiences of all of the operating companies), and if so, how much increase is required for that purpose. This cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percent of earned premiums which will constitute a "fair and reasonable profit" in that period. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

Whether six cents out of each dollar of gross revenue, i.e., earned premiums, is a fair and reasonable profit, an excessive profit, or an insufficient profit must be determined by the Commissioner from evidence, and this involves a projection into the future of past experience and present conditions. It involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

A "reasonable profit" cannot be determined until there is first a determination of reasonable expenses attributable to the business operated in this State. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Duty Imposed by Section. — This section imposes upon the Commissioner the duty of fixing such rates as will produce "a fair and reasonable profit" and no more. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Compliance with Statutory Procedures and Standards. — The Commissioner of Insurance has no authority to prescribe or regulate premium rates except insofar as that authority has been conferred upon him by statute. In exercising that authority he must comply with the statutory procedures and standards. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The use of past experience to estimate future needs involves, of necessity, a projection of known data into the unknown future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

The Commissioner's projection of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence (§ 58-9.3) and if he has taken into account all of the relevant facts which he is directed by statute to consider. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Statute Determinative of What Things Are Proper for Consideration by Commissioner. — The expert opinion of a witness, however well informed, as to what things are proper for consideration by the Commissioner in making his projection is not determinative. That is a matter determined by the provisions of the statute. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

"Prospective Loss Experience" and "Loss Trend". — "Prospective loss experience" and the present "loss trend" relate not only to the number of fires and to the extent of the physical destruction thereby, but also to the cost of replacement of the destroyed property. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Adjustment of Past Loss Experience. — The past loss experience should be adjusted to take into account any newly discovered practicable procedures and devices for reducing the risk of fire. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Stopping Adjusting Process After Bringing Past Experience to Present Level. — To bring past experience to the present level by pro forma adjustments of premiums earned and losses incurred, and then to stop the adjusting process, is to project into the future the assumption that there will be no further change in the incidence of fires, in the extent of physical destruction thereby, or in the cost of replacing the destroyed property. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence that present conditions are not those which prevailed during former experience is relevant to the translation of the past experience into an informed judgment concerning the future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Commissioner May Not Consider Fire Rate Based on Less than Five Years' Experience. — Upon hearing of a petition of the Rating Bureau for review of fire insurance rates on a particular classification, the Commissioner of Insurance has no right to consider a rate which is not based on experience for a period of not less than five years next preceding the year in which the review is requested. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Evidence of "Reasonable and Related Factors". — Evidence, otherwise competent, of a cost trend, upward or downward, which continues from the past into the present, and expert testimony, otherwise competent, that such trend may reasonably be expected to continue into the future, so that future costs will be higher or lower than present costs, is evidence of "reasonable and related factors" which this section requires the Commissioner to consider in making his own projection into the future. It is not a proper ground for the rejection of such evidence that such projection of an upward or downward cost trend into the future has never before been used in the rate-making process. The statute does not contemplate that procedures and methods for determining replacement costs for the future shall be frozen. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Fire Insurance Rate Not to Be Fixed upon Consideration of Hazard Alone. — It is apparent under the provisions of this section that the General Assembly has never authorized a fire insurance rate to be fixed upon a consideration of hazard alone. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

The determination of the cost of replacing losses to be incurred at price levels then to prevail is a matter of informed judgment and not of precise calculation. Such judgment can be formed only by consideration both of the past experience and of the present prevailing conditions. This is true both as to the number and physical extent of the losses to be anticipated and as to the cost of replacing such losses as they occur. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Recent events reliably indicating a rise or a fall in replacement costs previously experienced is a relevant circumstance in determining the extent to which past experience supplies a reliable guide to the future in the matter of replacement costs. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Statistical evidence which becomes available at any time during a public hearing for the establishment of fire insurance rates and the use of which will produce no unreasonable delay should be admitted and taken into consideration in fixing rates. In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

Requested Increase Based on Loss Ratio of a Class as a Whole. — Where requested increase in insurance rates is based on the loss ratio of a class as a whole, objection to finding that the Rating Bureau failed to present the loss experience for the prior five years on a subclassification included in the class, is immaterial. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Testimony of Actuary. — The presence in the record of testimony of the actuary for the Department of Insurance that, in his admittedly expert opinion, it would not be "conservative" or "proper" for the Commissioner, in fixing rates for the future, to consider a projection of the present and past cost trend does not afford a basis for calling into play the statutory presumption that the order of the Commissioner, resting upon the same conclusion, is correct and proper because "supported by substantial evidence." It is held that otherwise competent opinion evidence as to such projection is, as a matter of law, relevant to the determination by the Commissioner of the probable loss experience of the companies during the life of policies to be issued in the near future. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Premium Rates Not Fixed Retroactively. — It is not only impractical to fix premium rates retroactively, it is expressly required by this section that premium rates fixed in accordance with the statutory plan be applied only to policies issued after the rates are so established. Consequently, the entire procedure contemplates a looking to the future. In re North Carolina Fire

Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Formulating new rate-making procedures is a policy matter and should rest with the Commissioner. In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

But Not Consideration of Prevailing Cost Trends. — In its holding that consideration of a prevailing cost trend, established by otherwise competent and credible evidence, is "a policy matter and should rest with the Commissioner," the Court of Appeals erred and to that extent its decision is hereby reversed. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Burden upon Rating Bureau. — There is no statute or decision that makes a request of the Rating Bureau for an increase or decrease in rates presumptively correct and proper. The Rating Bureau is the movant in the proceeding and the burden is upon it to establish that the proposed rate is fair and reasonable and that it does not "unfairly discriminate between risks involving essentially the same construction and hazards, and having substantially the same degree of protection." In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

The mere fact that the Commissioner has heretofore approved 115 different classes of property in the State in order that premiums and losses with respect to each class may be ascertained, does not relieve the Rating Bureau of the burden of proof to support its request or requests to the Commissioner for reductions or increases in rates. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Application of Rating Method or Classification by Rating Bureau. — The fact that certain classes have been approved does not relieve the Commissioner of the duty to determine whether the Rating Bureau's application of an approved rating method or classification is unfairly discriminatory. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Application for an increase in insurance rates on unprotected farm dwellings, which would result in a higher rate from that applicable to unprotected nonfarm dwellings, similar in location, construction and hazards, and having substantially the same degree of protection, was properly denied by the Commissioner of Insurance, since § 58-131 proscribes such discrimination. In re North Carolina Fire Ins. Rating Bureau, 245 N.C. 444, 96 S.E.2d 344 (1957).

Quoted in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

§ 58-131.3. Deviations. — No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the Rating Bureau. However, an insurer may deviate from the rates promulgated by the Rating Bureau provided the insurer has filed the deviation to be applied both with the Rating Bureau and the Commissioner, and provided the said deviation is uniform in its application to all risks in the State of the class to which such deviation is to apply; and provided such deviation is approved by the Commissioner as being reasonable under all the circumstances. If approved the deviation shall remain in force for a period of one year from the date of approval by the Commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions. A rate in excess of that promulgated by the Rating Bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner. (1945, c. 380.)

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131.4. Pools, groups or associations. — Any insurer individually or as a member of a pool, group, or association engaged in the business of insuring special types or classes of risks in connection with which a particular inspection or engineering service and set of standards has been maintained to the satisfaction of the Commissioner, and with respect only to such types or classes of risks, shall submit loss experience data to the Commissioner for approval of its schedule of rates or deposits, forms and plans of operation either directly

in its own behalf or through a unified facility of the group created and licensed by the Commissioner for that purpose and maintained entirely or in part for such a purpose. In evaluating the forms, schedule of rates or deposits and plan of operation of such an insurer or pool or association of insurers the Commissioner shall act with due regard for the previous record of such insurer or group of insurers, and with due appreciation of previous and prospective loss trends in this State and outside of this State, and to any other factors reasonably related to the classes or types of insurance written by such insurer or group of insurers. When so approved such forms, schedule of rates or deposits and plan of operation shall be filed with the Bureau.

Nothing contained in this section shall be construed as exempting any insurer, pool, group or association of insurers from all other provisions of this Article and the provisions of Article 13B with respect to licensing. (1945, c. 380.)

§ 58-131.5. Hearing. — The Commissioner shall not make any rule, regulation or order under the provisions of this Article without giving the Rating Bureau and insurers who may be affected thereby reasonable notice and a hearing if hearing is requested. All hearings provided for in this Article shall be held at such time and place as shall be designated in a notice which shall be given by the Commissioner in writing to the Rating Bureau and insurer or the officers and agents and representatives thereof which may be affected thereby, at least 30 days before the date designated therein. The notice shall state the subject of the inquiry.

At the conclusion of such hearing, or within 30 days thereafter, the Commissioner shall make such order or orders as he may deem necessary in accordance with his finding. Within 30 days after receiving written notice of any such order or finding any person affected thereby may request a rehearing or review thereof before the Commissioner by filing a written request setting forth a summary of the reasons therefor. Upon receipt of such request, the Commissioner shall set a date for rehearing. Such application for rehearing shall act as a stay of the provisions of such order. The Commissioner may modify, change or rescind such order if he finds that the facts shown at the rehearing warrant such modification, change or rescission.

In the conduct of such hearing the Commissioner, his deputy or the duly authorized examiner specifically designated by him for such purpose shall have power to administer oaths and to examine any person under oath and in connection therewith to require the production of any books, records, or papers relative to the inquiry.

The giving of notice to the Rating Bureau shall, for the purposes of the provisions of this section, constitute notice to all of the insurer members of the Rating Bureau except those insurer members who are moving parties or have been named as parties or have been added as parties to the proceeding, provided that any insurer member who may be affected or may have a direct or indirect interest in any proposed rule, regulation or order may, upon written request of such insurer, be added as a named party to the proceeding and shall thereafter be entitled to receive all notices required by this section. (1945, c. 380; 1957, c. 546.)

Matters within Discretion of Commissioner. — It is within the sound discretion of the Commissioner to require complex statistical exhibits to be made available to the adverse party prior to the hearing, to restrict or deny the use of newly developed statistical data sprung suddenly at the hearings by either party to the surprise of the other, and to grant such recess of the hearing as he may deem necessary to permit reasonable opportunity to study such data and to prepare evidence to refute it. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

This section clearly contemplates the introduction of relevant and otherwise competent evidence at the rehearing. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Such Evidence Is Not Limited to Conditions Prevailing at or before Date of Filing. — Neither the Department of Insurance, any other protestant, nor the Bureau is confined to evi-

dence relating to conditions prevailing at the date of the filing and to experience prior thereto. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

While the statute requires that a hearing by the Commissioner upon a filing by the Bureau be held promptly, it is well within the bounds of possibility that, between the filing and the hearing, experience may be had which would be most relevant to the determination of the direction of a projection of the present "loss trend" into the future. Such change in conditions after the date of the filing might indicate a sharply downward trend in construction costs or in fire hazard. Surely, the statute does not contemplate that the Commissioner should shut his eyes to such a change in conditions after the date of the filing. It is equally clear that the Bureau may offer evidence of more recent experience which corroborates its allegations in the filing. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Where the Commissioner simply ruled, as a matter of law, that all evidence, however relevant, would be cut off as of the date of the filing, he did not follow the mandate of the statute. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Evidence relevant to the issues involved in the original hearing and to the reasons stated in the petition for rehearing, if otherwise competent, is admissible at a rehearing. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Application for rehearing, itself, automatically stays former order of Commissioner. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131.6. Revocation or suspension of license. — If the Commissioner shall find, after due notice and hearing, that any insurer, officer, agent or representative thereof has violated any of the provisions of this Article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 380.)

§ 58-131.7. Penalties. — Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this Article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). (1945, c. 380.)

§ 58-131.8. Review of order of Commissioner. — A review of any order made by the Commissioner in accordance with the provisions of this Article, shall be by appeal to the Superior Court of Wake County in accordance with the provisions of G.S. 58-9.3. (1945, c. 380.)

Quoted in In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

§ 58-131.9. Limitation. — Nothing in this Article shall apply to any town or county farmers mutual fire insurance association restricting their operations to not more than three adjacent counties, or to domestic insurance companies, associations, orders or fraternal benefit societies now doing business in this State on the assessment plan. (1945, c. 380.)

ARTICLE 13A.

Casualty Insurance Rating Regulations.

§ 58-131.10. Scope of Article. — Every insurer authorized to do the business of casualty insurance in this State, including fidelity and surety business, shall be either a member or a subscriber of a rating bureau licensed under this Article by the Commissioner or shall for itself make its own rates. No insurer shall be a member of more than one rating bureau for the purpose of rating the same risk. A rating bureau may be a person or persons, corporation, partnership,

company, society or association, domestic or foreign, which makes rates for casualty insurance. (1945, c. 380.)

Cross Reference. — As to Rating Bureau for workmen's compensation insurance, see §§ 97-102 through 97-104.

§ 58-131.11. License. — No rating bureau shall do business or furnish its services for use in this State until it shall have been licensed by the Commissioner and has designated a resident of North Carolina as its agent for service of notices and orders. Application for license shall be accompanied by a fee as prescribed in the Revenue Act and shall be in the form the Commissioner shall prescribe and shall include the name and address of the applicant; a copy of its constitution, its articles of agreement or association or incorporation, its bylaws or rules governing its business, or such of the foregoing, if any, as the bureau may have; a list of insurers licensed to do business in North Carolina who are or who have agreed to become members or subscribers; the names and addresses of all officers and managers; and such other information as the Commissioner may require. If the Commissioner finds that the applicant has complied with the provisions of this Article, he shall issue to it a license authorizing it to engage in rate making or the furnishing of its services for use in this State. Licenses shall remain in effect until suspended or revoked in the manner prescribed in this Article. The license of every rating bureau doing business or furnishing its services for use in this State on January 1, 1946, may continue in force, subject to the provisions of this Article, pending its application for license hereunder, which application shall be made within six months after January 1, 1946. (1945, c. 380.)

§ 58-131.12. Organization. — The government of a rating bureau shall be vested in its members, or, in the case of a corporation, in its board of directors, and it shall not be subject to the direction or control of any other bureau, association, corporation, company, individual or group of individuals. The bureau shall have power to establish reasonable agreements and bylaws for its government, and to adopt reasonable rules and regulations necessary to carry out its functions; such reasonable agreements, bylaws, rules and regulations shall not be inconsistent with the provisions of this Article and shall be first approved by the Commissioner. All amendments to such agreements, bylaws, rules and regulations shall before becoming effective, be submitted to and approved by the Commissioner. No such agreements, bylaws, rules and regulations shall discriminate against any type of insurer because of its plan of operation or otherwise, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. Every such rating bureau shall furnish its services without discrimination to any licensed insurer applying therefor. Any insurer admitted to membership or furnished service as a subscriber shall pay its reasonable share of the expense of operation of such bureau and shall observe all reasonable rules and regulations of the bureau.

Every rating bureau or insurer which makes its own rates shall, within 10 days after written request therefor, and upon payment of such reasonable charges as may be approved by the Commissioner, furnish to any person affected by any rate made by it, or to the authorized representative of such person, full information regarding such rate, including the schedule or schedules, if any, pursuant to which such rate was made. Every rating bureau, and every insurer which makes its own rates, shall provide reasonable means within this State, to be approved by the Commissioner, whereby any person or persons affected by a rate made by it may be heard.

Any member or subscriber of a rating bureau may appeal to the Commissioner from any decision of such bureau and the Commissioner shall, after a hearing held on not less than 10 days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-131.13. Filing of rates; approval. — Every rating bureau or insurer which makes its own rates shall file with the Commissioner every rate manual, classification of risks, rating plan, rating schedule, and every other rating rule which is made or used by it, and upon his request, all other information concerning the application and calculation of rates made or used by it. No rate, rate manual, classification of risks, rating plan, rating schedule, or other rating rule shall be effective until approved by the Commissioner. The Commissioner shall not approve any rate, rate manual, classification of risks, rating plan, rating schedule or other rating rule which is excessive, inadequate, unreasonable or unfairly discriminatory. (1945, c. 380.)

§ 58-131.14. Statistical reports. — Every insurer shall annually on or before October 1, file with the rating bureau of which it is a member or subscriber, or with such other agency as the Commissioner of Insurance may approve or designate, a statistical report showing a classification schedule of its premiums and losses on all classes of insurance to which this Article is applicable, and such other information as the Commissioner may deem necessary or expedient for the administration of the provisions of this Article. (1945, c. 380.)

§ 58-131.15. Deviation. — Any insurer may make written request to the Commissioner for approval of a deviation from a filing approved by him and made by a rating organization of which it is a member or subscriber. The basis for the deviation shall be specified in the request. The Commissioner shall hear the insurer and the rating organization and shall give them reasonable notice of the time and place of the hearing. The Commissioner shall approve a deviation if he finds it to be justified. He shall not approve a deviation if he finds that the resulting rates would be unreasonable, inadequate or unfairly discriminatory. (1945, c. 380.)

§ 58-131.16. Discrimination; revision of rates. — Whenever the Commissioner finds, after notice and hearing, that discrimination exists in the making or application of rates made or used by any rating bureau or insurer, he may order that such discrimination be removed. Such discrimination shall not be removed by increasing the rate on any risk affected by the order unless such increase is approved by the Commissioner as reasonable. Before making such order the Commissioner shall give notice to the bureau or insurer which made such rate or rates and to all other persons whom he may deem directly affected thereby. Every bureau receiving any such notice shall promptly notify all of its members or subscribers who would be affected by such order and notice to such rating organization shall be deemed notice to such members or subscribers.

Whenever the Commissioner shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable or unfairly discriminatory, he shall issue an order to the rating bureau or insurer making such rates, directing that such rates be altered or revised in the manner and to the extent stated in such order to produce rates which are reasonable, adequate and not unfairly discriminatory.

Whenever the Commissioner finds, after notice and hearing, that a bureau or insurer's application of an approved classification, rating plan, rating schedule or other rating rule is unwarranted, unreasonable, improper or unfairly discriminatory, he shall order the bureau or insurer to revise or alter the

application of such classification, rating plan, rating schedule, or other rating rule in the manner and to the extent set out in the order. (1945, c. 380.)

§ 58-131.17. Filing rate amendments. — Every rating bureau or insurer which makes its own rates may, from time to time, alter, supplement or amend its rates, rate manuals, schedules of rates, classifications of risks, rating plans and every other rating rule, or any part thereof, by filing with the Commissioner copies of such alteration, or amendment, together with a statement of the reason or reasons therefor, none of which shall take effect until approved by the Commissioner. (1945, c. 380.)

§ 58-131.18. Restriction on use of rates. — No insurer subject to this Article shall enter into any agreement for the purpose of making or establishing rates except in accordance with the provisions hereof. No member or subscriber of any rating bureau or insurer shall charge or receive any rate which deviates from the rates, rating plans, classifications, schedules, rules and standards made and filed by such rating bureau or insurer except as provided in this Article. No insurer and no agent or other representative of any insurer and no insurance broker shall knowingly charge, demand or receive a rate or premium which deviates from the rates, rating plans, classifications, schedules, rules and standards, made and last filed by or on behalf of the insurer, or issue or make any policy or contract involving a violation of such rate filings. A rate in excess of that promulgated by the rating bureau or filed by a company on its own behalf may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner. (1945, c. 380.)

This section is intended to prevent rebating and unlawful discrimination and favoritism by insurance companies. Where there is nothing in the record suggestive of an intent by either party to violate this section, an otherwise valid compromise will not be avoided solely on the ground that it is contrary to public policy. There must be some fact on which the asserted invalidity can rest. Fidelity & Cas. Co. v. Nello L. Teer Co., 179 F. Supp. 538 (M.D.N.C 1960), quoting Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547, 109 S.E.2d 171 (1959).

Compromise Settlement as to Credits for Unearned Premiums. — Where dispute between insurer and insured as to the amount of premiums due is not based upon controversy as to the rates but solely as to credits for unearned premiums and overpayment of premiums, a compromise settlement cannot be avoided on the ground that it was contrary to this section, since such compromise does not rest upon a charge of premiums at rates less than those prescribed by statute. Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547, 109 S.E.2d 171 (1959).

§ 58-131.19. Examinations. — The Commissioner may, whenever he deems it expedient, but shall at least once in every five years, make or cause to be made an examination of the business, affairs and method of operation of every rating bureau doing business or furnishing its services for use in this State. The reasonable costs of such examination shall be determined and fixed by the Commissioner and shall be paid by the rating bureau examined upon presentation to it of a detailed account of such cost. The Commissioner may, in his discretion, waive such examination upon proof that such rating bureau has, within a reasonably recent period, been examined by a public official or department of another state, pursuant to the laws of such state, and upon the filing with the Commissioner of a copy of the report of such examination. The officers, managers, agents, and employees of such rating bureau shall exhibit all its books, records, documents or agreements governing its method of operation, its rating system, and its accounts for the purpose of such examination. The Commissioner may, for the purpose of facilitating and furthering such examination, examine under oath the officers, managers, agents and employees of such rating bureau. (1945, c. 380.)

§ 58-131.20. False information. — No person shall give false or misleading information to any rating bureau of which it is a member or subscriber, to the Commissioner or to any person, which will in any manner affect the proper determination of reasonable, adequate and nondiscriminatory rates. (1945, c. 380.)

§ 58-131.21. Suspension of license; hearing. — Any rating bureau or insurer which violates any provision of this Article shall be subject to suspension of its license. Failure of any rating bureau or insurer to comply with the provisions of any order of the Commissioner within the time limited by such order, or any extension thereof as the Commissioner may, in his discretion, grant, shall, if no appeal has been taken from such order, automatically suspend its license. No order suspending a license shall be made by the Commissioner except upon 10 days' notice, specifying the particular violation. If such rating bureau or insurer shall make a request therefor in writing within the 10-day period, the Commissioner shall name a time and place for a hearing, at which it shall be given opportunity to make its defense. At the conclusion of such hearing or within 30 days thereafter the Commissioner shall make such order as in his judgment the evidence shall warrant. A suspension of license shall be effective until modified or rescinded by order of the Commissioner upon proof that the violation of the provisions of this Article no longer continues, or upon proof that the rating bureau or insurer has complied with the terms of any prior order made by the Commissioner, or until the order of the Commissioner upon which such suspension is based is reversed or modified upon an appeal therefrom. (1945, c. 380.)

§ 58-131.22. Revocation or suspension of license. — If the Commissioner shall find, after due notice and hearing, that any insurer, officer, agent or representative thereof has violated any of the provisions of this Article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 380.)

§ 58-131.23. Penalties. — Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this Article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). (1945, c. 380.)

§ 58-131.24. Review of order of Commissioner. — A review of any order made by the Commissioner, in accordance with the provisions of this Article, shall be by appeal to the Superior Court of Wake County in accordance with the provisions of G.S. 58-9.3. (1945, c. 380.)

§ 58-131.25. Exceptions. — The provisions of this Article shall not apply to any policy or contract of reinsurance; any policy of insurance against loss or damage to or legal liability in connection with property permanently located outside of this State, or any activity wholly carried on outside this State; insurance against loss of or damage to, or against liability arising out of the ownership, maintenance or use of any aircraft; marine insurance, inland marine insurance, automobile insurance, life, health or accident insurance, workmen's compensation insurance, title insurance, credit insurance, or annuities. The provisions of this Article shall not apply to nonprofit hospital service or nonprofit medical service organizations, mutual benefit associations, or fraternal beneficiary associations. (1945, c. 380.)

ARTICLE 13B.

Rate Regulation of Miscellaneous Lines.

§ 58-131.26. Information to be filed with Commissioner. — Every corporation, association, board, bureau or person maintaining a bureau or office for the purpose of suggesting, approving or making rates to be used by more than one insurer of property or risks of any kind located in this State other than those regulated under the provisions of Article 2 of Chapter 97, Articles 13, 13A and 25 of Chapter 58 shall be licensed and shall file with the Commissioner a copy of the articles of agreement, association or incorporation and the bylaws and all amendments thereto under which such person, association, or bureau operates or proposes to operate, together with his or its business address and a list of the members or insurers represented or to be represented by him or it, as well as such other information concerning such rating organization and its operations as may be required by the Commissioner. (1945, c. 380; 1947, c. 721.)

Cross Reference. — As to compensation rating and inspection bureau for workmen's compensation insurance, see §§ 97-102 through 97-104.

§ 58-131.27. Examination by Commissioner; reports. — Every such person, corporation, association, or bureau, whether before or after the filing of the information specified in G.S. 58-131.26, shall be subject to the visitation, supervision, and examination of the Commissioner, who shall cause to be made an examination thereof as often as he deems it expedient, and at least once in three years, provided, the Commissioner may accept in lieu of such examination a report of examination of such bureau made by any other state department of insurance. For such purpose he may appoint as examiners one or more competent persons, and upon such examination he, his deputy, or any examiner authorized by him shall have all the powers given to the Commissioner, his deputy, or any examiner authorized by him by law, including the power to examine under oath the officers and agents and all persons deemed to have material information regarding the business or manner of operation by every such person, corporation, association, bureau, or board. The expense of any such examination shall be borne by the party examined. (1945, c. 380.)

§ 58-131.28. Schedule of rates filed. — Every such person, corporation, association, or bureau, as well as every insurance company doing business in the State, shall file with the Commissioner any and every schedule of rates or such other information concerning such rates as may be suggested, approved, or made by any such rating organization for the purposes specified in G.S. 58-131.26 or by such company for its own use and such rates shall not become effective until and unless approved by him. (1945, c. 380.)

§ 58-131.29. Certain conditions forbidden; no discrimination. — No such person, corporation, association, or bureau shall fix or make any rate or schedule of rates which is to or may apply to any risk within this State, on the condition that the whole amount of insurance on such risk or any specified part thereof shall be placed at such rates, or with the members of or subscribers to such rating organization; nor shall any such person, association, or corporation authorized to transact the business of insurance within this State, fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within this State of essentially the same hazard. Whenever it is made to appear to the satisfaction of the Commissioner that such discrimination exists, he may, after a full hearing, either before himself or before any salaried employee of the Insurance Department whose report he may adopt, order such

discrimination removed; and all such persons, corporations, associations, or bureaus affected thereby shall immediately comply therewith; nor shall such persons, corporations, associations, or bureaus remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the Commissioner that such increase is justifiable. (1945, c. 380.)

§ 58-131.30. Record to be kept; hearing on rates. — Every such rating organization shall keep a careful record of its proceedings and shall furnish upon demand to any person upon whose property or risk a rate has been made, or to his authorized agent, full information as to such rate, and, if such property or risk be rated by schedule, a copy of such schedule; it shall also provide such means as may be approved by the Commissioner whereby any person affected by such rate may be heard, either in person or by agent, before the governing or rating committee or other proper executive of such rating organization on an application for a change in such rate. (1945, c. 380.)

§ 58-131.31. Hearing on rates before the Commissioner. — Any person, firm, or corporation aggrieved by any rating or classification assignment by such company, bureau, or board, may file a complaint in writing with the Commissioner stating in detail the grounds upon which the complainant asks relief. The Commissioner shall set a time, not earlier than seven days after the date of the notice, and a place for a hearing upon the complaint. After due hearing the Commissioner shall make a finding as to whether the established rate or classification assignment made is excessive or unfair and shall make such orders as he deems advisable.

Any member or subscriber of a rating bureau may appeal to the Commissioner from any decision of such bureau and the Commissioner shall, after a hearing held on not less than 10 days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 380.)

§ 58-131.32. Review of order of Commissioner. — A review of any order made by the Commissioner in accordance with the provisions of this Article shall be by appeal to the Superior Court of Wake County in accordance with the provisions of G.S. 58-9.3. (1945, c. 380.)

§ 58-131.33. Certain insurance contracts excepted. — This Article shall not apply to any contract of life insurance, accident and health insurance or annuities, to any contract of reinsurance, to contracts of insurance upon property or risks permanently located without this State, nor to kinds of insurance for which the Commissioner finds in the practice of the industry there are no established rates. (1945, c. 380.)

ARTICLE 14.

Real Estate Title Insurance Companies.

§ 58-132. Purpose of organization; formation. — (a) Companies may be formed in the manner provided in this Article for the purpose of furnishing information in relation to titles to real estate and of insuring owners and others interested therein against loss by reason of encumbrances and defective title; provided, however, that no such information shall be so furnished nor shall such insurance be so issued as to North Carolina real property unless and until the title insurance company has caused to be conducted a reasonable examination of the title, has obtained the opinion thereof of an attorney, not an employee of the company, licensed to practice law in North Carolina, and has caused to

be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies.

(b) Such companies shall be subject to:

(1) The same capital, surplus and investment requirements as govern the formation and operation of domestic stock casualty companies.

(2) The same deposit requirements governing the operation of other state or foreign casualty companies in this State; and

(3) Article 17A of the Insurance Law of this State and G.S. 58-39. Such companies shall not be subject to the Insurance Law of this State except as otherwise provided in this Article.

(c) This Article shall not be interpreted so as to imply the repeal or amendment of any of the provisions of Chapter 84 of the General Statutes of North Carolina nor of any other provisions of common law or statutory law governing the practice of law. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C. S., s. 6395; 1923, c. 71; 1973, c. 128.)

Editor's Note. — The 1973 amendment rewrote this section.

§ 58-133. Certificate of authority to do business. — Before any such company may issue any policy or make any contract or guarantee of insurance, it shall file with the Commissioner of Insurance a certified copy of the record or the certificate of its organization in the office of the Secretary of State, and obtain from the Commissioner of Insurance his certificate that it has complied with the laws applicable to it and that it is authorized to do business. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C. S., s. 6396.)

§ 58-134. Annual statement and license required. — Every such corporation shall, on or before the thirtieth day of January of each year, file in the office of the Commissioner of Insurance a statement, such as he may require, showing its condition and its affairs for the year ending on the preceding thirty-first day of December, signed and sworn to by its president or secretary or treasurer and one of its directors. For neglect to file such annual statement or for making a wilfully false statement it shall be liable to the same penalties imposed upon other insurance companies. The Commissioner of Insurance shall annually license such companies and their agents, and have the same power and authority to visit and examine such corporations as he has in the case of other domestic insurance companies; and the duties and liabilities of such corporations and their agents in reference to such examinations are the same as those of other domestic insurance companies. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C. S., s. 6397.)

Cross Reference. — As to examinations to be made by the Commissioner, see § 58-16.

§ 58-134.1. Investment of capital. — Any real estate title insurance company having a capital stock of more than fifty thousand dollars ($50,000), may, with the consent of the Commissioner, after investing fifty thousand dollars ($50,000) of the capital, as provided in this Chapter, invest not to exceed one fourth of the total capital stock in abstract or title plants; and no such company shall guarantee or insure in any one risk on real property located in North Carolina more than forty percent (40%) of its combined capital and surplus without first having the approval of the Commissioner, which approval shall be endorsed upon the policy. (1945, c. 386; 1967, c. 936.)

Editor's Note. — For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 58-134.2. Unearned premium reserve. — Every domestic title insurance company shall, in addition to other reserves, establish and maintain a reserve to be known as the "unearned premium reserve" for title insurance, which shall at all times and for all purposes be considered and constitute unearned portions of the original risk premiums and shall be charged as a reserve liability of such title insurance company in determining its financial conditions. While said sums are so reserved they shall be withdrawn from the use of the insurer for its general purposes and impressed with a trust in favor of the holders of title policies and held available for reinsurance of the title policies in the event of insolvency of the insurer. Nothing herein contained shall preclude such an insurer from investing said reserve in investments authorized by law for such an insurer, and the income from such invested reserve shall be included in the general income of the insurer to be used by such insurer for any lawful purpose. (1969, c. 897; 1973, c. 1035, s. 1.)

Editor's Note. — The 1973 amendment added the second and third sentences.

§ 58-134.3. Amount of unearned premium reserve. — (a) The unearned premium reserve of every domestic title insurance company shall consist of the aggregate of:

(1) The amount of the unearned premium reserve held as of January 1, 1974.

(2) The amount of all additions required to be made to such reserve by this section, less the reduction of such aggregate amount required hereby.

(b) On each contract of title insurance issued by a domestic title insurance company on and after January 1, 1974, there shall be reserved initially as an unearned premium reserve a sum equal to ten per centum (10%) of the original risk premium charged therefor.

(c) The aggregate of the amounts set aside in unearned premium reserves in any calendar year, pursuant to subsection (b) of this section, shall be reduced annually at the end of each calendar year following the year in which the policy is issued, at the annual rate of one twentieth of the aggregate of such amounts.

(d) The entire amount of the unearned premium reserve held as of January 1, 1974, shall be added to the reserve as of that date and shall be released from said reserve and restored to net profits at the annual rate of one twentieth of the said entire amount, beginning in the next ensuing calendar year.

(e) If substantially the entire outstanding liability under all policies, contracts of title insurance or reinsurance agreements of any such title insurance company shall be reinsured, the value of the consideration received by a reinsuring title insurance company authorized to transact the business of title insurance in this State, shall constitute, in its entirety, unearned portions of original premiums and be added to its unearned premium reserve and deemed, for recovery purposes, to have been provided for liabilities assumed during the year of such reinsurance. The amount of such addition to the unearned premium reserve of such assuming title insurance company shall be not less, however, than two thirds of the amount of the unearned premium reserve required to be maintained by the ceding title insurance company at the time of such reinsurance. (1969, c. 897; 1973, c. 1035, ss. 2-4.)

Editor's Note. — The 1973 amendment substituted "January 1, 1974" for "June 19, 1969" in subdivision (a)(1) and in subsection (b) and rewrote subsections (c) and (d).

§ 58-134.4. Unearned premium reserve on policies issued by foreign or alien title insurance companies. — Every foreign or alien title insurance company licensed to transact title insurance in this State shall reserve and maintain the same reserves as are required of domestic companies under the provisions of G.S. 58-134.4 [58-134.3], unless by the laws of the state or country of domicile of such company there is required to be set aside and maintained an unearned premium reserve in at least as great an amount as is required of domestic companies by that section. (1969, c. 897.)

§ 58-134.5. Maintenance of the unearned premium reserve. — If by reason of any cause, other than depreciation in the market value of investments, the amount of the assets of a title insurance company held as investments of its unearned premium reserve should on any date be less than the amount required to be maintained by law in such reserve, and the deficiency shall not be promptly cured, such title insurance company shall forthwith give written notice thereof to the Commissioner and shall make no further policies, contracts of title insurance or reinsurance agreements of title insurance until the deficiency shall have been eliminated and until it shall have received written approval from the Commissioner authorizing it to again issue such policies, contracts of title insurance or agreements. (1969, c. 897.)

§ 58-134.6. Use of the unearned premium reserve on liquidation, dissolution or insolvency. — (a) If a title insurance company becomes insolvent, or is in the process of liquidation or dissolution, or in the possession of the Commissioner:

(1) Such amount of the assets of such title insurance company equal to the unearned premium reserve then remaining as is necessary may be used by or with the written approval of the Commissioner, to pay for reinsurance of the liability of such title insurance company upon all outstanding policies or contracts or reinsurance agreements of title insurance, as to which claims for losses by the holders are not then pending, the balance, if any, of assets equal to the unearned premium reserve fund then remaining, then to be transferred to the general assets of the title insurance company.

(2) The assets other than the unearned premium reserve shall be available to pay claims for losses sustained by holders of policies then pending or arising up to the time reinsurance is effected. In the event that claims for losses are in excess of such other assets of the title insurance company, such claims, when established, shall be paid pro rata out of the surplus assets attributable to the unearned premium reserve, to the extent of such surplus, if any.

(b) In the event that reinsurance is not obtained, the unearned premium reserve and assets constituting minimum capital, or so much as remains thereof after outstanding claims have been paid, shall constitute a trust fund to be held by the Commissioner for 20 years, out of which claims of policyholders shall be paid as they arise. The balance, if any, of such fund shall, at expiration of 20 years, revert to the general assets of the title insurance company. (1969, c. 897.)

ARTICLE 15.

Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates.

§ 58-135. Issuance of collateral loan certificates; security. — Any domestic land mortgage company or title insurance company having a paid-in capital and surplus of at least two hundred thousand dollars ($200,000), may, under the supervision and control of the Commissioner of Insurance, issue collateral loan

certificates, or other certificates of indebtedness secured by the deposit of first mortgages on real estate with the Commissioner, or under his direction, or secured by the deposit with the Commissioner, or under his direction, of collateral trust bonds secured by first mortgages, the principal and interest of which said mortgages is guaranteed by a surety company having assets of at least ten million dollars ($10,000,000), upon a basis not to exceed one hundred dollars ($100.00) for each one hundred dollars ($100.00) of liability under the collateral loan certificates or other certificates of indebtedness outstanding and secured by such first mortgages or collateral trust bonds. (1927, c. 204, s. 1.)

§ 58-135.1. Prohibition against payment or receipt of title insurance kickbacks, rebates, commissions and other payments. — (a) No person or entity selling real property, or performing services as a real estate agent, attorney or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement; nor shall any title insurance company, agency or agent make any such payment.

(b) Any person or entity violating the provisions of this Chapter shall be guilty of a misdemeanor and subject to a fine of not more than one thousand dollars ($1,000), or imprisonment for not more than six months, or both, in the discretion of the court.

(c) No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency, or agent. For purposes of this section, and in addition to any other statutory or regulatory requirements, a bona fide title insurance company, agency or agent is defined to be a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies, binders and endorsements, and that maintains a separate and distinct staff and office or offices for such purposes. (1973, c. 1336, s. 1.)

§ 58-136. Licenses. — Any domestic land mortgage company, or title insurance company, wishing to do business under the provisions of this Article upon making written application and submitting proof satisfactory to the Commissioner of Insurance that its business, capital and other qualifications comply with the provisions of this Article, upon paying to the Commissioner of Insurance, the sum of two hundred dollars ($200.00) as a license fee and all other fees assessed against such company may be licensed to do business in this State under the provisions of this Article until the first day of the following July, and may have its license renewed for each year thereafter so long as it complies with the provisions of this Article and such rules and regulations as may be promulgated by the Commissioner of Insurance. For each such renewal such company shall pay to the Commissioner of Insurance the sum of two hundred dollars ($200.00), and all other fees assessed against such company and such renewal shall continue in force and effect until a new license be issued or specifically refused, unless revoked for good cause. The Commissioner of Insurance, or any person appointed by him, shall have the power and authority to make such rules and regulations and examinations not inconsistent with the provisions of this Article, as may be in his discretion necessary or proper to enforce the provisions hereof and secure compliance with the terms of this Article. For any examination made hereunder the Commissioner of Insurance shall charge the land mortgage companies or title insurance companies examined with the actual expense of such examination. (1927, c. 204, s. 2; 1955, c. 179, s. 3.)

§ 58-137. Annual statements furnished. — Every such domestic land mortgage company or title insurance company doing business in this State under this Article shall annually file with the Commissioner of Insurance on or before

the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year, and shall also exhibit the amount of real estate mortgages deposited by such land mortgage company or title insurance company for the protection of the certificates issued under this Article. The Commissioner of Insurance is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statements are true and correct. (1927, c. 204, s. 3.)

ARTICLE 16.

Reciprocal or Interinsurance Exchanges.

§ 58-138. Exchange of insurance contracts authorized; power of attorney. — Individuals, partnerships, and corporations of this State hereby designated as subscribers, are authorized to exchange reciprocal or interinsurance contracts with each other, or with individuals, partnerships, and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. Such contracts may be executed by an attorney, agent, or other representative, herein designated attorney, duly authorized and acting for such subscribers.

The attorney-in-fact for each of such exchanges shall be required to obtain a written power of attorney executed by each of the subscribers and have the same in his or its possession before any contracts of insurance of any kind or description shall be issued or renewed to subscribers, and a full copy of the provisions of the power of attorney used at the exchange and on file with the Commissioner of Insurance under the requirements of G.S. 58-139, subdivision (4), shall be incorporated into and made a part of all contracts or policies issued to subscribers in this State. (1913, c. 183, ss. 1, 2; C. S., s. 6398; 1937, c. 130.)

§ 58-139. Statement to be filed with Commissioner of Insurance. — The subscribers, so contracting among themselves, shall, through their attorney, file with the Commissioner of Insurance of this State a declaration verified by oath of such attorney, setting forth:

(1) The name or title of the office at which such subscribers propose to exchange such indemnity contracts. This name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the Commissioner of Insurance is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or interinsurance exchanges.

(2) The kind or kinds of insurance to be effected or exchanged.

(3) A copy of the form of policy, contract, or agreement under or by which the insurance is to be effected or exchanged.

(4) A copy of the form of power of attorney or other authority of such attorney under which the insurance is to be effected or exchanged.

(5) The location of the office or offices from which such contracts or agreements are to be issued.

(6) That applications have been made for indemnity upon at least 100 separate risks, aggregating not less than one and one-half million dollars ($1,500,000) as represented by executed contracts or bona fide applications, to become concurrently effective, or, in case of liability or compensation insurance, covering a total payroll of not less than one

and one-half million dollars ($1,500,000): Provided, that when the attorney maintains the central office in this State the Commissioner of Insurance may authorize an exchange with a less number of risks and a smaller amount of indemnity to be exchanged and an amount of cash deposits less than twenty-five thousand dollars ($25,000).

(7) That there is on deposit with such attorney and available for payment of losses a sum of not less than one hundred thousand dollars ($100,000). (1913, c. 183, s. 3; C. S., s. 6399; 1945, c. 386.)

§ 58-140. Agreement for service of process. — At the time of filing the declaration provided for by the preceding section [G.S. 58-139], the attorney shall file with the Commissioner of Insurance an instrument in writing, executed by him for the subscribers, conditioned that upon the issuance of certificate of authority provided for in this Article, service of process may be had upon the Commissioner of Insurance in all suits in this State arising out of such policies, contracts, or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or interinsurance contracts through such attorney. Three copies of such process shall be served, and the Commissioner of Insurance shall file one copy, forward one copy to the attorney, and return one copy with his admission of service. (1913, c. 183, s. 4; C. S., s. 6400.)

§ 58-141. Statement as to amount of risks. — There shall be filed with the Commissioner of Insurance of this State by such attorney a statement under his oath showing the maximum amount of indemnity upon any single risk, and the attorney shall, whenever and as often as the same shall be required, file with the Commissioner of Insurance a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least 100,000 subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than ten percent (10%) of the net worth of such subscriber. (1913, c. 183, s. 5; C. S., s. 6401.)

§ 58-142. Certificate issued by Commissioner. — Upon the filing of the foregoing papers, and upon the payment of fees as provided for in this Article, the Commissioner of Insurance shall examine and pass upon the same, and if found correct, and in accordance with this Article, issue a certificate of authority, which shall expire on the first day of July next succeeding. (1913, c. 183, s. 6; C. S., s. 6402; 1955, c. 179, s. 4.)

§ 58-143. Reserve fund. — There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to fifty per centum (50%) of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than one hundred thousand dollars ($100,000), and if at any time fifty percent (50%) of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (1913, c. 183, s. 7; C. S., s. 6403; 1945, c. 386.)

§ 58-144. Annual reports; examination by Commissioner. — The attorney shall make an annual report to the Commissioner of Insurance for each calendar year, showing the financial condition of affairs at that office where such contracts are issued, and shall furnish such additional information and reports

as may be required; but the attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of the reciprocal or interinsurance exchanges shall be subject to examination by the Commissioner of Insurance. (1913, c. 183, s. 8; C. S., s. 6404.)

§ 58-145. Corporations empowered to exchange insurance. — Any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned through exchanges complying with this Article. (1913, c. 183, s. 9; C. S., s. 6405.)

§ 58-146. Punishment for failing to comply with law. — Any attorney or representative who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contracts of indemnity of the kind and character specified in this Article, or directly or indirectly solicit or negotiate any applications for same without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars ($100.00), nor more than five hundred dollars ($500.00). (1913, c. 183, s. 10; C. S., s. 6406.)

§ 58-147. Certificate to attorney; revocation. — Each attorney by or through whom are issued any policies or contracts for indemnity of the character referred to in this Article shall procure from the Commissioner of Insurance annually a certificate of authority, stating that all the requirements of this Article have been complied with, and upon such compliance and the payment of the fees and taxes required by this Article, the Commissioner of Insurance shall issue such certificate of authority. The Commissioner of Insurance may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this Article after reasonable notice has been given the attorney in writing so that he may appear and show cause why such action should not be taken. (1913, c. 183, s. 11; C. S., s. 6407.)

§ 58-148. Application of other sections. — Except as otherwise provided in this Article, and except where the context otherwise requires, all of the provisions of this Chapter relating to all insurers and those relating to insurers transacting the same kind or kinds of insurance which reciprocal insurers are permitted to transact, shall be applicable to reciprocal insurers authorized to do business in this State. Where any of such sections refer to a corporation, company or insurer, the same, when read in connection with and applicable to this Article shall be deemed to mean a reciprocal insurer. (1913, c. 183, s. 13; C. S., s. 6409; 1945, c. 386.)

ARTICLE 16A.

"Lloyds" Insurance Associations.

§ 58-148.1. "Lloyds" insurance associations may transact business of insurance other than life, on certain conditions. — Associations of individuals, whether organized within the State or elsewhere, formed upon the plan known as "Lloyds" — whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by policy — may be authorized to transact business of insurance, other than life, in this State, in like manner and upon the same terms and conditions as are required of and imposed upon insurance companies regularly organized; but all such "Lloyds" whether organized within the State or elsewhere, shall make the same deposit, and upon the same terms and conditions as required by Articles 17 and 20 of this Chapter for foreign or alien insurance companies incorporated under the laws of any

government or state other than the United States or one of the several states of the Union. Provided, such associations shall be subject to all of the laws and regulations of the State of North Carolina relating to the transaction of insurance business within this State. (1967, c. 844.)

ARTICLE 17.

Foreign or Alien Insurance Companies.

§ 58-149. Admitted to do business. — Foreign or alien insurance companies, upon complying with the conditions of this Chapter applicable to them, may be admitted to transact in this State, by constituted agents resident herein, any class of insurance authorized by the laws in force relative to the duties, obligations, prohibitions, and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign or alien insurance companies and their agents. (1899, c. 54, s. 61; Rev., s. 4746; C. S., s. 6410; 1945, c. 384.)

Rights of Insurer after Admission. — When a foreign insurance company has complied with all the laws of the State, the courts of this State are open to it for the purpose of enforcing liabilities of policyholders. Commonwealth Mut. Fire Ins. Co. v. Edwards & Broughton, 124 N.C. 116, 32 S.E. 404 (1899).

Stated in Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950).

§ 58-150. Conditions of admission. — A foreign or alien insurance company may be admitted and authorized to do business when it:

(1) Deposits with the Commissioner a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this statement the sum required by law.

(2) Satisfies the Commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact, and that it has been successful in the conduct of such business; that it has, if a stock company, a free surplus and a fully paid-up and unimpaired capital, exclusive of stockholders' obligations of any description of an amount not less than that required for the organization of a domestic company writing the same kinds of business; and if a mutual company that its free surplus is not less than that required for the organization of a domestic company writing the same kind of business, and that such capital, surplus, and other funds are invested in substantial accordance with the requirements of this Chapter.

(3) By a duly executed instrument filed in his office constitutes and appoints the Commissioner and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company; and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this State. Copies of this instrument, certified by the Commissioner, are sufficient evidence thereof, and service upon such attorney is sufficient service upon the principal.

(4) Appoints as its agent or agents in this State some resident or residents thereof.

(5) Files with the Commissioner a certificate that it has complied with the laws of the state or government under which it was organized and is authorized to make contracts of insurance. (1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4747; C. S., s. 6411; 1945, c. 384; 1951, c. 781, s. 3.)

Cross References. — See note to § 1-79. As to deposits required of foreign companies, see §§ 58-110, 58-182 through 58-188.8.

Editor's Note. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

This section prescribes the conditions for a foreign insurance company to be admitted and authorized to do business in North Carolina. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Power of Attorney for Service of Process. — The statute requires the power of attorney executed to the Commissioner of Insurance to be irrevocable as long as "any liability of the company remains outstanding" in this State, and no amount of authorities having a more or less fancied analogy can overcome these plain words of the statute and of a power of attorney drawn and filed in conformity thereto. Biggs v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901); Insurance Co. v. Scott, 136 N.C. 157, 48 S.E. 581 (1904).

Service of process upon the Commissioner of Insurance is valid notwithstanding the insurance company attempted to annul the power of attorney conferred upon him under this section. Biggs v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901).

When an insurance company, pursuant to this section, designates the State Commissioner of Insurance its true and lawful attorney upon whom all lawful processes in any action against it may be served, it creates "a passive agency" for the service of lawful process alone, and the statute gives no authority to the Commissioner even to accept service of process. It provides residents of this State a simple procedure to be followed in in obtaining service of lawful process upon foreign insurance companies doing business here, and nothing more. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

The Commissioner of Insurance is not authorized to accept service for foreign insurance companies under the provisions of this section, the passive agency under this section being solely for the purpose of constituting him an agent upon whom service on foreign insurance companies may be made in the statutory manner. Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950).

The section was intended to protect residents of this State and does not apply to policies issued before the statute and transferred to a resident of another state. The service on the Commissioner is not valid when the insurance company has ceased doing business in the State and has no further liabilities therein. Williams v. Mutual Reserve Fund Life Ins. Ass'n, 145 N.C. 128, 58 S.E. 802 (1907).

Broker as Agent. — Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the company, and the contract to be made here, subject to the laws of this State. Commonwealth Mut. Fire Ins. Co. v. Edwards & Broughton, 124 N.C. 116, 32 S.E. 404 (1899).

Power of Corporation to Sue and Be Sued. — Where a foreign insurance corporation has fully complied with the provisions of this section, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued in the courts of this State as a domestic corporation. Occidental Life Ins. Co. v. Lawrence, 204 N.C. 707, 169 S.E. 636 (1933).

When the insurance company complies with the provisions of this section, it acquires the right to sue and be sued in the State courts under the rules and statutes, which apply to domestic corporations. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Statement Setting Forth Principal Place of Business, etc., Not Required. — This section does not require a foreign insurance corporation desiring to be admitted and authorized to do business in North Carolina to file a statement in the office of the Commissioner of Insurance setting forth its "principal place of business" or "principal office" or "a registered office." Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

Cited in Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

§ 58-151. Limitation as to kinds of insurance. — Any foreign or alien company admitted to do business in this State shall be limited with respect to doing kinds of insurance in this State in the same manner and to the same extent as are domestic companies, provided that any foreign insurance company which has been licensed to do the business of life insurance in this State continuously

during a period of 20 years next preceding March 6, 1945, may continue to be licensed, in the discretion of the Commissioner, to do the kind or kinds of insurance business which it was authorized to do immediately prior to March 6, 1945. (1899, c. 44, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4748; 1911, c. 111, s. 2; C. S., s. 6412; 1945, c. 384.)

§ 58-151.1. Foreign companies; requirements for admission. — A company organized under the laws of any other of these United States for the transaction of life insurance may be admitted to do business in this State if it complies with the other provisions of this Chapter regulating the terms and conditions upon which foreign life insurance companies may be admitted and authorized to do business in this State, and, in the opinion of the Commissioner of Insurance, is in sound financial condition and has policies in force upon not less than 500 lives for an aggregate amount of not less than five hundred thousand dollars ($500,000). Any life company organized under the laws of any other country than the United States, in addition to the above requirements, must make and maintain the deposit required of such companies by Article 4 of this Chapter. (1899, c. 54, s. 56; Rev., s. 4774; C. S., s. 6456; 1945, c. 379.)

§ 58-151.2. Company owned or controlled by alien government prohibited from doing business. — (a) Any insurance company or other insurance entity which is financially owned or financially controlled by any alien or foreign government outside the continental limits of the United States or the territories of the United States is hereby prohibited from doing any kind of insurance business in the State of North Carolina. For the purposes of this section, the term "alien or foreign government" is defined to mean any foreign government or any state, province, municipality, or political subdivision of any foreign government, and shall not be construed to apply to any insurance company organized under the laws of a foreign nation which is financially owned or financially controlled by the private citizens or private business interest of such foreign nation.

(b) The Commissioner of Insurance is hereby forbidden to grant a license to any insurance company or other insurance entity which is financially owned or financially controlled by any alien or foreign government outside the continental limits of the United States or the territories of the United States, or to authorize any such company or entity to transact any kind of insurance business in the State of North Carolina.

(c) Any insurance company or other insurance entity which is financially owned or financially controlled by any alien or foreign government outside the continental limits of the United States or the territories of the United States, or any representative or agent of any such company or entity which violates the provisions of this section, shall be guilty of a misdemeanor and, upon conviction, shall be fined in the discretion of the court. (1955, c. 449.)

§ 58-152. Retaliatory laws. — When, by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions are imposed upon insurance companies of this State doing business in such other state or nation or upon their agents therein greater than those imposed by this State upon insurance companies of such other state, then, so long as such laws continue in force, the same taxes, fines, penalties, licenses, fees, deposits, obligations and prohibitions, of whatever kind, may in the discretion of the Commissioner be imposed upon all such insurance companies of such other state or nation doing business within this State and upon their agents here. Nothing herein repeals or reduces the license, fees, taxes, and other obligations now imposed by the laws of this State or to go into effect with the companies of any other state or nation unless some company of this State is actually doing or seeking to do business in such state or nation. When an insurance company organized under the laws of any state or country

is prohibited by the laws of such state or country or by its charter from investing its assets other than capital stock in the bonds of this State, then and in such case the Commissioner of Insurance is authorized and directed to refuse to grant a license to transact business in this State to such insurance company. (1899, c. 54, s. 71; 1903, c. 536, s. 11; Rev., s. 4749; C. S., s. 6413; 1927, c. 32; 1945, c. 384.)

Not Repealed by Implication. — This section was not impliedly repealed by the Revenue Acts of 1923 or 1925 (Public Laws 1923, c. 4, § 903; 1925, c. 101, § 903). The 1927 amendment was legislative recognition that it was still in force. Atlantic Life Ins. Co. v. Wade, 195 N.C. 424, 142 S.E. 474 (1928).

§ 58-153. Service of legal process upon Commissioner of Insurance. — As an alternative to service of legal process under the provisions of Rule 4 of the Rules of Civil Procedure, the service of such process upon any company licensed or admitted and authorized to do business in this State under the provisions of this Chapter may be made by the sheriff delivering and leaving a copy of such process in the office of the Commissioner of Insurance with a deputy duly appointed by the Commissioner for such purpose or acceptance of service of such process may be made by the Commissioner of Insurance or such duly appointed deputy. As a condition precedent to a valid service of process and of the action of the Commissioner in the premises, the party obtaining such service shall pay to the Commissioner of Insurance at the time of service or acceptance of service the sum of one dollar ($1.00), which such party shall recover as part of the taxable costs if he prevails in his action. (1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; Rev., s. 4750; C. S., s. 6414; 1927, c. 167, s. 1; 1931, c. 287; 1951, c. 781, s. 9; 1971, c. 421, s. 1.)

Cross Reference. — As to other ways of serving a foreign insurance company with process, see §§ 55-143, 55-144, 55-146.

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 398.

Power of Attorney to Receive Process, Condition Precedent to Doing Business. — One of the conditions precedent upon which a foreign insurance company is authorized to do business in this State is that such company will file a duly executed instrument with the Commissioner of Insurance appointing him its attorney, upon whom all lawful process against said company can be served. Biggs v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901). See § 58-150.

Attempted Annulment of Power of Attorney. — The service of a licensed insurance company made upon the Commissioner is valid although the insurance company may have attempted to annul the power of attorney, for the statute requires power of attorney to be irrevocable so long as the insurance company has any liabilities in the State. Biggs. v. Life Ass'n, 128 N.C. 5, 37 S.E. 955 (1901); Moore v. Mutual Reserve Fund Life Ass'n, 129 N.C. 31, 39 S.E. 637 (1901); Hinton v. Mutual Reserve Fund Life Ass'n, 135 N.C. 314, 47 S.E. 474 (1904).

Service can be made under this section only on licensed insurance companies. Parker v. Insurance Co., 143 N.C. 339, 55 S.E. 717 (1906).

Unlicensed Companies. — A foreign insurance company that has no process agent in this State and is not licensed or transacting business here cannot be served with process under this section. Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Fraternal Society. — In an action against a foreign fraternal insurance society doing business in this State, service of summons on the Commissioner of Insurance brings the corporation into the court. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

Quoted in Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950).

Cited in Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 (1954).

§ 58-153.1. Unauthorized Insurers Process Act. — (a) Purpose of Section. — The purpose of this section is to subject certain insurers to the jurisdiction of courts of this State in suits by or on behalf of insureds or beneficiaries under

insurance contracts. The General Assembly declares that it is a subject of concern that many residents of this State hold policies of insurance issued by insurers not authorized to do business in this State, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such State interest, the General Assembly herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 20, 1st Session, s. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

(b) Service of Process upon Unauthorized Insurer.

(1) Any of the following acts in this State, effected by mail or otherwise, by an unauthorized foreign or alien insurer:

a. The issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein,

b. The solicitation of applications for such contracts,

c. The collection of premiums, membership fees, assessments or other considerations for such contracts, or

d. Any other transaction of business,

Is equivalent to and shall constitute an appointment by such insurer of the Commissioner of Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

(2) Such service of process shall be made by delivering to and leaving with the Commissioner of Insurance or some person in apparent charge of his office two copies thereof and the payment to him of one dollar ($1.00). The Commissioner of Insurance shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within 10 days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(3) Service of process in any such action, suit or proceeding shall in addition to the manner provided in subdivision (2) of this subsection be valid if served upon any person within this State who, in this State on behalf of such insurer, is

a. Soliciting insurance, or

b. Making, issuing or delivering any contract of insurance, or

c. Collecting or receiving any premium, membership fee, assessment or other consideration for insurance.

And a copy of such process is sent within 10 days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(4) No plaintiff or complainant shall be entitled to a judgment by default under this section until the expiration of 30 days from the date of the filing of the affidavit of compliance.

(5) Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

(c) Defense of Action by Unauthorized Insurer.

(1) Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either

a. Deposit with the clerk of the court in which such action, suit or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action; or

b. Procure a certificate of authority to transact the business of insurance in this State.

(2) The court in any action, suit, or proceeding, in which service is made in the manner provided in subdivisions (2) or (3) of subsection (b) may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of subdivision (1) of this subsection and to defend such action.

(3) Nothing in subdivision (1) of this subsection is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in subdivisions (2) or (3) of subsection (b) on the ground either

a. That such unauthorized insurer has not done any of the acts enumerated in subdivision (1) of subsection (b), or

b. That the person on whom service was made pursuant to subdivision (3) of subsection (b) was not doing any of the acts therein enumerated.

(d) Attorney Fees. — In any action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this State to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for 30 days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action; providing, however, that the fee or portion of fee included in the judgment shall be not less than twenty-five dollars ($25.00) nor more than twelve and one-half percent (12½%) of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer. Failure of an insurer to defend any such action shall be deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

(e) Short Title. — This section may be cited as the Unauthorized Insurers Process Act. (1955, c. 1040.)

Section 58-164(e)(1) is no longer in effect and has been superseded by this section. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

The purpose of this section is to protect residents of this State who are insureds or beneficiaries of insurance contracts. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

The plain language of this section manifests that the primary purpose of the statute is to protect residents of this State, and to prevent the necessity of North Carolina residents from resorting to distant forums to assert rights under insurance policies. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

Nonresident Plaintiffs. — A substitute service statute would be inequitable where a nonresident seeks to take advantage of it to sue on a foreign cause of action unrelated to the State. Under such circumstances, a showing of substantial business activity in the State by the defendants would be required. In fact, unless such statutes are construed to make these requirements there is considerable doubt of their constitutionality. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

Where none of the plaintiffs are residents of North Carolina they are not entitled to take advantage of this section. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

Holders of public liability policies were neither "residents" nor "insureds or beneficiaries" within the meaning of this section, and therefore the section was inapplicable in their declaratory judgment action against nonresident reinsurers who did not transact business in North Carolina, and service of process attempted under this section on such defendants was ineffectual and invalid. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

Nonresident Reinsurers Licensed to Do Business in State. — Nonresident reinsurers were subject to the jurisdiction of the United States District Court in North Carolina by reason of the fact that they were licensed to do business in North Carolina. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

§ 58-153.2. Alternative service of process on insurers. — In addition to the procedures set out in this Chapter, insurers may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3.)

§ 58-154. Commissioner to notify company of service or acceptance of service of process. — When service of legal process is made in the manner provided in G.S. 58-153, the Commissioner of Insurance or his duly appointed deputy shall within two business days thereafter notify the company served of such service or acceptance of service by registered or certified mail directed to its secretary, or its resident manager in the case of a foreign company having no secretary in the United States. Such notification shall be accompanied by a copy of the process served or accepted and any pleading or order accompanying the process. The Commissioner shall keep a record which shall show the day and hour of such service or acceptance of service of process and whether any pleading or order accompanied the process. When service is made under the provisions of G.S. 58-153, the time within which to file a responsive pleading, as provided by Chapter 1A of the General Statutes, shall be deemed extended by 10 days. (1899, c. 54, s. 16; Rev., s. 4751; C. S., s. 6415; 1927, c. 167, s. 2; 1971, c. 421, s. 2.)

Cited in Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

§ 58-155. Action to enforce compliance with this Chapter. — Compliance with the provisions of this Chapter as to deposits, obligations, and prohibitions,

and the payment of taxes, fines, fees, and penalties by foreign or alien insurance companies, may be enforced in the ordinary course of legal procedure by action brought in the Superior Court of Wake County by the Attorney General in the name of the State upon the relation of the Commissioner of Insurance. (1899, c. 54, s. 102; 1903, c. 438, s. 10; Rev., s. 4752; C. S., s. 6416; 1945, c. 384.)

ARTICLE 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.1. **Merger or consolidation.** — (a) Subject to the provisions of G.S. 58-103 and 58-104, relating to the mutualization of stock insurers, a domestic insurer may merge or consolidate with another insurer, subject to the following conditions:

(1) The plan of merger or consolidation must be submitted to and be approved by the Commissioner in advance of the merger or consolidation.

(2) The Commissioner shall not approve any such plan unless, after a hearing, he finds that it is fair, equitable to policyholders, consistent with law, and will not conflict with the public interest. If the Commissioner fails to approve the plan, he shall state his reasons for such failure in his order made on such hearing.

(3) No director, officer, member or subscriber of any such insurer, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation.

(4) Any merger or consolidation as to an incorporated domestic insurer shall in other respects be governed by the general laws of this State relating to business corporations, except that the merger or consolidation of a domestic mutual insurer may be effected by vote of two thirds of the members voting thereon pursuant to such notice and procedure as the Commissioner may prescribe.

(b) Reinsurance of all or substantially all of the insurance in force of a domestic insurer by another insurer under an agreement whereby the reinsuring company succeeds to all of the liabilities of and supplants the domestic insurance company thereon shall be deemed a consolidation for the purposes of this section, unless the Commissioner, after such investigation as he may deem expedient to make, finds that a consolidation would:

(1) Not be in the best interests of the policyholders of either of the insurers, or

(2) Not be in the best interests of the public, or

(3) Prevent reinsurance which would otherwise be for the best interests of the policyholders or the public, or

(4) Result in the reinsurance of a solvent company. (1947, c. 923; 1955, c. 905.)

Editor's Note. — For discussion of this Article, see 25 N.C.L. Rev. 429.

§ 58-155.2. **Grounds for rehabilitation.** — The Commissioner may apply for an order directing him to rehabilitate a domestic insurer upon one or more of the following grounds: That the insurer

(1) Is insolvent; or

(2) Has refused to submit its books, records, accounts or affairs to examination by the Commissioner; or

(3) Has failed to comply with the Commissioner's order to make good an impairment of capital of a stock insurer or an impairment of surplus of a mutual or reciprocal insurer, within the time prescribed; or
(4) Has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business in that of any other insurer without first having obtained the written approval of the Commissioner; or
(5) Is found, after examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to its members, subscribers, or stockholders, or to the public; or
(6) Has willfully violated its charter; or
(7) Has an officer, director, or manager who has refused to be examined under oath, concerning its affairs; or
(8) Has been the subject of an application for the appointment of a receiver, trustee, custodian or sequestrator of the insurer or of its property, or if a receiver, trustee, custodian, or sequestrator is appointed by a federal court or if such appointment is imminent; or
(9) Has consented to such an order through a majority of its directors, stockholders, members, or subscribers; or
(10) Has failed to remove from office any officer or director whom the Commissioner has found, after notice to and hearing of such insurer and such officer or director, to be a dishonest or untrustworthy person; or
(11) Has failed to pay a final judgment rendered against it in any state upon any insurance contract issued or assumed by it, within 30 days after the judgment became final or within 30 days after time for taking an appeal has expired, or within 30 days after dismissal of an appeal before final determination, whichever date is the later. (1947, c. 923.)

§ 58-155.3. Order of rehabilitation; termination. — (a) An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

(b) If at any time the Commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

(c) The Commissioner, or any interested person upon due notice to the Commissioner, at any time may apply for an order terminating the rehabilitation proceeding and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court has determined that the purposes of the proceeding have been fully accomplished. (1947, c. 923.)

§ 58-155.4. Grounds for liquidation. — The Commissioner may apply for an order directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trusteed assets in this State, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer, upon any of the grounds specified in G.S. 58-155.2 or upon any one or more of the following grounds: That the insurer

(1) Has ceased transacting insurance for a period of one year; or
(2) Has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure

the appointment of a receiver, trustee, custodian, or sequestrator under any law except this Chapter; or

(3) Has not organized or completed its organization and obtained a certificate of authority as an insurer. (1947, c. 923.)

§ 58-155.5. Order of liquidation. — An order to liquidate the business of a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as Commissioner or in the name of the insurer as the court may direct, to give notice to all creditors who may have claims against the insurer to present such claims, and to dissolve the insurer. (1947, c. 923.)

§ 58-155.6. Liquidation of alien insurers. — An order to liquidate the business of the United States branch of an alien insurer having trusteed assets in this State shall be in the same terms as those prescribed for domestic insurers, except that only the assets in this State of the business of such United States branch shall be included therein. (1947, c. 923.)

§ 58-155.7. Conservation of assets of foreign insurer. — The Commissioner may apply for an order directing him to conserve the assets within this State of a foreign insurer upon any one or more of the following grounds:

(1) Upon any of the grounds specified in subdivisions (1) to (9) inclusive of G.S. 58-155.2, and in subdivision (2) of G.S. 58-155.4.

(2) That its property has been sequestrated in the state of its domicile or in any other jurisdiction. (1947, c. 923.)

§ 58-155.8. Conservation of assets of alien insurer. — The Commissioner may apply for an order directing him to conserve the assets within this State of an alien insurer upon any one or more of the following grounds:

(1) Upon any of the grounds specified in subdivisions (1) to (9) inclusive of G.S. 58-155.2, and in subdivision (2) of G.S. 58-155.4; or

(2) That the insurer has failed to comply, within the time designated by the Commissioner, with an order of the Commissioner pursuant to law to make good an impairment of its trusteed funds; or

(3) That the property of the insurer has been sequestrated in its domiciliary sovereignty or elsewhere. (1947, c. 923.)

§ 58-155.9. Order of conservation or ancillary liquidation of foreign or alien insurers. — (a) An order to conserve the assets of a foreign or alien insurer shall direct the Commissioner forthwith to take possession of the property of the insurer within this State and to conserve it, subject to the further direction of the court.

(b) Whenever a domiciliary receiver is appointed for any such insurer in its domiciliary state which is also a reciprocal state, as defined in G.S. 58-155.10, the court shall on application of the Commissioner appoint the Commissioner as the ancillary receiver in this State, subject to the provisions of the Uniform Insurers Liquidation Act. (1947, c. 923.)

§ 58-155.10. Uniform Insurers Liquidation Act; definitions. — This section and G.S. 58-155.11 to 58-155.17 inclusive, comprise and may be cited as the Uniform Insurers Liquidation Act. For the purposes of this act:

(1) "Ancillary state" means any state other than a domiciliary state.

(2) "Deliquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

(3) "Domiciliary state" means the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become

authorized to do business in such state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders, or policyholders and creditors in the United States; and any such insurer is deemed to be domiciled in such state.

(4) "Foreign country" means territory not in any state.

(5) "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders, or all policyholders and creditors in the United States, shall be deemed general assets.

(6) "Insurer" means any person, firm, corporation, association or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization, or conservation by, the Commissioner, or the equivalent insurance supervisory official of another state.

(7) "Preferred claim" means any claim with respect to which the law of a state or of the United States accords priority of payment from the general assets of the insurer.

(8) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.

(9) "Reciprocal state" means any state other than this State in which in substance and effect the provisions of this act are in force, including the provisions requiring that the Commissioner of Insurance or equivalent supervisory official be the receiver of a delinquent insurer.

(10) "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

(11) "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

(12) "State" means any state of the United States, and also the District of Columbia, Alaska, Hawaii and Puerto Rico. (1943, c. 170; 1947, c. 923.)

§ 58-155.11. Conduct of delinquency proceedings against insurers domiciled in this State. — (a) Whenever under the laws of this State a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this State, the court shall appoint the Commissioner as such receiver. The court shall direct the Commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

(b) As domiciliary receiver the Commissioner shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer, or to liquidate the United States branch of an alien insurer domiciled in this State, and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are

hereinafter prescribed for ancillary receivers appointed in this State as to assets located in this State.

(c) The recording of the order directing possession to be taken, or a certified copy thereof, in the record of lis pendens in the office of the clerk of the superior court of the county wherein the property is located shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded.

(d) The Commissioner as domiciliary receiver shall be responsible on his official bond for the proper administration of all assets coming into his possession or control. The court may at any time require an additional bond from him or his deputies if deemed desirable for the protection of the assets.

(e) Upon taking possession of the assets of an insurer the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this State for the purpose of liquidating, rehabilitating, reorganizing or conserving the affairs of the insurer.

(f) In connection with delinquency proceedings the Commissioner may appoint one or more special deputy commissioners to act for him, and may employ such counsel, clerks, and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks or assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of the duties imposed upon them special deputies shall possess all the powers given to, and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings. (1947, c. 923.)

§ 58-155.12. Conduct of delinquency proceedings against insurers not domiciled in this State. — (a) Whenever under the laws of this State an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this State, the court shall appoint the Commissioner as ancillary receiver. The Commissioner shall file a petition requesting the appointment

(1) If he finds that there are sufficient assets of such insurer located in this State to justify the appointment of an ancillary receiver, or

(2) If 10 or more persons resident in this State having claims against such insurer file a petition with the Commissioner requesting the appointment of such ancillary receiver.

(b) The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all the property, contracts, and rights of action, and all of the books and records of the insurer located in this State, and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this State. He shall also be entitled to recover the other assets of the insurer located in this State except that upon the appointment of an ancillary receiver in this State, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this State, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this State.

(c) The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this State to recover any assets of such insurer to which he may be entitled under the laws of this State. (1947, c. 923.)

Cited in State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961).

§ 58-155.13. Claims of nonresidents against domestic insurers. — (a) In a delinquency proceeding begun in this State against an insurer domiciled in this State, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Converted claims belonging to claimants residing in reciprocal states may either

(1) Be proved in this State as provided by law, or

(2) If ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings.

In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this State as provided in G.S. 58-155.14 with respect to ancillary proceedings in this State, the final allowance of such claim by the courts in the ancillary state shall be accepted in this State as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state. (1947, c. 923.)

§ 58-155.14. Claims against foreign insurers. — (a) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer, who reside within this State, may file claims either with the ancillary receiver, if any, appointed in this State, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Controverted claims belonging to claimants residing in this State may either

(1) Be proved in the domiciliary state as provided by the law of that state, or

(2) If ancillary proceedings have been commenced in this State, be proved in those proceedings.

In the event that any such claimant elects to prove his claim in this State, he shall file his claim with the ancillary receiver in the manner provided by the law of this State for the proving of claims against insurers domiciled in this State, and he shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least 40 days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver, within 30 days after the giving of such notice, shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this State involving the adjudication of the claim. The final allowance of the claim by the courts of this State shall be accepted as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this State. (1947, c. 923.)

§ 58-155.15. Priority of certain claims. — (a) In a delinquency proceeding against an insurer domiciled in this State, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of

this State. All such claims whether owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

(b) In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this State shall be preferred if like claims are preferred by the laws of that state.

(c) The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective deposits, have been paid percentages of their claims equal to the percentage paid from special deposit.

(d) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this act [G.S. 58-155.10 to 58-155.17], or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amount shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state. (1947, c. 923.)

§ 58-155.16. Attachment and garnishment of assets. — During the pendency of delinquency proceedings in this or any reciprocal state no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this State against the delinquent insurer or its assets. Any lien obtained by such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding. (1947, c. 923.)

§ 58-155.17. Uniformity of interpretation. — This Uniform Insurers Liquidation Act [G.S. 58-155.10 to 58-155.17] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions, when applicable, conflict with other provisions of this Article, the provisions of this act shall control. (1947, c. 923.)

§ 58-155.18. Commencement of proceedings. — (a) Proceedings under this Article involving a domestic insurer shall be commenced in the superior court for the county in which is located the insurer's home office. Proceedings under this Article involving other insurers shall be commenced in the Superior Court of Wake County.

(b) The Commissioner shall commence any such proceeding, the Attorney General representing him, by an application to the court or to any judge thereof, for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers or the public may require. (1947, c. 923.)

§ 58-155.19. Injunctions. — (a) Upon application by the Commissioner for such an order to show cause or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, employees and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

(b) The court may at any time during a proceeding under this Article issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. (1947, c. 923.)

Cited in State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961).

§ 58-155.20. Removal of proceedings. — At any time after the commencement of a proceeding under this Article the Commissioner may apply ex parte to the court for an order changing the venue of, and removing the proceeding to Wake County, or, in the discretion of the Commissioner, to any other county of this State in which he deems that such proceeding may be most economically and efficiently conducted.

Upon the filing of any such application for removal, the court shall direct the clerk of the court in which the proceeding is then pending to transmit all the papers filed therein with such clerk to the clerk of the court to which the proceeding is removed, and the proceeding shall thereafter be conducted in such other court as though it had been commenced in such court. (1947, c. 923.)

§ 58-155.21. Deposit of moneys collected. — The moneys collected by the Commissioner in a proceeding under this Article, shall be, from time to time, deposited in one or more State or national banks, savings banks, or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depositary which is an institution organized and supervised under the laws of this State, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking law of this State. The Commissioner may in his discretion deposit such moneys or any part thereof in a national bank or trust company as a trust fund. (1947, c. 923.)

§ 58-155.22. Exemption from filing fees. — The Commissioner shall not be required to pay any fee to any public officer in this State for filing, recording, issuing a transcript or certificate, or authenticating any paper or instrument pertaining to the exercise by the Commissioner of any of the powers or duties conferred upon him under this Article, whether or not such paper or instrument be executed by the Commissioner or his deputies, employees or attorneys of record and whether or not it is connected with the commencement of an action or proceeding by or against the Commissioner, or with the subsequent conduct of such action or proceeding. (1947, c. 923.)

§ 58-155.23. Borrowing on pledge of assets. — For the purpose of facilitating the rehabilitation, liquidation, conservation or dissolution of an insurer pursuant to this Article, the Commissioner may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust or hypothecation of any or all of the property whether real, personal or mixed of such insurer, and the Commissioner, subject to the approval of the court, shall have power to take any and all other

action necessary and proper to consummate any such loans and to provide for the repayment thereof. The Commissioner shall be under no obligation personally or in his official capacity as Commissioner to repay any loan made pursuant to this section. (1947, c. 923.)

§ 58-155.24. Report to the General Assembly. — The Commissioner shall transmit to the General Assembly in his biennial report, the names of all insurers proceeded against under this Article together with such facts as shall acquaint the policyholders, creditors, stockholders and the public with all proceedings. To that end the special deputy Commissioner in charge of any such insurer shall file annually with the Commissioner a report of the affairs of the insurer. (1947, c. 923.)

§ 58-155.25. Date rights fixed on liquidation. — The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order, subject to the provisions of G.S. 58-155.29 with respect to the rights of claimants holding contingent claims. (1947, c. 923.)

§ 58-155.26. Voidable transfers or liens. — (a) Any transfer of, or lien upon, the property of an insurer which is made or created within four months prior to the granting of an order to show cause under this Article with the intent of giving to any creditor or of enabling him to obtain a greater percentage of his debt than any other creditor of the same class and which is accepted by such creditor having reasonable cause to believe that such a preference will occur, shall be voidable.

(b) Every director, officer, employee, stockholder, member, subscriber and any other person acting on behalf of such insurer who shall be concerned in any such prohibited act or deed and every person receiving thereby any property of such insurer or the benefit thereof shall be personally liable therefor and shall be bound to account to the Commissioner.

(c) The Commissioner as liquidator, rehabilitator or conservator in any proceeding under this Article, may avoid any transfer of, or lien upon the property of an insurer which any creditor, stockholder, subscriber or member of such insurer might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the granting of an order to show cause under this Article. Such property or its value may be recovered from anyone who has received it except a bona fide holder for value as above specified. (1947, c. 923.)

§ 58-155.27. Priority of claims for compensation. — (a) Compensation actually owing to employees other than officers of an insurer, for services rendered within three months prior to the commencement of a proceeding against the insurer under this Article, but not exceeding three hundred dollars ($300.00) for each such employee, shall be paid prior to the payment of every other debt or claim, and in the discretion of the Commissioner may be paid as soon as practicable after the proceeding has been commenced; except that at all times the Commissioner shall reserve such funds as will in his opinion be sufficient for the expenses of administration.

(b) Such priority shall be in lieu of any other similar priority which may be authorized by law as to the wages or compensation of such employees. (1947, c. 923.)

§ 58-155.28. Offsets. — (a) In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or

proceeding under this Article, such credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in subsection (b) of this section.

(b) No offset shall be allowed in favor of any such person where

(1) The obligation of the insurer to such person would not at the date of the entry of any liquidation order, or otherwise, as provided in G.S. 58-155.25, entitle him to share as a claimant in the assets of the insurer, or

(2) The obligation of the insurer to such person was purchased by or transferred to such person with a view of its being used as an offset, or

(3) The obligation of such person is to pay an assessment levied against the members of a mutual insurer, or against the subscribers of a reciprocal insurer, or is to pay a balance upon a subscription to the capital stock of a stock insurer. (1947, c. 923.)

§ 58-155.29. Allowance of certain claims. — (a) No contingent claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to G.S. 58-155.30 except that such claims shall be considered, if properly presented, and may be allowed to share where:

(1) Such claim becomes absolute against the insurer on or before the last day fixed for filing of proofs of claim against the assets of such insurer, or

(2) There is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.

(b) Where an insurer has been so adjudicated to be insolvent any person who has a cause of action against an insured of such insurer under a liability insurance policy issued by such insurer, shall have the right to file a claim in the liquidation proceedings, regardless of the fact that such claim may be contingent, and such claim may be allowed:

(1) If it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured; and

(2) If such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claims against such insurer arising out of his cause of action other than those already presented can be made; and

(3) If the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its total liability would be were it not in liquidation.

No judgment against such an insured taken after the date of the entry of the liquidation order shall be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default, inquest or by collusion prior to the entry of the liquidation order shall be considered as conclusive evidence in the liquidation proceeding either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

(c) No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and the value of the security itself as of the date of entry of the order of liquidation or such other date set by the court for fixation of rights and liabilities as provided in G.S. 58-155.25 unless the claimant shall surrender his security to the Commissioner in which event the claim shall be allowed in the full amount for which it is valued. (1947, c. 923.)

§ 58-155.30. Time to file claims. — (a) If upon the granting of an order of liquidation under this Article or at any time thereafter during the liquidation proceeding the insurer shall not be clearly solvent, the court shall, after such notice and hearing as it deems proper, make an order declaring the insurer to be insolvent. Thereupon, regardless of any prior notice which may have been given to creditors, the Commissioner shall notify all persons who may have claims against such insurer and who have not filed proper proofs thereof, to present the same to him, at a place specified in such notice, within four months from the date of the entry of such order, or, if the Commissioner shall certify that it is necessary, within such longer time as the court shall prescribe. The last day for the filing of proofs of claim shall be specified in the notice. Such notice shall be given in a manner determined by the court.

(b) Proofs of claim may be filed subsequent to the date specified, but no such claim shall share in the distribution of the assets until all allowed claims, proofs of which have been filed before said date, have been paid in full with interest. (1947, c. 923.)

§ 58-155.31. Report for assessment. — Within three years from the date an order of rehabilitation or liquidation of a domestic mutual insurer or a domestic reciprocal insurer was filed in the office of the clerk of the court by which such order was made, the Commissioner may make a report to the court setting forth:

(1) The reasonable value of the assets of the insurer;
(2) The insurer's probable liabilities; and
(3) The probable necessary assessment, if any, to pay all possible claims and expenses in full, including expenses of administration. (1947, c. 923.)

§ 58-155.32. Levy of assessment. — (a) Upon the basis of the report provided for in G.S. 58-155.31 including any amendment thereof, the court, ex parte, may levy one or more assessments against all members of such insurer who, as shown by the records of the insurer, were members of a mutual insurer or subscribers in a reciprocal insurer, at any time within one year prior to the date of issuance of the order to show cause under G.S. 58-155.18.

(b) Such assessment or assessments shall cover the excess of the probable liabilities over the reasonable value of the assets, together with the estimated cost of collection and percentage of uncollectibility thereof. The total of all assessments against any member or subscriber with respect to any policy, by whomsoever levied or for whatsoever purposes levied, shall be for no greater amount than that specified in the policy or policies of the member or subscriber and as limited under this Chapter; except that if the court finds that the policy was issued at a rate of premium below the minimum rate lawfully permitted for the risk insured, the court may determine the upper limit of such assessment upon the basis of an adequate rate for the insurance.

(c) No assessment shall be levied against any member or subscriber with respect to any nonassessable policy issued in accordance with this Chapter. (1947, c. 923.)

§ 58-155.33. Order to pay assessment. — After levy of assessment as provided in G.S. 58-155.32, upon the filing of a further detailed report by the Commissioner, the court shall issue an order directing each member of a mutual insurer or each subscriber in a reciprocal insurer, if he shall not pay the amount assessed against him to the Commissioner on or before a day to be specified in the order, to show cause why he should not be held liable to pay such assessment together with costs as set forth in G.S. 58-155.35 and why the Commissioner should not have judgment therefor. (1947, c. 923.)

§ 58-155.34. Publication and transmittal of assessment order. — The Commissioner shall cause a notice of such assessment order setting forth a brief summary of the contents of such order to be:

(1) Published in such manner as shall be directed by the court; and
(2) Enclosed in a sealed envelope, addressed and mailed postage prepaid to each member or subscriber liable thereunder at his last known address as it appears on the records of the insurer, at least 20 days before the return day of the order to show cause provided for in G.S. 58-155.33. (1947, c. 923.)

§ 58-155.35. Judgment upon the assessment. — (a) On the return day of the order to show cause provided for in G.S. 58-155.33 if the member or subscriber does not appear and serve verified objections upon the Commissioner, the court shall make an order adjudging that such member or subscriber is liable for the amount of the assessment against him together with ten dollars ($10.00) costs, and that the Commissioner may have judgment against the member or subscriber therefor.

(b) If on such return day the member or subscriber shall appear and serve verified objections upon the Commissioner there shall be a full hearing before the court or a referee to hear and determine, who, after such hearing, shall make an order either negativing the liability of the member or subscriber to pay the assessment or affirming his liability to pay the whole or some part thereof together with twenty-five dollars ($25.00) costs and the necessary disbursements incurred at such hearing, and directing that the Commissioner in the latter case may have judgment therefor.

(c) A judgment upon any such order, whether granted by a court or by a referee, shall have the same force and effect, and may be entered and docketed and may be appealed from as if it were a judgment in an original action brought in the court in which the proceeding is pending. (1947, c. 923.)

§ 58-155.36. Special deputy commissioners, counsel, clerks and assistants; expenses of liquidation or rehabilitation. — The Commissioner shall have power to appoint, under his official seal, one or more special deputies, as his agent or agents, and to employ such counsel, clerks and assistants as may by him be deemed necessary, for the purpose of efficiently conducting such liquidation or rehabilitation and may delegate to each of them such of the powers vested in him as he may deem wise and prudent. The compensation of such special deputy commissioners, counsel, clerks and assistants, and all expenses of taking possession of and conducting the business of liquidating or rehabilitating any such corporation shall be fixed by the Commissioner, subject to the approval of the court, and shall, on certificate of the Commissioner, be paid out of the funds or assets of such corporation. (1951, c. 781, s. 4.)

Editor's Note. — For brief comment on this section, see 29 N.C.L. Rev. 398.

§§ 58-155.37 to 58-155.40: Reserved.

Article 17B.

Postassessment Insurance Guaranty Association.

§ 58-155.41. Short title. — This Article shall be known and may be cited as the "Insurance Guaranty Association Act." (1971, c. 670, s. 1.)

Editor's Note. — Session Laws 1971, c. 670, s. 2, contains a severability clause.

§ 58-155.42. Purpose of Article. — The purpose of this Article is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers. (1971, c. 670, s. 1.)

§ 58-155.43. Scope. — This Article shall apply to all kinds of direct insurance, except life, annuities, title, surety, accident and health, credit, mortgage guaranty, ocean marine, and workmen's compensation and employer's liability insurance. (1971, c. 670, s. 1.)

§ 58-155.44. Construction. — This Article shall be liberally construed to effect the purpose under G.S. 58-155.42 which shall constitute an aid and guide to interpretation. (1971, c. 670, s. 1.)

§ 58-155.45. Definitions. — As used in this Article:

(1) "Account" means any one of the two accounts created by G.S. 58-155.46.

(2) "Association" means the North Carolina Insurance Guaranty Association created under G.S. 58-155.46.

(3) "Commissioner" means the Commissioner of Insurance of North Carolina.

(4) "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State. "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.

(5) "Insolvent insurer" means (i) an insurer authorized to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (ii) determined to be insolvent by a court of competent jurisdiction.

(6) "Member insurer" means any person who (i) writes any kind of insurance to which this Article applies under G.S. 58-155.43, including the exchange of reciprocal or interinsurance contracts, and (ii) is licensed to transact insurance in this State.

(7) "Net direct written premiums" means direct gross premiums written in this State on insurance policies to which this Article applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.

(8) "Person" means any individual, corporation, partnership, association or voluntary organization. (1971, c. 670, s. 1.)

§ 58-155.46. Creation of the Association. — There is created a nonprofit, unincorporated legal entity to be known as the North Carolina Insurance Guaranty Association. All insurers defined as member insurers in G.S. 58-155.45(6) shall be and remain members of the Association as a condition of their authority to transact insurance in this State. The Association shall perform its functions under a plan of operation established and approved under G.S. 58-155.49 and shall exercise its powers through a board of directors established under G.S. 58-155.47. For purposes of administration and assessment, the Association shall be divided into two separate accounts: (i) the automobile

insurance account; and (ii) the account for all other insurance to which the Article applies. (1971, c. 670, s. 1.)

§ 58-155.47. Board of directors. — (a) The board of directors of the Association shall consist of not less than five nor more than nine persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the Commissioner. Vacancies of the board shall be filled for the remaining period of the term in the same manner as initial appointments. If no members are selected within 60 days after June 25, 1971, the Commissioner may appoint the initial members of the board of directors.

(b) In approving selections to the board, the Commissioner shall consider among other things whether all member insurers are fairly represented.

(c) Members of the board may be reimbursed from the assets of the Association for expenses incurred by them as members of the board of directors. (1971, c. 670, s. 1.)

§ 58-155.48. Powers and duties of the Association. — (a) The Association shall:

(1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination, but such obligation shall include only that amount of each covered claim which is in excess of one hundred dollars ($100.00) and is less than three hundred thousand dollars ($300,000). In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

(2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

(3) Allocate claims paid and expenses incurred among the two accounts separately, and assess member insurers separately for each account amounts necessary to pay the obligation of the Association under subsection (a) above subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under G.S. 58-155.53 and other expenses authorized by this Article. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the preceding calendar year on the kinds of insurance in the account. Each member insurer shall be notified of the assessment not later than 30 days before it is due. No member insurer may be assessed in any year on any account an amount greater than two percent (2%) of that member insurer's net direct written premiums for the preceding calendar year on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the Association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The Association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts

required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. Each member insurer may set off against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer if they are chargeable to the account for which the assessment is made.

(4) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation and deny all other claims and may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which such settlements, releases and judgments may be properly contested.

(5) Notify such persons as the Commissioner directs under G.S. 58-155.50(b)(1).

(6) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but such designation may be declined by a member insurer.

(7) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association and shall pay the other expenses of the Association authorized by this Article.

(b) The Association may:

(1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association.

(2) Borrow funds necessary to effect the purposes of this Article in accord with the plan of operation.

(3) Sue or be sued.

(4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this Article.

(5) Perform such other acts as are necessary or proper to effectuate the purpose of this Article.

(6) Refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the liabilities if, at the end of any calendar year, the board of directors finds that the assets of the Association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year. (1971, c. 670, s. 1.)

§ 58-155.49. Plan of operation. — (a) The Association shall submit to the Commissioner a plan of operation and any amendment thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the Commissioner.

If the Association fails to submit a suitable plan of operation within 90 days following June 25, 1971, or if at any time thereafter the Association fails to submit suitable amendments to the plan, the Commissioner shall, after notice and hearing, adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this Article. Such rules shall continue in force until modified by the Commissioner or superseded by a plan submitted by the Association and approved by the Commissioner.

(b) All member insurers shall comply with the plan of operation.

(c) The plan of operation shall:

(1) Establish the procedures whereby all the powers and duties of the Association under G.S. 58-155.48 will be performed.

(2) Establish procedures for handling assets of the Association.

(3) Establish the amount and method of reimbursing members of the board of directors under G.S. 58-155.47.

(4) Establish procedures by which claims may be filed with the Association and establish acceptable forms of proof of covered claims. Notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the Association or its agent and a list of such claims shall be periodically submitted to the Association or similar organization in another state by the receiver or liquidator.

(5) Establish regular places and times for meetings of the board of directors.

(6) Establish procedures for records to be kept of all financial transactions of the Association, its agents, and the board of directors.

(7) Provide that any member insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within 30 days after the action or decision.

(8) Establish the procedures whereby selections for the board of directors will be submitted to the Commissioner.

(9) Contain additional provisions necessary or proper for the execution of the powers and duties of the Association.

(d) The plan of operation may provide that any or all powers and duties of the Association, except those under G.S. 58-155.48(a)(3) and G.S. 58-155.48(b)(2), are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this Association, or its equivalent, in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance of any other functions of the Association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the Commissioner, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this Article. (1971, c. 670, s. 1; 1973, c. 1446, s. 2.)

Editor's Note. — The 1973 amendment corrected an error in subsection (d) by substituting "of" for "or" in the second sentence.

§ 58-155.50. Duties and powers of the Commissioner. — (a) The Commissioner shall:

(1) Notify the Association of the existence of an insolvent insurer not later than three days after he receives notice of the determination of the insolvency.

(2) Upon request of the board of directors, provide the Association with a statement of the net direct written premiums of each member insurer.

(b) The Commissioner may:

(1) Require that the Association notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this Article. Such notification shall be by mail at their last known address, where available, but if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation shall be sufficient.

(2) Suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this State of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the Commissioner may levy a fine on any member insurer which fails to pay an assessment when due. Such fine shall not exceed five percent (5%) of the unpaid assessment per month,

except that no fine shall be less than one hundred dollars ($100.00) per month.

(3) Revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily.

(c) Any final action or order of the Commissioner under this Article shall be subject to judicial review in accordance with the provisions of G.S. 58-9.3. (1971, c. 670, s. 1.)

§ 58-155.51. Effect of paid claims. — (a) Any person recovering under this Article shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association. Every insured or claimant seeking the protection of this Article shall cooperate with the Association to the same extent as such person would have been required to cooperate with the insolvent insurer. The Association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the Association shall not operate to reduce the liability of insureds to the receiver, liquidator, or statutory successor for unpaid assessments.

(b) The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the Association or a similar organization in another state. The court having jurisdiction shall grant such claims priority equal to that to which the claimant would have been entitled in the absence of this Article against the assets of the insolvent insurer. The expenses of the Association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

(c) The Association shall periodically file with the receiver or liquidator of the insolvent insurer statements of the covered claims paid by the Association and estimates of anticipated claims on the Association which shall preserve the rights of the Association against the assets of the insolvent insurer. (1971, c. 670, s. 1.)

§ 58-155.52. Nonduplication of recovery. — (a) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his rights under such policy. Any amount payable on a covered claim under this Article shall be reduced by the amount of any recovery under such insurance policy.

(b) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property. Any recovery under this Article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. (1971, c. 670, s. 1.)

§ 58-155.53. Prevention of insolvencies. — (a) To aid in the detection and prevention of insurer insolvencies, it shall be the duty of the board of directors, upon majority vote, to notify the Commissioner of any information indicating any member insurer may be insolvent or in a financial condition hazardous to the policyholders or the public.

(b) The board of directors may, upon majority vote, request that the Commissioner order an examination of any member insurer which the board in good faith believes may be in a financial condition hazardous to the policyholders or the public. Within 30 days of the receipt of such request, the Commissioner shall begin such examination. The examination may be conducted as a National Association of Insurance Commissioners examination or may be conducted by

such persons as the Commissioner designates. The cost of such examination shall be paid by the Association and the examination report shall be treated as are other examination reports. In no event shall such examination report be released to the board of directors prior to its release to the public, but this shall not preclude the Commissioner from complying with subsection (c) below. The Commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the Commissioner but it shall not be open to public inspection prior to the release of the examination report to the public.

(c) It shall be the duty of the Commissioner to report to the board of directors when he has reasonable cause to believe that any member insurer examined or being examined at the request of the board of directors may be insolvent or in a financial condition hazardous to the policyholders or the public.

(d) The board of directors may, upon majority vote, make reports and recommendations to the Commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents.

(e) The board of directors may, upon majority vote, make recommendations to the Commissioner for the detection and prevention of insurer insolvencies.

(f) The board of directors shall, at the conclusion of any insurer insolvency in which the Association was obligated to pay covered claims, prepare a report on the history and causes of such insolvency, based on the information available to the Association, and submit such report to the Commissioner. (1971, c. 670, s. 1.)

§ 58-155.54. Examination of the Association. — The Association shall be subject to examination and regulation by the Commissioner. The board of directors shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner. (1971, c. 670, s. 1.)

§ 58-155.55. Tax exemption. — The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its subdivisions except taxes levied by its subdivisions on real or personal property. (1971, c. 670, s. 1.)

§ 58-155.56. Recognition of assessments in rates. — The rates and premiums charged for insurance policies to which this Article applies shall include amounts sufficient to recoup a sum equal to the amounts paid to the Association by the member insurer less any amounts returned to the member insurer by the Association and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer. (1971, c. 670, s. 1.)

§ 58-155.57. Immunity. — There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, the Association or its agents or employees, the board of directors, or the Commissioner or his representatives for any action taken by them in the performance of their powers and duties under this Article. (1971, c. 670, s. 1.)

§ 58-155.58. Stay of proceedings; reopening of default judgments. — All proceedings in which the insolvent insurer is a party or is obligated to defend a party in any court in this State shall be stayed for 60 days from the date the insolvency is determined to permit proper defense by the Association of all pending causes of action as to any covered claims arising from a judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend an insured, the Association either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict

or finding set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and shall be permitted to defend against such claim on the merits. (1971, c. 670, s. 1.)

§ 58-155.59. Termination; distribution of funds. — (a) The Commissioner shall by order terminate the operation of the North Carolina Insurance Guaranty Association as to any kind of insurance covered by this Article with respect to which he has found, after hearing, that there is in effect a statutory or voluntary plan which:

(1) Is a permanent plan which is adequately funded or for which adequate funding is provided; and

(2) Extends, or will extend to the North Carolina policyholders and residents protection and benefits with respect to insolvent insurers not substantially less favorable and effective to such policyholders and residents than the protection and benefits provided with respect to such kinds of insurance under this Article.

(b) The Commissioner shall by the same such order authorize discontinuance of future payments by insurers to the North Carolina Insurance Guaranty Association with respect to the same kinds of insurance; provided, the assessments and payments shall continue, as necessary, to liquidate covered claims of insurers adjudged insolvent prior to said order and the related expenses not covered by such other plan.

(c) In the event the operation of the North Carolina Insurance Guaranty Association shall be so terminated as to all kinds of insurance otherwise within its scope, the Association as soon as possible thereafter shall distribute the balance of moneys and assets remaining (after discharge of the functions of the Association with respect to prior insurer insolvencies not covered by such other plan, together with related expenses) to the insurers which are then writing in this State policies of the kinds of insurance covered by this Article and which had made payments to the Association, pro rata upon the basis of the aggregate of such payments made by the respective insurers during the period of five years next preceding the date of such order. Upon completion of such distribution with respect to all of the kinds of insurance covered by this Article, this Article shall be deemed to have expired. (1971, c. 670, s. 1.)

§§ 58-155.60 to 58-155.64: Reserved for future codification purposes.

Article 17C.

Life and Accident and Health Insurance Guaranty Association.

§ 58-155.65. Title. — This Article shall be known and may be cited as the "Life and Accident and Health Insurance Guaranty Association Act." (1973, c. 1438, s. 1.)

Editor's Note. — Session Laws 1973, c. 1438, s. 2, contains a severability clause.

§ 58-155.66. Purpose. — The purpose of this Article is to maintain public confidence in the promises of insurers, to provide a mechanism for the payment of covered claims under certain insurance policies, to assist in the detection and prevention of insurer insolvencies, and to protect policy owners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of the insurer issuing such policies or contracts. To provide this protection, (i) an association of insurers is created to enable the

guaranty of payment of benefits and of continuation of coverages, (ii) members of the Association are subject to assessment to provide funds to carry out the purpose of this Article, and (iii) the Association is authorized to assist the Commissioner, in the prescribed manner, in the detection and prevention of insurer impairments. (1973, c. 1438, s. 1.)

§ 58-155.67. Scope. — (a) This Article shall apply to direct life policies, accident and health insurance policies, annuity contracts, variable contracts, and contracts supplemental to life and accident and health insurance policies and annuity contracts issued by persons authorized to transact insurance in this State at any time.

(b) This Article shall not apply to:

(1) Any such policies or contracts, or any part of such policies or contracts under which the risk is borne by the policyholder;

(2) Any such policy or contract or part thereof assumed by the impaired insurer under a contract of reinsurance, other than reinsurance for which assumption certificates have been issued;

(3) Any policy or contract issued by a corporation governed by the provisions of Chapter 57 of the General Statutes;

(4) Any policy or contract issued by a fraternal order or society. (1973, c. 1438, s. 1.)

§ 58-155.68. Construction. — This Article shall be liberally construed to effect the purpose under G.S. 58-155.66 which shall constitute an aid and guide to interpretation. (1973, c. 1438, s. 1.)

§ 58-155.69. Definitions. — As used in this Article:

(1) "Account" means either of the three accounts created under G.S. 58-155.70.

(2) "Association" means the Life and Accident and Health Insurance Guaranty Association created under G.S. 58-155.70.

(3) "Commissioner" means the Commissioner of Insurance of this State.

(4) "Contractual obligation" means any obligation under covered policies.

(5) "Covered policy" means any policy or contract within the scope of this Article under G.S. 58-155.67.

(6) "Impaired insurer" means (i) an insurer which after the effective date of this Article, becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction, or (ii) an insurer deemed by the Commissioner after the effective date of this Article to be unable or potentially unable to fulfill its contractual obligations.

(7) "Member insurer" means any person authorized to transact in this State any kind of insurance to which this Article applies under G.S. 58-155.70.

(8) "Premiums" means direct gross insurance premiums and annuity considerations written on covered policies, less return premiums and considerations thereon and dividends paid or credited to policyholders on such direct business. "Premiums" do not include premiums and considerations on contracts between insurers and reinsurers. As used in G.S. 58-155.73 "premiums" are those for the calendar year preceding the determination of impairment.

(9) "Person" means any individual, corporation, partnership, association or voluntary organization.

(10) "Resident" means any person who resides in this State at the time the impairment is determined and to whom contractual obligations are owed. (1973, c. 1438, s. 1.)

§ 58-155.70. Creation of the Association. — (a) There is created a nonprofit legal entity to be known as the Life and Accident and Health Insurance

Guaranty Association. As a condition of their authority to transact insurance in this State, all member insurers shall be and remain members of the Association and shall be jointly and severally liable for all contractual obligations incurred by impaired insurers of the Association. The Association shall perform its functions under the plan of operation established and approved under G.S. 58-155.74 and shall exercise its powers through a board of directors established under G.S. 58-155.71. For purposes of administration and assessment, the Association shall maintain three accounts:

(1) The accident and health insurance account;

(2) The life insurance account; and

(3) The annuity account.

(b) The Association shall come under the immediate supervision of the Commissioner and shall be subject to the applicable provisions of the insurance laws of this State. (1973, c. 1438, s. 1.)

§ 58-155.71. Board of directors. — (a) The board of directors of the Association shall consist of not less than five nor more than nine members serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the Commissioner. Vacancies on the board shall be filled for the remaining period of the term in the manner described in the plan of operation. To select the initial board of directors, and initially organize the Association, the Commissioner shall give notice to all member insurers of the time and place of the organizational meeting. In determining voting rights at the organizational meeting each member insurer shall be entitled to one vote in person or by proxy. If the board of directors is not selected within 60 days after notice of the organizational meeting, the Commissioner may appoint the initial members.

(b) In approving selections or in appointing members to the board, the Commissioner shall consider, among other things, whether all member insurers are fairly represented.

(c) Members of the board may be reimbursed from the assets of the Association for expenses incurred by them as members of the board of directors but members of the board shall not otherwise be compensated by the Association for their services. (1973, c. 1438, s. 1.)

§ 58-155.72. Powers and duties of the Association. — In addition to the powers and duties enumerated in other sections of this Article:

(1) If a domestic insurer is an impaired insurer, the Association may, prior to an order of liquidation or rehabilitation, and subject to any conditions imposed by the Association other than those which impair the contractual obligations of the impaired insurer, and approved by the impaired insurer and the Commissioner:

a. Guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, all the covered policies of the impaired insurer;

b. Provide such moneys, pledges, notes, guarantees, or other means as are proper to effectuate paragraph a, and assure payment of the contractual obligations of the impaired insurer pending action under paragraph a;

c. Loan money to the impaired insurer.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such domestic impaired insurer.

(2) If a foreign or alien insurer is an impaired insurer, the Association may, prior to an order of liquidation, rehabilitation, or conservation, with respect to the covered policies of residents and subject to any conditions imposed by the Association other than those which impair the

contractual obligations of the impaired insurer, and approved by the inpaired insurer and the Commissioner:

a. Guarantee or reinsure, or cause to be guaranteed, assumed, or reinsured, the insurer's covered policies of residents;

b. Provide such moneys, pledges, notes, guarantees or other means as are proper to effectuate paragraph a, and assure payment of the impaired insurer's contractual obligations to residents pending action under paragraph a;

c. Loan money to the impaired insurer.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such foreign or alien impaired insurer.

(3) If a domestic insurer is an impaired insurer under an order of liquidation or rehabilitation, the Association shall, subject to the approval of the Commissioner:

a. Guarantee, assume, or reinsure, or cause to be guaranteed, assumed or reinsured the covered policies of the impaired insurer;

b. Assure payment of the contractual obligations of the impaired insurer; and

c. Provide such moneys, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such domestic impaired insurer.

(4) If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the Association shall, subject to the approval of the Commissioner:

a. Guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured the covered policies of residents;

b. Assure payment of the contractual obligations of the impaired insurer to residents; and

c. Provide such moneys, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties.

If the Association fails to act within a reasonable period of time, the Commissioner shall have the powers and duties of the Association under this Article with respect to such foreign or alien impaired insurer.

(5) a. In carrying out its duties under subdivisions (3) and (4), the Association may request that there be imposed policy liens, contract liens, moratoriums on payments or other similar means and such liens, moratoriums, or similar means may be imposed if the Commissioner:

1. Finds that the amounts which can be assessed under this Article are less than the amounts needed to assure full and prompt performance of the impaired insurer's contractual obligations, or that the economic or financial conditions as they affect member insurers are sufficiently adverse to render the imposition of policy or contract liens, moratoriums, or similar means to be in the public interest, and

2. Approves the specific policy liens, contract liens, moratoriums, or similar means to be used.

b. Before being obligated under subdivisions (3) and (4) the Association may request that there be imposed temporary moratoriums or liens on payments of cash values and policy loans and such temporary moratoriums and liens may be imposed if they are approved by the Commissioner.

(6) The Association shall have no liability under this section for any covered policy of a foreign or alien insurer whose domiciliary jurisdiction or state of entry provides by statute or regulation, for residents of this State protection substantially similar to that provided by this Article for residents of other states.

(7) The Association may render assistance and advice to the Commissioner, upon his request, concerning rehabilitation, payment of claims, continuations of coverage, or the performance of other contractual obligations of any impaired insurer.

(8) The Association shall have standing to appear before any court in this State with jurisdiction over an impaired insurer concerning which the Association is or may become obligated under this Article. Such standing shall extend to all matters germane to the powers and duties of the Association, including, but not limited to, proposals for reinsuring or guaranteeing the covered policies of the impaired insurer and the determination of the covered policies and contractual obligations.

(9) a. Any person receiving benefits under this Article shall be deemed to have assigned his rights under the covered policy to the Association to the extent of the benefits received because of this Article whether the benefits are payments of contractual obligations or continuation of coverage. The Association may require an assignment to it of such rights by any payee, policy or contract owner, beneficiary, insurer or annuitant as a condition precedent to the receipt of any rights or benefits conferred by this Article upon such person. The Association shall be subrogated to these rights against the assets of any impaired insurer.

b. The subrogation rights of the Association under this subdivision shall have the same priority against the assets of the impaired insurer as that possessed by the person entitled to receive benefits under this Article.

(10) The contractual obligations of the impaired insurer for which the Association becomes or may become liable shall be as great as but no greater than the contractual obligations of the impaired insurer would have been in the absence of an impairment unless such obligations are reduced as permitted by subdivision (5).

(11) The Association may:

a. Enter into such contracts as are necessary or proper to carry out the provisions and purposes of this Article.

b. Sue or be sued, including taking any legal actions necessary or proper for recovery of any unpaid assessments under G.S. 58-155.73 or to enforce any other obligations under the provisions of this Article.

c. Borrow money to effect the purposes of this Article. Any notes or other evidence of indebtedness of the Association not in default shall be legal investments for domestic insurers and may be carried as admitted assets.

d. Employ or retain such persons as are necessary to handle the financial transactions of the Association, and to perform such other functions as become necessary or proper under this Article.

e. Negotiate and contract with any liquidator, rehabilitator, conservator, or ancilliary receiver to carry out the powers and duties of the Association.

f. Take such legal action as may be necessary to avoid payment of improper claims.

g. Exercise, for the purposes of this Article and to the extent approved by the Commissioner, the powers of a domestic life or accident and health insurer, but in no case may the Association issue insurance policies or annuity contracts other than those issued to perform the contractual obligations of the impaired insurer.

(12) In the event the Association fails to discharge any of its powers and duties within a reasonable time, the Commissioner shall have all the powers and duties of the Association and shall have the full power and duties of its board of directors. (1973, c. 1438, s. 1.)

§ 58-155.73. Assessments. — (a) For the purpose of providing the funds necessary to carry out the powers and duties of the Association, the board of directors shall assess the member insurers, separately for each account, at such times and for such amounts as the board finds necessary. The board shall collect the assessments after 30 days' written notice to the member insurers before payment is due. In the event that the member insurers do not within the time prescribed pay the assessment set by the board, the Association may file suit against such member insurers jointly and severally for the amounts necessary to carry out the responsibilities of the Association as determined by the board of directors.

(b) There shall be three classes of assessments, as follows:

(1) Class A assessments shall be made for the purpose of meeting administrative costs and other general expenses not related to a particular impaired insurer.

(2) Class B assessments shall be made to the extent necessary to carry out the powers and duties of the Association under G.S. 58-155.72 with regard to an impaired domestic insurer.

(3) Class C assessments shall be made to the extent necessary to carry out the powers and duties of the Association under G.S. 58-155.72 with regard to an impaired foreign or alien insurer.

(c)(1) The amount of any Class A assessment for each account shall be determined by the board. The amount of any Class B or C assessment shall be divided among the accounts in the proportion that the premiums received by the impaired insurer on the policies covered by each account bears to the premiums received by such insurer on all covered policies.

(2) Class A and Class C assessments against member insurers for each account shall be in the proportion that the premiums received on business in this State by each assessed member insurer on policies covered by each account bears to such premiums received on business in this State by all assessed member insurers.

(3) Class B assessments for each account shall be made separately for each state in which the impaired domestic insurer was authorized to transact insurance at any time, in the proportion that the premiums received on business in such state by the impaired insurer on policies covered by such account bears to such premiums received in all such states by the impaired insurer. The assessments against member insurers shall be in the proportion that the premiums received on business in each such state by each assessed member insurer on policies covered by each account bears to such premiums received on business in each state by all assessed member insurers.

(4) Assessments for funds to meet the requirements of the Association with respect to an impaired insurer shall not be made until necessary to implement the purposes of this Article. Classification of assessments under subsection (2) and computation of assessments under this subsection shall be made with a reasonable degree of accuracy, recognizing that the exact determinations may not always be possible.

(d) The Association may abate or defer, in whole or in part, the assessment of a member insurer if, in the opinion of the board, payment of the assessment would endanger the ability of the member insurer to fulfill its contractual obligations. The total of all assessments upon a member insurer for each account shall not in any one calendar year exceed four percent (4%) of such insurer's premiums in this State on the policies covered by the account.

(e) In the event an assessment against a member insurer is abated, or deferred, in whole or in part, because of the limitations set forth in subsection (4), the amount by which such assessment is abated or deferred, shall be assessed against the other member insurers in a manner consistent with the basis for assessments set forth in this section. If the maximum assessment, together with the other assets of the Association in either account, does not provide in any one year in either account an amount sufficient to carry out the responsibilities of the Association, the necessary additional funds shall be assessed as soon thereafter as permitted by this Article. In the event a member insurer or a former member insurer fails or refuses to pay an assessment, the amount of such assessment shall be assessed against the other member insurers in a manner consistent with the basis for assessment set forth in this section, pending the recovery of any such unpaid assessment in order that the purpose of this Article may be effected.

(f) The board may, by an equitable method as established in the plan of operation, refund to member insurers, in proportion to the contribution of each insurer to that account, the amount by which the assets of the account exceed the amount the board finds is necessary to carry out during the coming year the obligations of the Association with regard to that amount, including assets accruing from net realized gains and income from investments. A reasonable amount may be retained in any account to provide funds for the continuing expenses of the Association and for future losses if refunds are impractical.

(g) The Association shall issue to each insurer paying an assessment under this Article a certificate of contribution, in a form prescribed by the Commissioner, for the amount so paid. All outstanding certificates shall be of equal dignity and priority without reference to amounts or dates of issue. A certificate of contribution may be shown by the insurer in its financial statement as an asset in such form and for such amount, if any, and period of time as the Commissioner may approve.

(h) Any member insurer whose certificate of authority has been terminated for any reason whatever shall be liable for any assessment based on insolvencies occurring prior to such termination. (1973, c. 1438, s. 1.)

§ 58-155.74. **Plan of operation.** — (a) (1) The Association shall submit to the Commissioner a plan of operation and any amendments thereto necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The plan of operation and any amendments thereto shall become effective upon approval in writing by the Commissioner.

(2) If the Association fails to submit a suitable plan of operation within 90 days following the effective date of this Article or if at any time thereafter the Association fails to submit suitable amendments to the plan, the Commissioner shall, after notice and hearing, formulate, adopt, promulgate and place into effect such plan of operation, amendments thereto, and such reasonable rules as are necessary or advisable to effectuate the provisions of this Article. Such plan and rules shall continue in force until modified by the Commissioner or superseded by a plan submitted by the Association and approved by the Commissioner.

(b) All member insurers shall comply with the plan of operation, and as a prerequisite to further engaging in writing such insurance in this State shall formally subscribe to and participate in the plan so approved.

(c) The plan of operation shall, in addition to requirements enumerated elsewhere in this Article:

(1) Establish procedures for handling the assets of the Association.

(2) Establish the amount and method of reimbursing members of the board of directors under G.S. 58-155.71.

(3) Establish regular places and times for meetings of the board of directors.

(4) Establish procedures for records to be kept of all financial transactions of the Association, its agents and the board of directors.

(5) Establish the procedures whereby selections for the board of directors will be made and submitted to the Commissioner.

(6) Establish any additional procedures for assessments under G.S. 58-155.73.

(7) Contain additional provisions necessary or proper for the execution of the powers and duties of the Association.

(d) The plan of operation may provide that any or all powers and duties of the Association except those under G.S. 58-155.72(11)(c) and G.S. 58-155.73, are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this Association, or its equivalent in two or more states. Such a corporation, association, or organization shall be reimbursed for any payments made on behalf of the Association and shall be paid for its performance of any function of the Association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the Commissioner, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this Article. (1973, c. 1438, s. 1.)

§ 58-155.75. Duties and powers of the Commissioner. — In addition to the duties and powers enumerated elsewhere in this Article:

(1) The Commissioner shall:

a. Notify the board of directors of the existence of an impaired insurer not later than three days after a determination of impairment is made or he received notice of impairment.

b. Upon request of the board of directors, provide the Association with a statement of the premiums in the appropriate states for each member insurer.

c. When an impairment is declared and the amount of the impairment is determined, serve a demand upon the impaired insurer to make good the impairment within a reasonable time. Notice to the impaired insurer shall constitute notice to its shareholders, if any. The failure of the insurer to promptly comply with such demand shall not excuse the Association from the performance of its powers and duties under this Article.

d. In any liquidation or rehabilitation proceeding involving a domestic insurer, be appointed as the liquidator or rehabilitator. If a foreign or alien member insurer is subject to a liquidation proceeding in its domiciliary jurisdiction or state of entry, the Commissioner shall be appointed conservator.

(2) The Commissioner may suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this State of any member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative the Commissioner may levy a forfeiture on any member insurer which fails to pay an assessment when due. Such forfeiture shall not exceed five percent (5%)

of the unpaid assessment per month, but no forfeiture shall be less than one hundred dollars ($100.00) per month.

(3) The liquidator, rehabilitator, or conservator of any impaired insurer may notify all interested persons of the effect of this Article. (1973, c. 1438, s. 1.)

§ 58-155.76. Prevention of impairments. — To aid in the detection and prevention of insurer impairments:

(1) The board of directors shall, upon majority vote, notify the Commissioner of any information indicating member insurer may be unable or potentially unable to fulfill its contractual obligations.

(2) The board of directors may, upon majority vote, request that the Commissioner order an examination of any member insurer which the board in good faith believes may be unable or potentially unable to fulfill its contractual obligations. The Commissioner may conduct such examination. The examination may be conducted as a National Association of Insurance Commissioners examination or may be conducted by such persons as the Commissioner designates. The cost of such examination shall be paid by the Association and the examination report shall be treated as are other examination reports. In no event shall such examination report be released to the board of directors of the Association prior to its release to the public, but this shall not excuse the Commissioner from his obligation to comply with subdivision (3). The Commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the Commissioner but it shall not be open to public inspection prior to the release of the examination report to the public and shall be released at that time only if the examination discloses that the examined insurer is unable or potentially unable to meet its contractual obligations.

(3) The Commissioner shall report to the board of directors when he has reasonable cause to believe that any member insurer examined at the request of the board of directors may be unable or potentially unable to fulfill its contractual obligations.

(4) The board of directors may, upon majority vote, make reports and recommendations to the Commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents.

(5) The board of directors may, upon majority vote, make recommendations to the Commissioner for the detection and prevention of insurer impairments.

(6) The board of directors shall, at the conclusion of any insurer impairment in which the Association carried out its duties under this Article or exercised any of its powers under this Article, prepare a report on the history and causes of such impairment, based on the information available to the Association, and submit such report to the Commissioner. (1973, c. 1438, s. 1.)

§ 58-155.77. Appointment of Association nominee. — The Association may recommend a natural person to serve as a special deputy to act for the Commissioner and under his supervision in the liquidation, rehabilitation, or conservation of any member insurer. (1973, c. 1438, s. 1.)

§ 58-155.78. Miscellaneous provisions. — (a) Nothing in this Article shall be construed to reduce the liability for unpaid assessments of the insureds of an impaired insurer operating under a plan with assessment liability.

(b) Records shall be kept of all negotiations and meetings in which the Association or its representatives are involved to discuss the activities of the Association in carrying out its powers and duties under G.S. 58-155.72. Records of such negotiations or meetings shall be made public only upon the termination of a liquidation, rehabilitation, or conservation proceeding involving the impaired insurer, upon the termination of the impairment of the insurer, or upon the order of a court of competent jurisdiction. Nothing in this subsection shall limit the duty of the Association to render a report of its activities under G.S. 58-155.79.

(c) For the purpose of carrying out its obligations under this Article, the Association shall be deemed to be a creditor of the impaired insurer to the extent of assets attributable to covered policies reduced by any amounts to which the Association is entitled as subrogee pursuant to G.S. 58-155.72(9), and any insured, beneficiary, or other person who has a valid claim against any impaired insurer shall likewise be deemed to be a creditor of the Association and its members, jointly and severally. All assets of the impaired insurer attributable to covered policies shall be used to continue all covered policies and pay all contractual obligations of the impaired insurer as required by this Article. Assets attributable to covered policies, as used in this subsection, is that proportion of the assets which the reserves that should have been established for such policies bear to the reserve that should have been established for all policies of insurance written by the impaired insurer.

(d) (1) Prior to the termination of any liquidation, rehabilitation, or conservation proceeding, the court may take into consideration the contributions of the respective parties, including the Association, the shareholders and policy owners of the impaired insurer, and any other party with a bona fide interest, in making an equitable distribution of the ownership rights of such impaired insurer. In such a determination, consideration shall be given to the welfare of the policyholders of the continuing or successor insurer.

(2) No distribution to stockholders, if any, of an impaired insurer shall be made until and unless the total amount of assessments levied by the Association with respect to such insurer has been fully recovered by the Association.

(e) It shall be a prohibited unfair trade practice for any person to make use in any manner of the protection afforded by this Article in the sale of insurance.

(f) (1) If an order for liquidation or rehabilitation of an insurer domiciled in this State has been entered, the receiver appointed under such order shall have a right to recover on behalf of the insurer, from any affiliate that controlled it, the amount of distributions, other than stock dividends paid by the insurer on its capital stock, made at any time during the five years preceding the petition for liquidation or rehabilitation subject to the limitations of subdivisions (2) to (4).

(2) No such dividend shall be recoverable if the insurer shows that when paid the distribution was lawful and reasonable, and that the insurer did not know and could not reasonably have known that the distribution might adversely affect the ability of the insurer to fulfill its contractual obligations.

(3) Any person who as an affiliate that controlled the insurer at the time the distributions were paid shall be liable up to the amount of distributions he received. Any person who was an affiliate that controlled the insurer at the time the distributions were declared, shall be liable up to the amount of distributions he would have received if they had been paid immediately. If two or more persons are liable with respect to the same distributions, they shall be jointly and severally liable.

(4) The maximum amount recoverable under this subsection shall be the amount needed in excess of all other available assets of the impaired insurer to pay the contractual obligations of the impaired insurer.

(5) If any person liable under subdivision (3) is insolvent, all its affiliates that controlled it at the time the dividend was paid, shall be jointly and severally liable for any resulting deficiency in the amount recovered from the insolvent affiliate. (1973, c. 1438, s. 1.)

§ 58-155.79. Examination of the Association; annual report. — The Association shall be subject to examination and regulation by the Commissioner. The board of directors shall submit to the Commissioner, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner and a report of its activities during the preceding calendar year. (1973, c. 1438, s. 1.)

§ 58-155.80. Tax exemptions. — The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its subdivisions, except taxes levied on real property. (1973, c. 1438, s. 1.)

§ 58-155.81. Immunity. — There shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer or its agents or employees, the Association or its agents or employees, members of the board of directors, or the Commissioner or his representatives, for any action taken by them in the performance of their powers and duties under this Article. (1973, c. 1438, s. 1.)

§ 58-155.82. Stay of proceedings; reopening default judgments. — All proceedings in which the impaired insurer is a party in any court in this State shall be stayed 60 days from the date an order of liquidation, rehabilitation, or conservation is final to permit proper legal action by the Association on any matters germane to its powers or duties. As to a judgment under any decision, order, verdict, or findings based on default the Association may apply to have such judgment set aside by the same court that made such judgment and shall be permitted to defend against such suit on the merits. (1973, c. 1438, s. 1.)

§ 58-155.83. Hearings; review. — (a) Any person aggrieved with respect to the operation of the Association may request a formal hearing and ruling by the board of directors on any alleged failure to comply with the plan of operation or any alleged improper act or ruling in the administration of the Association. The request for hearing must be made within 15 days after the date of the alleged violation or improper act or ruling. The hearing shall be held within 15 days after the receipt of the request. Except as may be otherwise provided by the board of directors the hearing shall be held by a panel appointed by the Chairman consisting of three board members entitled to vote. The ruling of a majority of the panel shall be deemed to be the formal action of the board unless the full board on its own motion shall modify or rescind the panel's action.

(b) Any formal action of the board may be appealed to the Commissioner by filing notice of appeal with the Association and Commissioner within 30 days after the date of the board's action. The Commissioner shall issue an order approving or disapproving the action or decision, or directing the board to reconsider the action.

(c) Any aggrieved person, any member insurer, or the Association may request a public hearing and ruling by the Commissioner on the provisions of the plan of operation, rules, or regulations approved by the Commissioner. The request for a hearing shall specify the matters to be considered. The hearing shall be held within 30 days after receipt of the request. The Commissioner shall give public notice of the hearing and the matters to be considered not less than 15 days in advance of the hearing date.

(d) In any hearing held pursuant to this Article the board of directors or the Commissioner, as the case may be, shall issue a ruling or order within 30 days after the close of the hearing.

(e) All rulings or orders of the Commissioner under this Article are subject to judicial review as provided in G.S. 58-9.3. (1973, c. 1438, s. 1.)

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 18.

General Regulations of Business.

§ 58-156: Repealed by Session Laws 1945, c. 378.

§ 58-157. Performance of contracts as to devices not prohibited. — Nothing contained in this Chapter shall be construed as prohibiting the performance of any contract hereafter made for the introduction or installation of automatic sprinklers or other betterments or improvements for reducing the risk by fire or water on any property located in this State, and containing provisions for obtaining insurance against loss or damage by fire or water, for a specified time at a fixed rate; provided, every policy issued under such contract shall be as provided by law. (1929, c. 145, s. 1.)

§ 58-158. Limitation as to amount and term; indemnity contracts for difference in actual value and cost of replacement. — No insurance company or agent shall knowingly issue any fire insurance policy upon property within this State for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than seven years: Provided, any fire insurance company authorized to transact business in this State may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for the difference between the actual value of the insured property at the time any loss or damage occurs, and the amount actually expended to repair, rebuild or replace on the premises described in the policy, or some other location within the State of North Carolina with new materials of like size, kind and quality, such property as has been damaged or destroyed by fire or other perils insured against. Policies issued in violation of this section are binding upon the company issuing them, but the company is liable for the forfeitures by law prescribed for such violation. (1899, c. 54, ss. 39, 99; 1903, c. 438, s. 10; Rev., s. 4755; C. S., s. 6418; 1949, c. 295, s. 1.)

Cross Reference. — As to forfeiture prescribed, see § 58-173.

Determining Amount of Loss. — A statement of an agent acting for his company in writing fire insurance, made after an inspection of the property to be insured, is competent upon the question of the amount of the loss, in the action of the insured to recover upon the policy issued, especially as this section requires that the insurer should know the true value of the property, etc., to be insured before issuing the policy thereon. Queen v. Dixie Fire Ins. Co., 177 N.C. 34, 97 S.E. 741 (1919).

Construction of Policy. — Where plaintiffs' property consisted of one building containing three stores, and the insurer contended that the policy issued covered only one of the stores and not the entire building, it appearing that that amount of the policy was greatly in excess of the value of the one store, but was about the value of the entire building, and that insured paid the premium based upon the amount for which the policy was issued, it was held that in construing the policy it would not be presumed that insurer charged a premium based upon a valuation greatly in excess of the value of the property insured in violation of this and § 58-175, but that the policy covered the entire building. Williams v. Greensboro Fire Ins. Co., 209 N.C. 765, 185 S.E. 21 (1936).

§ 58-159. Limit of liability on total loss. — Subject to the provisions of G.S. 58-158, when buildings insured against loss by fire and situated within the State are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the ascertained values, with interest at six per centum (6%) per annum from the date of issue. (1899, c. 54, s. 40; Rev., s. 4756; C. S., s. 6419; 1949, c. 295, s. 2.)

§ 58-160. Policies for the benefit of mortgagees. — Where by an agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee of the property for his benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims appear, not beyond the amount for which the company is liable, and such payments are, to the extent thereof, payment and satisfaction of the liabilities of the company under the policy. Any payment due by the insuring company to mortgagees or loss payees under the terms of the policy shall be made within 90 days of the loss or within 60 days of the filing of proof of loss, whichever is the longer period; provided, the payment of or settlement of the claim of the mortgagee or loss payee under the policy shall in no way constitute an admission of liability as to the insured and the fact of such payment or settlement shall be inadmissible in any action at law. (1899, c. 54, s. 41; Rev., s. 4757; C. S., s. 6420; 1969, c. 1077, s. 1.)

Editor's Note. — Session Laws 1969, c. 1077, s. 3, provides: "This act shall be effective upon ratification, but shall apply only to fire and extended coverage policies written after the date of its ratification." The act was ratified June 27, 1969.

See 13 N.C.L. Rev. 98.

Priority between Mortgagees. — Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has superior lien on the proceeds to the one having the later registered security. Wayne Nat'l Bank v. National Bank, 197 N.C. 68, 147 S.E. 691 (1929).

Where mortgagor procured insurance for benefit of mortgagee, whose mortgage was registered December 14, 1920, and for the benefit of subsequent mortgagee whose mortgage was not executed until May 11, 1925, claim of first mortgagee should first be paid out of funds derived from policy under this section, providing that where, by terms of fire policy taken out by mortgagor, loss is payable to mortgagee for his benefit, company shall pay all mortgages in order of their priority of claim, and in view of § 47-20, by which priority is given to mortgage which was first recorded. Wayne Nat'l Bank v. National Bank, 197 N.C. 68, 147 S.E. 691 (1929).

Where Neither Mortgagee Has Claim to Priority. — If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims. Wayne Nat'l Bank v. National Bank, 197 N.C. 68, 147 S.E. 691 (1929).

Cited in Peeler v. United States Cas. Co., 197 N.C. 286, 148 S.E. 261 (1929).

§ 58-161: Repealed by Session Laws 1945, c. 378.

§ 58-162. Reinsurance assumed from unlicensed companies prohibited. — No fire, marine, or fire and marine insurance company licensed to do business in North Carolina shall assume reinsurance on property located in the State of North Carolina from a company which is not licensed to do business in North Carolina. A company violating the provisions of this section shall be subject to

cancellation of its license to do business in this State and upon conviction thereof shall be punished by a fine of five hundred dollars ($500.00) for each offense. (1899, c. 54, s. 63; 1901, c. 391, s. 5; Rev., s. 4770; C. S., s. 6422; 1945, c. 378.)

§ 58-162.1. Limitation of fire insurance risks. — No insurer authorized to do in this State the business of fire insurance shall expose itself to any loss on any one fire risk, whether located in this State or elsewhere, in an amount exceeding ten percent (10%) of its surplus to policyholders, except that in the case of risks adequately protected by automatic sprinklers or risks principally of noncombustible construction and occupancy such insurer may expose itself to any loss on any one risk in an amount not exceeding twenty-five percent (25%) of the sum of (i) its unearned premium reserve and (ii) its surplus to policyholders. Any risk or portion of any risk which shall have been reinsured shall be deducted in determining the limitation of risk prescribed in this section. (1945, c. 378.)

§ 58-163: Repealed by Session Laws 1945, c. 378.

§ 58-164. Uniform Unauthorized Insurers Act. — (a) No person, corporation, association or partnership shall in this State act as agent for any insurer not authorized to transact business in this State, or negotiate for or place or aid in placing insurance coverage in this State for another with any such insurer.

(b) No person, corporation, association or partnership shall in this State aid any unauthorized insurer in effecting insurance or in transacting insurance business in this State, either by fixing rates, by adjusting or investigating losses, by inspecting or examining risks, by acting as attorney-in-fact or as attorney for service for process, or otherwise, except as provided in subsection (e) hereof.

(c) No person, corporation, association or partnership shall make, negotiate for or place, or aid in negotiating or placing any insurance contract in this State for another who is an applicant for insurance covering any property or risk in another state, territory or district of the United States with any insurer not authorized to transact insurance business in the state, territory or district wherein such property or risk or any part thereof is located.

(d) The provisions of the three foregoing subsections do not apply to contracts of reinsurance, or to contracts of insurance made through authorized surplus line agents or authorized surplus line brokers as provided in G.S. 58-53.1, 58-53.2 and 58-53.3, nor do they apply to any insurer not authorized in this State, or its representatives, in investigating, adjusting losses or otherwise complying in this State with the terms of its insurance contracts made in a state wherein the insurer was authorized; provided, the property or risk insured under such contracts at the time such contract was issued was located in such other state. A motor vehicle used and kept garaged principally in another state shall be deemed to be located in such state.

(e) (1) The transacting of business in this State by a foreign or alien insurer without a license and the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this State or to a resident thereof, or to a corporation authorized to do business therein, is equivalent to an appointment by such insurer of the Commissioner and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this State upon it.

(2) Such service of process shall be made by delivering and leaving with the Commissioner or to some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed

by law. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all such process so served upon him. Such service of process is sufficient provided notice of such service and a copy of the process are sent within 10 days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a judgment by default under this subdivision (2) until the expiration of 30 days from the date of the filing of the affidavit of compliance.

(3) Service of process in any such action, suit or proceeding shall be in addition to the manner provided in the preceding subdivision (2) be valid if served upon any person within this State who, in this State on behalf of such insurer, is

a. Soliciting insurance, or

b. Making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or

c. Collecting or receiving any premium for insurance; and a copy of such process is sent within 10 days thereafter by registered mail by plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

d. Nothing in this subsection (e) shall limit or abridge the right to serve process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

(f) No unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding in this State to enforce any right, claim or demand arising out of the transaction of business in this State until such insurer shall have obtained a license to transact insurance business in this State. Nothing in this subsection shall be construed to require an unauthorized insurance company to obtain a certificate of authority before instituting or filing, or causing to be instituted or filed, any suit, action or proceeding either in connection with any of its investments in this State or in connection with any contract issued by it at a time when it was authorized to do business in the state where such contract was issued.

(g) (1) Before any unauthorized insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either

a. File with the clerk of the court in which such action, suit or proceeding is pending a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action or

b. Procure a license to transact the business of insurance in this State.

(2) The court in any action, suit or proceeding in which service is made in the manner prescribed in subdivisions (2) and (3) of subsection (e) may order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of subdivision (1) of this subsection (g) and to defend such action.

(3) Nothing in subdivision (1) of this subsection (g) shall be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in subdivisions (2) and (3) of subsection (e) on the ground either

a. That no policy or contract of insurance has been issued or delivered to a citizen or resident of this State or to a corporation authorized to do business therein, or

b. That such insurer has not been transacting business in this State, or

c. That the person on whom service was made pursuant to subdivision (3) of subsection (e) was not doing any of the acts enumerated therein.

(h) Any person, corporation, association or partnership violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00).

(i) This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(j) This section may be cited as the Uniform Unauthorized Insurers Act. (1899, c. 54, s. 105; Rev., s. 4763; C. S., s. 6424; 1945, c. 386.)

Editor's Note. — The 1945 amendment provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or to associations of such common carriers administering such departments, plans or organizations."

This section applies only to fire insurance. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

Subsection (e)(1) of this section is no longer in effect and has been superseded by § 58-153.1. Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227 (M.D.N.C. 1962).

Transacting Business in State. — Findings to the effect that defendant insurance company and its predecessor solicited applications for insurance, delivered policies and collected premiums in this State through the United States mail is sufficient to show that defendant was transacting business in this State within the meaning of subsection (e) of this section, and that process served on the Commissioner of Insurance in compliance with this statute renders defendant amenable to the jurisdiction of our courts, and meets the requirements of due process. Suits v. Old Equity Life Ins. Co., 241 N.C. 483, 85 S.E.2d 602 (1955).

The statute does not make the policy void in the hands of the assured. The company issuing a policy in violation of this section may not receive the premiums and rely upon the statute to invalidate the policy, for this would permit it to take advantage of its own wrong. T.T. Hay & Bro. v. Union Fire Ins. Co., 167 N.C. 82, 83 S.E. 241 (1914).

§ 58-165: Repealed by Session Laws 1945, c. 378.

Editor's Note. — The repealed section was rewritten as § 58-53.1.

§ 58-166: Transferred to G.S. 58-53.2 by Session Laws 1945, c. 378.

§ 58-167: Transferred to G.S. 58-53.3 by Session Laws 1945, c. 378.

§ 58-168. Resident agents required. — Foreign fire insurance companies legally authorized to do business in this State through regularly commissioned

and licensed agents located in the State shall not make contracts of fire insurance on property herein, except through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this State. This section does not apply to direct insurance covering the rolling stock of railroad corporations or property in transit while in the possession and custody of railroad corporations or other common carriers. (1899, c. 54, s. 107; 1901, c. 391, s. 8; Rev., s. 4764; C. S., s. 6428.)

§ 58-169. Policies through nonresident agent prohibited. — Every fire insurance company authorized to do business in the State is prohibited from authorizing or allowing any person, agent, firm, or corporation who is a nonresident of this State, to issue or cause to be issued, except through a licensed agent, any policy of insurance on property located in the State. (1903, c. 488, s. 1; 1905, c. 170; Rev., s. 4765; C. S., s. 6429.)

Validity as to Insured. — Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another state which is unauthorized to write it here, because of this section, the policy is valid as to the right of action of the insured thereon. T.T. Hay & Bro. v. Union Fire Ins. Co., 167 N.C. 82, 83 S.E. 241 (1914).

§§ 58-170, 58-171: Repealed by Session Laws 1945, c. 458.

Editor's Note. — Repealed § 58-170 was rewritten as §§ 58-44.1, 58-44.2 and 58-44.3. Repealed § 58-171 was rewritten as § 58-44.4.

§ 58-172. Agreements restricting agent's commission; penalty. — It is unlawful for any insurance company doing the business of insurance as defined in subdivisions (3) to (22), inclusive, of G.S. 58-72 and employing an agent representing another such company, either directly or through any organization or association, to enter into, make or maintain any stipulation or agreement in anywise limiting the compensation such agent may receive from any such other company or forbidding or prohibiting reinsurance of the risks of any such domestic company in whole or in part by any other company holding membership in or cooperating with such organization or association. The penalty for any violation of this section shall be a fine of not less than two hundred and fifty dollars ($250.00) nor more than five hundred dollars ($500.00), and the forfeiture of license to do business in this State for a period of 12 months following conviction. (1905, c. 424; Rev., ss. 3491, 4768; 1915, c. 166, ss. 2, 3; C. S., s. 6432; 1945, c. 458.)

§ 58-173. Punishment for issuing fire policies contrary to law. — Any insurance company or agent who makes, issues, or delivers a policy of fire insurance in willful violation of the provisions of this Chapter which prohibit a domestic insurance company from issuing policies before obtaining certificate and authority from the Commissioner of Insurance; or which prohibit the issuing of a fire insurance policy for more than the fair value of the property or for a longer term than seven years; or which prohibit stipulations in insurance contracts restricting the jurisdiction of courts, or limiting the time within which an action may be brought to less than one year after the cause of action accrues or to less than six months after a nonsuit by the plaintiff, shall forfeit for each offense not less than fifty ($50.00) nor more than two hundred dollars ($200.00); but the policy shall be binding upon the company issuing it. (1899, c. 54, s. 99; 1903, c. 438, s. 10; Rev., s. 4832; C. S., s. 6433.)

ARTICLE 18A.

Fire and Extended Coverage for Beach Area Property.

§ 58-173.1. Declarations and purpose of Article. — It is hereby declared by the General Assembly of North Carolina that an adequate market for fire and extended coverage insurance is necessary to the economic welfare of the beach area of the State of North Carolina and that without such insurance the orderly growth and development of the beach area of the State of North Carolina would be severely impeded; that furthermore, adequate insurance upon property in the beach area is necessary to enable homeowners and commercial owners to obtain financing for the purchase and improvement of their property; and that while the need for such insurance is increasing, the market for such insurance is not adequate and is likely to become less adequate in the future; and that the present plans to provide adequate insurance on property in the beach area, while deserving praise, have not been sufficient to meet the needs of this area. It is further declared that the State has an obligation to provide an equitable method whereby every licensed insurer writing fire and extended coverage in North Carolina is required to meet its public responsibility instead of shifting the burden to a few willing and public-spirited insurers. It is the purpose of this Article to accept this obligation and to provide a mandatory program to assure an adequate market for fire and extended coverage insurance in the beach area of North Carolina. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.2. Definition of terms. — In this Article, unless the context otherwise requires,

(1) "Association" means the North Carolina Insurance Underwriting Association established pursuant to the provisions of this Article;

(2) "Beach area" means all of that area of the State of North Carolina south and east of the inland waterway from the South Carolina line to Fort Macon (Beaufort Inlet); thence south and east of Core, Pamlico, Roanoke and Currituck sounds to the Virginia line, being those portions of land generally known as the Outer Banks;

(3) "Commissioner" means the Commissioner of Insurance of the State of North Carolina;

(4) "Essential property insurance" means insurance against direct loss to property as defined and limited in the standard statutory fire policy and extended coverage endorsement thereon, as approved by the Commissioner;

(5) "Insurable property" means real property at fixed locations in beach areas of the State as that term is hereinafter defined or the tangible personal property located therein, but shall not include insurance on motor vehicles, farm and manufacturing risks, which property is determined by the Association, after inspection and pursuant to the criteria specified in the plan of operation, to be in an insurable condition: Provided, however, any one and two family dwellings built in substantial accordance with the North Carolina Uniform Residential Building Code and any structure or building built in substantial compliance with the North Carolina Building Code, including the design-wind requirements, which is not otherwise rendered uninsurable by reason of use or occupancy, shall be an insurable risk within the meaning of this Article, but neighborhood, area, location, environmental hazards beyond the control of the applicant or owner of the property shall not be considered in determining insurable condition. Provided further, that any structure commenced on or after January 1, 1970, not built in substantial compliance with the North Carolina Uniform Residential Building Code or the North Carolina Building Code, including the design-wind requirements therein, shall not be an

insurable risk. The owner or applicant shall furnish with the application proof in the form of a certificate from a local building inspector, contractor, engineer or architect that the structure is built in substantial accordance with the North Carolina Uniform Residential Building Code or the North Carolina Building Code;

(6) "Net direct premiums" means gross direct premiums (excluding reinsurance assumed and ceded) written on property in this State for fire and extended coverage insurance, including the fire and extended coverage components of homeowners and commercial multiple peril package policies as computed by the Commissioner, less return premiums upon cancelled contracts, dividends paid or credited to policyholders or the unused or unabsorbed portion of premium deposits, and further excluding premiums on farm properties and manufacturing risks;

(7) "Plan of operation" means the plan of operation of the Association approved or promulgated by the Commissioner of Insurance, pursuant to the provisions of this Article. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.3. North Carolina Insurance Underwriting Association created. — There is hereby created the North Carolina Insurance Underwriting Association, consisting of all insurers authorized to write and engage in writing within this State, on a direct basis, property insurance, except town and county mutual insurance associations and assessable mutual companies as authorized by G.S. 58-77(5)b, 58-77(5)d, and 58-77(7)b and except an insurer who only writes insurance in this State on property exempted from taxation by the provisions of G.S. 105-296 and 105-297. Every such insurer shall be a member of the Association and shall remain a member of the Association so long as the Association is in existence as a condition of its authority to continue to transact the business of insurance in this State. (1967, c. 1111, s. 1; 1969, c. 249; 1971, c. 1067, s. 2.)

Editor's Note. — The provisions as to property exempt from taxation formerly contained in §§ 105-296 and 105-297, referred to in this section, now appear in §§ 105-278.1 through 105-278.9.

§ 58-173.4. Powers and duties of Association. — The Association shall, pursuant to the provisions of this Article and the plan of operation, and with respect to essential property insurance on insurable property, have the power on behalf of its members:

(1) To cause to be issued policies of insurance to applicants;

(2) To assume reinsurance from its members;

(3) To cede reinsurance to its members and to purchase reinsurance in behalf of its members. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.5. Temporary directors of Association. — Within 10 days after April 17, 1969, the Commissioner shall appoint a temporary board of directors of this Association, which shall consist of 11 representatives of members of the Association. Such temporary board of directors shall prepare and submit a plan of operation in accordance with G.S. 58-173.7 and shall serve until the permanent board of directors shall take office in accordance with said plan of operation. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.6. Each member of Association to participate in its writings, expenses, profits and losses in proportion to net direct premium of such member. — All members of the Association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premium of such member written in this State during the preceding calendar year bears to the

aggregate net direct premiums written in this State by all members of the Association, as certified to the Association by the Commissioner after review of annual statements, other reports and any other statistics the Commissioner shall deem necessary to provide the information herein required and which the Commissioner is hereby authorized and empowered to obtain from any member of the Association, provided, however, that a member shall annually receive credit for essential property insurance voluntarily written in the beach area and its participation in the writings in the Association shall be reduced accordingly. Each member's participation in the Association shall be determined annually in the same manner as the initial determination. Any insurer authorized to write and engage in writing any insurance, the writing of which requires such insurer to be a member of the Association, pursuant to the provisions of G.S. 58-173.3 of this Article, who is authorized and engaged in writing such insurance after April 17, 1969, shall become a member of the Association on the January 1 immediately following such authorization and the determination of such insurer's participation in the Association shall be made as of the date of such membership in the same manner as for all other members of the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.7. Directors to submit plan of operation to Commissioner; review and approval; amendments. — Within 90 days after April 17, 1969, the directors of the Association shall submit to the Commissioner for his review and approval, a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors, and shall grant proper credit annually to each member of the Association for essential property insurance voluntarily written in the beach area and shall provide for the efficient, economical, fair and nondiscriminatory administration of the Association and for the prompt and efficient provision of essential property insurance in the beach areas of North Carolina so as to promote orderly community development in those areas and to provide means for the adequate maintenance and improvement of the property in such areas. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation; the establishment of necessary facilities; management of the Association; plan for the assessment of members to defray losses and expenses; underwriting standards; procedures for the acceptance and cession of reinsurance; procedures for determining the amounts of insurance to be provided to specific risks; time limits and procedures for processing applications for insurance and for such other provisions as may be deemed necessary by the Commissioner to carry out the purposes of this Article.

The proposed plan shall be reviewed by the Commissioner and approved by him if he finds that such plan fulfills the purposes provided by G.S. 58-173.1 of this Article. In the review of the proposed plan the Commissioner may, in his discretion, consult with the directors of the Association and may seek any further information which he deems necessary to his decision. If the Commissioner approves the proposed plan, he shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Commissioner disapproves all or any part of the proposed plan of operation he shall return the same to the directors with his written statement for the reasons for disapproval and any recommendations he may wish to make. The directors may alter the plan in accordance with the Commissioner's recommendation or may within 30 days from the date of disapproval return a new plan to the Commissioner. Should the directors fail to submit a proposed plan of operation within 90 days of April 17, 1969, or a new plan which is acceptable to the Commissioner, or accept the recommendations of the Commissioner within 30 days after his disapproval of the plan, the Commissioner shall promulgate and place into effect a plan of operation certifying the same

to the directors of the Association. Any such plan promulgated by the Commissioner shall take effect 10 days after certification to the directors: Provided, however, that until a plan of operation is in effect, pursuant to the provisions of this Article, any existing temporary placement facility may be continued in effect on a mandatory basis on such terms as the Commissioner may determine.

The directors of the Association may, subject to the approval of the Commissioner, amend the plan of operation at any time. The Commissioner may review the plan of operation at any time he deems expedient or prudent, but not less than once in each calendar year. After review of such plan the Commissioner may amend the plan after consultation with the directors and upon certification to the directors of such amendment. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.8. Persons eligible to apply to Association for coverage; contents of application. — (a) Any person having an insurable interest in insurable property, may, on or after the effective date of the plan of operation, be entitled to apply to the Association for such coverage and for an inspection of the property. Such application may be made on behalf of the applicant by a broker or agent authorized by him. Every such application shall be submitted on forms prescribed by the Association after consultation with the Commissioner, which application shall contain statement as to whether or not there is any unpaid premiums due from the applicant for fire insurance on the property.

The term "insurable interest" as used in this subsection shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.

(b) If the Association determines that the property is insurable and that there is no unpaid premium due from the applicant for prior insurance on the property, the Association upon receipt of the premium, or such portion thereof, as is prescribed in the plan of operation, shall cause to be issued a policy of essential property insurance for a term of one year. Any policy issued pursuant to the provisions of this section shall be renewed annually, upon application therefor, so long as the property meets the definition of "insurable property" set forth in G.S. 58-173.2(5).

(c) If the Association, for any reason, denies an application and refuses to cause to be issued an insurance policy on insurable property to any applicant or takes no action on an application within the time prescribed in the plan of operation, such applicant may appeal to the Commissioner and the Commissioner, or a member of his staff designated by him, after reviewing the facts, may direct the Association to issue or cause to be issued an insurance policy to the applicant. In carrying out his duties pursuant to this section, the Commissioner may request, and the Association shall provide any information the Commissioner deems necessary to a determination concerning the reason for the denial or delay of the application. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.9. Association members may cede insurance to Association. — Any member of the Association may cede to the Association essential property insurance written on insurable property, to the extent, if any, and on the terms and conditions set forth in the plan of operation. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.10. Rates, rating plans and rate rules applicable. — The rates, rating plans and rating rules applicable to the insurance written by the Association shall be in accord with the manual rates in current usage throughout the State of North Carolina. No special surcharge (other than those presently in effect) may be applied to the fire or extended coverage rates of properties located in the beach area. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.11. Appeal from acts of Association to Commissioner; appeal from Commissioner to superior court. — Any person insured pursuant to this

Article, or his representative, or any affected insurer, who may be aggrieved by an act, ruling or decision of the Association, may, within 30 days after such ruling appeal to the Commissioner. Any hearings held by the Commissioner of Insurance pursuant to such an appeal shall be in accordance with the procedure set forth in G.S. 58-9.2: Provided, however, the Commissioner of Insurance is authorized to appoint a member of his staff as deputy commissioner for the purpose of hearing such appeals and a ruling based upon such hearing shall have the same effect as if heard by the Commissioner. All persons or insureds aggrieved by any order or decision of the Commissioner of Insurance may appeal as is provided by the provisions of G.S. 58-9.3. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.12. Reports of inspection made available. — All reports of inspection performed by or on behalf of the Association shall be made available to the members of the Association, applicants, agent or broker, and the Commissioner. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.13. Association and Commissioner immune from liability. — There shall be no liability on the part of and no cause of action of any nature shall arise against the Commissioner of Insurance or any of his staff, the Association or its agents or employees, or against any participating insurer, for any inspections made hereunder or any statements made in good faith by them in any reports or communications concerning risks submitted to the Association, or at any administrative hearings conducted in connection therewith under the provisions of this Article. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.14. Association to file annual report with Commissioner. — The Association shall file in the office of the Commissioner on an annual basis on or before July 1 a statement which shall summarize the transactions, conditions, operations and affairs of the Association during the preceding year. Such statement shall contain such matters and information as are prescribed by the Commissioner and shall be in such form as is approved by him. The Commissioner may at any time require the Association to furnish to him any additional information with respect to its transactions or any other matter which the Commissioner deems to be material to assist him in evaluating the operation and experience of the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.15. Commissioner may examine affairs of Association. — The Commissioner may from time to time make an examination into the affairs of the Association when he deems it to be prudent and in undertaking such examination he may hold a public hearing pursuant to the provisions of G.S. 58-9.2. The expenses of such examination shall be borne and paid by the Association. (1967, c. 1111, s. 1; 1969, c. 249.)

§ 58-173.16. Commissioner authorized to promulgate reasonable rules and regulations. — The Commissioner of Insurance shall have authority to make reasonable rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Article. The Commissioner shall not be liable for any act or omission in connection with the administration of the duties imposed upon him by the provisions of this Article. (1967, c. 1111, s. 1; 1969, c. 249.)

ARTICLE 18B.

Fair Access to Insurance Requirements.

§ 58-173.17. Purpose of Article. — It is the purpose of this Article to provide a program whereby adequate basic property insurance may be made available to property owners having insurable property in urban areas of the State and

to enable insurers doing business in the State to participate in the federal reinsurance provisions or Public Law 90-448, 90th Congress, August 1, 1968. It is further the purpose of this Article to encourage the improvement of properties located in urban areas of the State and to arrest the decline of properties located in such areas. (1969, c. 1284.)

§ 58-173.18. Organization of underwriting association. — All insurers licensed to write and writing property insurance in this State on a direct basis are authorized, subject to the approval and regulation by the Commissioner, to establish and maintain a FAIR Plan (Fair Access to Insurance Requirements) and to establish and maintain an underwriting association and to formulate, and from time to time, to amend the plans and articles of the association and rules and regulations in connection therewith, and to assess and share on a fair and equitable basis all expenses, income and losses incident to such FAIR Plan and underwriting association in a manner consistent with the provisions of this Article and in conformity with the Urban Property Protection and Reinsurance Act of 1968. (Title XI of Housing and Urban Development Act of 1968, Public Law 90-448, 90th Congress, August 1, 1969). (1969, c. 1284.)

§ 58-173.19. Participation in association. — Every insurer authorized to write basic property insurance in this State except town and county mutual insurance associations and assessable mutual companies as authorized by G.S. 58-77(5)b, 58-77(5)d and 58-77(7)b and except an insurer who only writes insurance on property exempted from taxation by the provisions of G.S. 105-296 and 105-297 shall be required to become and remain a member of the Plan and underwriting association and comply with the requirements thereof as a condition of its authority to transact basic property insurance business in the State of North Carolina. The premiums paid by insurers of North Carolina property to the National Insurance Development Fund for reinsurance, shall be used for the payment of losses occurring in this State and shall, to the extent not so used, be credited to the participation of such insurers in the reinsurance facility provided by this Article and the federal act. (1969, c. 1284; 1971, c. 1067, s. 1.)

Editor's Note. — The provisions as to property exempt from taxation formerly contained in §§ 105-296 and 105-297, referred to in this section, now appear in §§ 105-278.1 through 105-278.9.

Opinions of Attorney General. — Honorable Edwin S. Lanier, Commissioner of Insurance, 40 N.C.A.G. 333 (1969).

§ 58-173.20. Requirements of Plan and authority of association. — The association formed pursuant to the provisions of this Article shall have authority on behalf of its members to cause to be issued basic property insurance policies, to reinsure in whole or in part, any such policies, and to cede any such reinsurance. The Plan adopted, pursuant to the provision of this Article, shall provide, among other things, for the perils to be covered, the geographical areas of coverage, compensation and commissions, assessments of members, the sharing of expenses, income and losses on an equitable basis, cumulative weighted voting for the board of directors of the association, the administration of the Plan and association and any other matter necessary or convenient for the purpose of assuring fair access to insurance requirements, provided the same permits each member insurer thereof to qualify for federal insurance under the Urban Property Protection and Reinsurance Act of 1968. (1969, c. 1284.)

§ 58-173.21. Authority of Commissioner. — (a) Within 90 days following July 2, 1969, and before August 1, 1969, the directors of the association shall

submit to the Commissioner of Insurance for his review, a proposed FAIR Plan and articles of the association consistent with the provisions of this Article.

(b) The FAIR Plan and articles of association shall be subject to approval by the Commissioner and shall take effect 10 days after having been approved by him. If the Commissioner disapproves all or any part of the proposed Plan and articles, the directors of the association shall within 30 days submit for review an appropriately revised Plan and articles and if the directors fail to do so, the Commissioner shall thereafter promulgate such Plan and articles not inconsistent with the provisions of this Article. (1969, c. 1284.)

§ 58-173.22. Temporary directors of association. — Within 10 days after July 2, 1969, the Commissioner shall appoint a temporary board of directors of the association, which temporary board of directors may prepare and submit a Plan of operation and articles of association in accordance with G.S. 58-173.21. (1969, c. 1284.)

§ 58-173.23. Appeals; judicial review. — The association shall provide reasonable means, to be approved by the Commissioner, whereby any person or insurer affected by any act or decision of the administrators of the Plan or underwriting association, may be heard in person or by authorized representative, before the governing board of the association or a designated committee. Any person or insurer aggrieved by any decision of the governing board or designated committee, may be appealed to the Commissioner within 30 days from the date of such ruling or decision. The Commissioner, after hearing held pursuant to the procedure set forth in G.S. 58-9.2, shall issue an order approving or disapproving the act or decision with respect to the matter which is the subject of appeal. The Commissioner is authorized to appoint a member of his staff as deputy commissioner for the purpose of hearing such appeals and a ruling based on such hearing shall have the same effect as if heard by the Commissioner personally. All persons or insurers or their representatives aggrieved by any order or decision of the Commissioner may appeal as provided by the provisions of G.S. 58-9.3. (1969, c. 1284.)

§ 58-173.24. Reports of inspection made available; immunity from liability. — All reports of inspection performed by or on behalf of the association shall be made available to the members of the association, applicants and the Commissioner. There shall be no liability on the part of and no cause of action of any nature shall arise against the Commissioner, any of his staff, the association or any of its agents or employees, or against any participating insurer for any inspections made hereunder or any statements made in good faith by them in any reports or communications concerning risks submitted to the association, or at any administrative hearing conducted in connection therewith under the provisions of this Article. (1969, c. 1284.)

§ 58-173.25. Riot Reinsurance Reimbursement Fund; assessment of insurers. — In the event it shall become necessary because of loss occasioned in this State at any time since August 1, 1968, to reimburse the Secretary of the Department of Housing and Urban Development under the provisions of section 1223(a)(1) of the Urban Property Protection and Reimbursement Act of 1968, the Commissioner of Insurance shall assess all insurers engaged in the business of writing property insurance in the State in an amount sufficient to pay any unpaid reimbursements to the Secretary of the Department of Housing and Urban Development. Provided, that the amount assessed each insurer shall be in the same proportion that the premiums earned by each such insurer in this State bears to the aggregate premiums earned in this State by all insurance companies on those lines of property insurance for which reinsurance was available in this State from the Secretary of the Department of Housing and Urban Development during the preceding calendar year. All assessments made

by the Commissioner of Insurance under this section shall be payable to the Treasurer of the State of North Carolina and he shall maintain a special fund designated as the "Riot Reinsurance Reimbursement Fund." All moneys received by the Treasurer pursuant to an assessment under this section shall be deposited in such special fund.

Whenever the Commissioner of Insurance shall certify to the Governor, the Council of State and the Treasurer of the State of North Carolina that it has become necessary to reimburse the Secretary of the Department of Housing and Urban Development under the provisions of the Urban Property Protection and Reinsurance Act of 1968, because of losses occasioned in this State since August 1, 1968, the Treasurer is hereby authorized and is directed to pay such amounts certified by the Commissioner of Insurance out of the Riot Reinsurance Reimbursement Fund to an extent, not exceeding in the aggregate for any one year, five percent (5%) of the aggregate property insurance premiums earned in this State during the preceding calendar year on those lines of insurance reinsured by the Secretary of Housing and Urban Development in this State during the current year. Nothing herein shall be construed to pledge the faith and credit of the State to any obligation or obligations. (1969, c. 1284.)

§ 58-173.26. Assessment; inability to pay. — In the event any insurer fails by reason of insolvency to pay any assessment as provided herein, the amount assessed each insurer, as computed under G.S. 58-173.25, shall be immediately recalculated excluding therefrom the insolvent insurer so that its assessment is, in effect, assumed and redistributed among the remaining insurers. Such an assessment against an insolvent insurer shall not be a charge against any special deposit fund held under the provisions of Article 20 of Chapter 58 for the benefit of policyholders. (1969, c. 1284.)

§ 58-173.27. Termination; outstanding obligations. — This Article shall expire on December 31, 1977, or after the expiration of the Urban Property Protection and Reimbursement Act of 1968, whichever shall first occur, except that rights and obligations incurred by the association and its members to be established pursuant to the provisions of this Chapter shall not be impaired by the expiration of this Article, and such association shall be continued for the purpose of performing such obligations. (1969, c. 1284; 1973, c. 1440, s. 1.)

Editor's Note. — The 1973 amendment substituted "1977" for "1974" near the beginning of the section.

§ 58-173.28. Recoupment by insurers. — Any insurer assessed under the provisions of this Article may add to the premiums applicable to the lines on which the assessment is levied an amount to be approved by the Commissioner of Insurance sufficient to recover within not more than three years an amount assessed under G.S. 58-173.25 of this Article during the preceding calendar year, together with the amounts, costs and expenses reasonably attributable to such assessment and recovery thereof. Every insurer adding to the premiums of its policyholders to make a recoupment under the provisions of this section, shall keep separate records as to the costs and expenses and as to the amounts collected and shall file copies of such records with the Commissioner of Insurance in the year following such recoupment. (1969, c. 1284.)

ARTICLE 19.

Fire Insurance Policies.

§ 58-174. Terms and conditions must be set out in policy. — In all insurance against loss by fire the conditions of insurance must be stated in full, and the rules and bylaws of the company are not a warranty or a part of the contract, except as incorporated in full into the policy. (1899, c. 54, s. 42; Rev., s. 4758; C. S., s. 6434.)

§ 58-175. Items to be expressed in policies. — Upon request there shall be printed, stamped, or written on each fire policy issued in this State the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this State upon request a full statement thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the insurance on the property in charge, by the company, association, their agent or representative. (1915, c. 109, s. 3; C. S., s. 6435; 1925, c. 70, s. 3; 1945, c. 378.)

§ 58-175.1. Agent to inspect risks. — Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, informing himself as to its value and insurable condition. (1915, c. 109, s. 3; C. S., s. 6435; 1925, c. 70, s. 3; 1945, c. 378.)

Editor's Note. — This section was formerly a part of § 58-175.

Cited in State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

§ 58-176. Fire insurance contract; standard policy provisions. — (a) The printed form of a policy on fire insurance, as set forth in subsection (c) shall be known and designated as the "Standard Fire Insurance Policy for North Carolina."

(b) No policy or contract of fire insurance except contracts of automobile fire, theft, comprehensive and collision, marine and inland marine insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this State, unless it shall conform as to all provisions, stipulations, agreements and conditions, with such form of policy, except as provided in G.S. 58-126.1.

There shall be printed at the head of said policy the name of the insurer or insurers issuing the policy; the location of the home office thereof; a statement whether said insurer or insurers are stock or mutual corporations or are reciprocal insurers. No provisions of this section limit a company to the use of any particular size or manner of folding the paper upon which the policy is printed; provided, however, that any company organized under special charter provisions may so indicate upon its policy, and may add a statement of the plan under which it operates in this State.

The standard fire insurance policy provided for herein need not be used for effecting reinsurance between insurers.

No provision in any fire insurance policy or in any extended coverage endorsement or other endorsement or rider, providing for an exclusion from the perils covered by the policy, endorsement or rider, issued on or after July 1, 1955, shall be valid unless such provision is printed in type which shall not be smaller than eight point type and in such other form and arrangement as shall be approved by the Commissioner of Insurance; provided, that the issuance of a renewal certificate of an annual renewal policy shall not be considered the issuance of a policy, endorsement or rider within the meaning of this section.

(c) The form of the standard fire insurance policy for North Carolina (with permission to substitute for the word "company" a more accurate descriptive term for the type of insurer and with permission for the North Carolina Fire Insurance Rating Bureau to change the manner of folding the policy and arrangement of the pages and the arrangement of the wording of page 1, page 3, and the back of the policy and relocation of the signatures, and any other relocations or rearrangement of the contents of the policy, with the approval of the Commissioner) shall be as follows: (See the three following pages for a form photographically reproduced.) (1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4760; 1915, c. 109, s. 9; C. S., s. 6437; 1945, c. 378; 1951, c. 767; 1955, c. 622; c. 807, s. 2.)

STANDARD FIRE INSURANCE POLICY for Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

No. _____ RENEWAL OF NUMBER

TYPE OF COMPANY

SPACE FOR COMPANY NAME, INSIGNIA, AND LOCATION

Insured's Name and Mailing Address

SPACE FOR PRODUCER'S NAME AND MAILING ADDRESS

Policy Term: _____ Inception (Mo. Day Yr.) _____ Expiration (Mo. Day Yr.) _____ Years

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

INSURANCE IS PROVIDED AGAINST ONLY THOSE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW BY A PREMIUM CHARGE AND AGAINST OTHER PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO.

Item No.	DESCRIPTION AND LOCATION OF PROPERTY COVERED Show address (No., Street, City, County, State, Zip Code), construction, type of roof and occupancy of building(s) covered or containing property covered. If occupied as a dwelling state if building is a seasonal or farm dwelling. If commercial state exact nature of product (and whether manufacturer, wholesaler or retailer) or the service or activity involved.	Protection Class	Dwelling Business Only: No. of Families	Feet From Hydrant	Miles From Fire Dept.	Zone
1.						

Item No.	PERIL(S) INSURED AGAINST AND COVERAGE(S) PROVIDED (INSERT NAME OF EACH)	Per Cent of Co-Insurance Applicable	Deductible Amount	Amount of Insurance	Rate	Prepaid or Installment Premium Due At Inception	Installment Premium Due At Each Anniversary
1.	FIRE AND LIGHTNING			$		$	$
	EXTENDED COVERAGE			XXXXXXX			
					TOTAL(S)	$	$
	TOTAL PREMIUM FOR POLICY TERM PAID IN INSTALLMENTS $						

Subject to Form No(s). _____ **attached hereto.**

INSERT FORM NUMBER(S) AND EDITION DATE(S)

Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to:

INSERT NAME(S) OF MORTGAGEE(S) AND MAILING ADDRESS(ES)

Countersignature Date _____ Agency at _____ Agent _____

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO AND OF the premium above specified, this Company, for the term of *years specified above* from *inception date shown above* At Noon (Standard Time) to *expiration date shown above* At Noon (Standard Time) at location of property involved, to an amount not exceeding the amount(s) above specified, does insure *the insured named above* and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all **DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED,** to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

SPECIMEN

ATTACH FORM BELOW THIS LINE

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

STATE EXCEPTIONS

KANSAS: The words "demand and" in line 58 and "on demand" in lines 65 and 67 are deleted. The words "twelve months" in line 161 are changed to "sixty months".

NORTH DAKOTA: The words "twelve months" in line 161 are changed to "thirty-six months".

WISCONSIN: The words "five days" in line 62 are changed to "ten days".

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

INSERT SIGNATURES AND TITLES OF PROPER OFFICERS

I. General Consideration.
II. Title or Interest of Insured.
III. Certain Other Conditions.
IV. Liability of Insurer in Case of Loss; Subrogation.
V. Liability of Agent.

I. GENERAL CONSIDERATION.

Cross References. — See § 58-177. As to limitation of actions, see § 58-31 and note.

Editor's Note. — The form of policy set out herein is one of three arrangements of the Standard Fire Insurance Policy which have been approved for use in North Carolina. A form incorporating the amendment to line 161 of the second page of the policy, enacted by Session Laws 1971, c. 476, was not available for reproduction at the time of publication of this volume. As to the effect of the amendment, see below. See 13 N.C.L. Rev. 98.

Standard Fire Policy Amended Effective Jan. 1, 1972. — Session Laws 1971, c. 476, s. 1, effective Jan. 1, 1972, amends this section by substituting "three years" for "twelve months" in line 161 of the Standard Fire Policy. Section 2 of the 1971 act provides that it shall not apply to any fire insurance policy issued prior to the effective date of the act.

History of Legislation in Respect to "Standard Fire Insurance Policy". — See Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Provisions of Standard Form Are Those of the Law. — The material provisions of the standard form of a fire insurance policy written in accordance with this section are those of the law. Greene v. Aetna Ins. Co., 196 N.C. 335, 145 S.E. 616 (1928).

And Policy Must Comply with Statute. — The Commissioner of Insurance has no power to authorize or acquiesce in the issuance of policies unauthorized or forbidden by statute. Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

Agreements in the policy contrary to statutory provisions are void. Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936).

Validity and Binding Effect. — The provisions of the standard form of fire insurance policy are valid. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948); Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

The terms and conditions of the standard form of a fire insurance policy, and the stipulations as to a valid waiver thereof, are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N.C. 139, 147 S.E. 812 (1929).

The provisions of the standard form of fire insurance policy are valid, and the rights and liabilities of both parties under the policy must be ascertained and determined in accordance with its terms. Gardner v. Carolina Ins. Co., 230 N.C. 750, 55 S.E.2d 694 (1949).

Rights and Liabilities of Parties Determined from Policy. — The rights and liabilities of both insurer and insured must be determined in accordance with the terms of the standard form of fire insurance policy. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

When a policy of insurance, in the form prescribed by this section, has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provisions and conditions which are included in the policy. Both are ordinarily bound by them. Lancaster v. Southern Ins. Co., 153 N.C. 285, 69 S.E. 214 (1910); Midkiff v. North Carolina Home Ins. Co., 197 N.C. 139, 147 S.E. 812 (1929). See Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

The inception of the risk is not delayed until the policy is countersigned. Pruitt v. Great Am. Ins. Co., 241 N.C. 725, 86 S.E.2d 401 (1955).

Loss-Payable Clause. — The rights of the parties under a loss-payable clause in a policy of fire insurance will be determined in accordance with the terms and provisions of the contract, which derive no extra validity by reason of the fact that the form is prescribed by law. Atlantic Joint Stock Land Bank v. Foster, 217 N.C. 415, 8 S.E.2d 235 (1940).

Binder Slips Not Contrary to Law. — Our statute, by establishing a standard form of fire insurance, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insured is responsible for the loss in accordance with the terms of the statutory form of policy. Lea & Adcock v. Atlantic Fire Ins. Co., 168 N.C. 478, 84 S.E. 813 (1915). See § 58-177, subdivision (4).

Waivers Making Policy More Restrictive Are Void. — Waivers inserted in or attached to a policy of fire insurance which have the effect of making the provisions of the standard policy

form more restrictive are void under this section and § 58-177. Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

A waiver attached to a policy of fire insurance which provides that the policy should not cover loss caused by fire originating on the property of a neighbor if the property insured is situated within a stipulated distance of the combustible property of a neighbor, is restrictive of the provisions of the standard policy form and is void. Glover v. Rowan Mut. Fire Ins. Co., 228 N.C. 195, 45 S.E.2d 45 (1947).

Waiver by or Estoppel against Insurer from Act or Omission of Agent. — A waiver by, or an estoppel against, an insurer may arise from the act, conduct, omission, or knowledge of a duly authorized representative of the insurer acting within the scope of his actual or apparent authority. Northern Assurance Co. of America v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

At the time of issuing the policy the local agent pro hac vice represents the company and his knowledge is ordinarily held to be notice to his principal. But this rule does not apply to authorize extension of time for the performance of conditions precedent to establishing liability after the loss has occurred, and in direct contradiction of the terms of the written contract of insurance. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

Knowledge of Agent Imputed to Company. — In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for same. Faircloth v. Ohio Farmers Ins. Co., 253 N.C. 522, 117 S.E.2d 404 (1960).

In the absence of fraud or collusion, and when acting within the scope of his authority, the agent's knowledge is in law the knowledge of the insurer, although not in fact communicated to the insurer. Northern Assurance Co. of America v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

Limitations on Agent's Authority Are Binding. — Limitations on the agent's authority expressed in unambiguous language in the policy must be held binding on the insured. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

As to Conditions Arising after Issue of Policy and Loss. — While provisions in the policy restricting the local agent's power to waive conditions as a general rule do not include conditions existing at the inception of the contract, the rule is otherwise as to those arising after the policy has been issued and loss has occurred. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

Agent May Not Alter Terms of Policy after Loss. — Suggestions made by the local agent to the insured after loss are not within the scope of his authority, nor may he alter the terms of the policy after its issue and loss thereunder has been reported. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

Oral Contract with Agent. — In the absence of fraud an insurance company cannot be held liable upon a parol contract alleged to have been made by its agent, which is contradictory of and totally inconsistent with the standard form prescribed by statute. Hardin v. Liverpool & London & Globe Ins. Co., 189 N.C. 423, 127 S.E. 353 (1925).

When a loss occurs the rights of the parties to a fire insurance policy become fixed. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

The standard fire policy does not provide for automatic termination of the insurance upon default in the payment of premium installments. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Right to Cancel Policy. — Either party to the contract may cancel the standard form policies without the consent of the other, by following the provisions of the policy applicable; the expression in other forms of policies that the policy "may be canceled" is construed as reading, "shall be canceled." Roberta Mfg. Co. v. Royal Exch. Assurance Co., 161 N.C. 88, 76 S.E. 865 (1912).

An insurance policy is a contract; a contract may be rescinded for fraud or mutual mistake, it may be terminated in accordance with the provisions thereof or by mutual consent, a meeting of the minds, but one of the parties may not terminate it without the assent of the other unless the contract so provides. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Same — Provision for Notice. — The provision for five days' notice before cancellation in this section is for the protection of the insured, and the insurer cannot effect cancellation until the expiration of five days from the receipt of the written notice by plaintiff, and whether plaintiff intends to waive this provision and does waive it by returning the policy as requested is for the determination of the jury. Wilson v. National Union Fire Ins. Co., 206 N.C. 635, 174 S.E. 745 (1934).

To effect a cancellation by insurer, the five days' notice provision must be strictly complied with. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Unless the requirement is waived by insured, an insurer must comply with the terms of the policy or statute that it give notice of its intention to cancel. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

A provision in a policy that insurer must give notice to insured as a condition precedent to cancellation is for insured's benefit and may be

waived by him. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

The burden is on insurer to show a waiver by the insured, and it must appear clearly that the insured expressly or impliedly waived notice of cancellation if he is to be held bound by such waiver. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Same — Communication of Insured's Intent. — To effect a cancellation by insured there must be communicated to the insurer a definite and unconditional request therefor by insured or his authorized agent. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

A mere intention to cancel, not communicated to insurer, is not sufficient to effect a cancellation by the insured. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Same—Procuring Additional Insurance. — Procuring additional insurance without requesting the original insurer to cancel its policy does not terminate the policy. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Same — Substitution of One Policy for Another. — In order for cancellation to take place by the substitution of one policy for another it must be done by mutual consent or agreement. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Mere procuring of substituted insurance with the intent to replace existing insurance and without the intent to thereby acquire additional insurance does not per se work a cancelling of the existing insurance. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Description of Property Covered as Located in Building Occupied by Insured Is Authorized. — Language insuring property located in a occupied by the insured is expressly authorized by this section. It is a material part of the contract; it cannot be ignored. Parker v. Worcester Mut. Fire Ins. Co., 264 N.C. 339, 141 S.E.2d 466 (1965).

It Means Building So Occupied When Policy Was Issued. — Where a policy insured the contents of a building occupied by the insured, it meant the building occupied by insured when the policy was issued — not elsewhere. Parker v. Worcester Mut. Fire Ins. Co., 264 N.C. 339, 141 S.E.2d 466 (1965).

Standard or Union Mortgage Clause. — When the standard or union mortgage clause is attached to or inserted in a policy insuring property against loss, it operates as a distinct and independent contract between the insurance company and the mortgagee, effecting a separate insurance of the mortgage interest. Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960).

Same — Effect of Foreclosure Deed to Mortgagee. — A deed to the mortgagee upon foreclosure of the mortgage does not defeat the right of the mortgagee under a standard or union mortgage clause, despite the argument that the word "mortgagee" in that clause discloses an intention to benefit one in that capacity only, and the contention based on the provisions of that clause requiring the mortgagee to notify the insurer of any change of ownership which shall come to his knowledge. Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960).

Applied in Pettit v. Wood-Owen Trailer Co., 214 N.C. 335, 199 S.E. 279 (1938); Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972); Knapp v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 17 N.C. App. 455, 194 S.E.2d 572 (1973).

Quoted in In re North Carolina Fire Ins. Rating Bureau, 2 N.C. App. 10, 162 S.E.2d 671 (1968).

Cited in Cuthrell v. Milwaukee Mechanics Ins. Co., 234 N.C. 137, 66 S.E.2d 649 (1951); Crowell v. Eastern Air Lines, 240 N.C. 20, 81 S.E.2d 178 (1954); Firemen's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 146 S.E.2d 53 (1966).

II. TITLE OR INTEREST OF INSURED.

Editor's Note. — Most of the cases under this analysis line were decided before the 1945 amendments to this section and § 58-177. Most of them construe provisions in the former standard policy to the effect that the policy should be void if the interest of the insured was other than unconditional and sole ownership, if, with the knowledge of the insured, foreclosure proceedings were commenced or notice given of sale of the property under any mortgage or deed of trust, or if any change, other than by the death of an insured, took place in the interest, title or possession of the property.

The requirement of "unconditional and sole ownership" in a policy of fire insurance in the former standard form as required by this section, was statutory as well as contractual. Roberts v. American Alliance Ins. Co., 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310 (1937).

Misrepresentations as to Title. — Misrepresentations as to title of part of the premises insured avoided the entire contract of insurance. Cuthbertson v. North Carolina Home Ins. Co., 96 N.C. 480, 2 S.E. 258 (1887).

Title under Executory Contract. — A vendee of land occupying it under an executory contract, on which he had paid a portion of the price, and on which he had erected a building, was an "unconditional and sole owner" in fee simple within the conditions of a fire policy providing that it should be void if the interest of the insured was other than sole ownership of the fee simple title. Jordan v. Hanover Fire Ins. Co., 151 N.C. 341, 66 S.E. 206 (1909).

Existence of Lien Did Not Violate Provision. — The stipulation in a fire policy for sole and unconditional ownership was not violated by the

existence of a lien on the property. Lancaster v. Southern Ins. Co., 153 N.C. 285, 69 S.E. 214 (1910).

Policy Invalidated by Mortgage. — Where the insured failed to state that the property was mortgaged, when in fact it was mortgaged, and the policy provided that the contract of insurance would be void if the insured property was mortgaged, the policy was invalid though the omission was made without the intent to deceive. Hayes v. United States Fire Ins. Co., 132 N.C. 702, 44 S.E. 404 (1903).

Execution of a mortgage on the insured property so affected title as to void an insurance policy then existing thereon and forfeit its benefit, if the mortgage was made without the knowledge or consent of the insurance company and not attested as prescribed by the policy contract, unless the company thereafter, by its acts, conduct and statements had waived the effect of the mortgage and was estopped to assert the forfeiture. Modlin v. Atlantic Fire Ins. Co., 151 N.C. 35, 65 S.E. 605 (1909).

Right of Insurer to Know of Encumbrances. — In Weddington v. Piedmont Fire Ins. Co., 141 N.C. 234, 54 S.E. 271 (1906), Mr. Justice Walker says: "The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, encumbrances, and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances." See Watson v. North Carolina Home Ins. Co., 159 N.C. 638, 75 S.E. 1105 (1912).

Removal of Encumbrance before Loss. — Where the owner of an unencumbered automobile insured it under a statutory form of policy, stipulating, among other things, that the policy would be void if the interest of the assured was other than unconditional or sole ownership, or if the property was or became encumbered by a chattel mortgage, and thereafter gave a mortgage thereon which was canceled four days before the destruction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revived the original status of the policy, the temporary violation of the stipulation being immaterial, and put the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the obligation of the insurance company during the violation of the stipulation. Cottingham v. Maryland Motor Car Ins. Co., 168 N.C. 259, 84 S.E. 274 (1915).

The commencement of foreclosure against insured property terminated the policy, there being in the policy a provision to that effect. Hayes v. United States Fire Ins. Co., 132 N.C. 702, 44 S.E. 404 (1903).

Mortgagee Not Liable for Premiums. — The provision in the loss-payable clause of a fire insurance policy taken out by a mortgagor that the mortgagee would pay the premium on demand should the mortgagor not do so, was held to be a condition upon which the mortgagee might receive the benefit of the protection afforded by the policy as a special contract made in his favor, and not as a covenant that he would pay the premium on demand of the insurer, upon the mortgagor's default; and upon the mortgagee's refusal or neglect to pay the premiums in default upon the insurer's demand, the latter might after 10 days' written notice cancel the policy. Whitehead v. Wilson Knitting Mills, 194 N.C. 281, 139 S.E. 456, 56 A.L.R. 674 (1927).

Assignment for Creditors. — Making an assignment for creditors avoided a policy containing an unconditional ownership clause. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Waiver of Sole Ownership Provision. — Where a policy of fire insurance was issued under the former statutory standard form, the condition therein of sole and unconditional ownership of the insured could not be held to have been waived by the insurer or its agent in the absence of knowledge that the insured's ownership was otherwise than as stated in the policy contract. Hardin v. Liverpool & London & Globe Ins. Co., 189 N.C. 423, 127 S.E. 353 (1925). But where the agent issued the policy with full knowledge of the state of the title the condition was waived. Gerringer v. North Carolina Home Ins. Co., 133 N.C. 407, 45 S.E. 773 (1903).

The condition that the policy should be void if the insured had not the sole and unconditional title was valid and enforceable by the company without the necessity of disclaiming liability upon notice or knowledge of its infraction, and the company's inaction in this respect was not a waiver of the condition. Smith v. National Ben Franklin Fire Ins. Co., 193 N.C. 446, 137 S.E. 310 (1927).

The provision in a policy of fire insurance written in accordance with the former standard statutory form, that the policy should be void if the insured was not the unconditional owner of the property in fee simple, was not waived by a written agreement providing that the agreement was solely for the purpose of determining the loss and to save time to the parties and that it should not operate as a waiver of any conditions or provisions of the policy. Sasser v. Pilot Fire Ins. Co., 203 N.C. 232, 165 S.E. 684 (1932).

Evidence Sufficient to Support Finding of Insurable Interest. — Evidence that the owner of property advised insurer's agent that he was giving the property in question to his son and to change the insurance so as to name his son the insured, that the owner thereafter died and the son remained in exclusive possession of the property and continued the insurance in force, was

sufficient to support the conclusion that the son had an insurable interest in the property so as to be entitled to recover on the policy. King v. National Union Fire Ins. Co., 258 N.C. 432, 128 S.E.2d 849 (1963).

III. CERTAIN OTHER CONDITIONS.

Additional Insurance. — The condition against additional insurance on the property, formerly appearing in the standard policy, was valid and enforceable. Black v. Atlantic Home Ins. Co., 148 N.C. 169, 61 S.E. 672 (1908).

When the standard fire insurance policy under this section provided that the policy should be void if the insured procured other contemporaneous insurance on the same property during the term covered, unless the insurer agreed thereto and a writing to that effect was attached to the policy contract, the provision was valid and binding. Johnson v. Aetna Ins. Co., 201 N.C. 362, 160 S.E. 454 (1931).

When the insured had violated the provision of the former standard policy by placing more concurrent insurance on the property than the policy permitted, the policy was invalid. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

Where insured obtains other insurance contrary to the provisions of his policy, the insurer may avoid liability for breach of the provision prohibiting other insurance, since breach of the provision against additional insurance, both before and after the 1945 amendment to this section, does not merely limit the amount of insurer's liability, but is a breach of condition defeating recovery. Hiatt v. American Ins. Co., 250 N.C. 553, 109 S.E.2d 185 (1959).

Same — Right to Have Other Coverage Determined and Maintained. — Provision of an insurance contract providing that the insurer "shall not be liable for a greater portion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved," gives it the right to have determined whether there was at the time of the loss other coverage, what its liability is, and to insist that other coverage be not extinguished after the loss by acts of the insured which will cast the entire loss on it. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963).

Same — Condition Not Applicable. — A policy of fire insurance was issued to the devisee of the fee in property subject to a charge in favor of other beneficiaries under the will. Thereafter the guardian of such other beneficiaries took out a policy, following the former standard form, to protect the interest of his wards. It was held that the insurer issuing the policy to the guardian could not avoid liability thereon, on the ground of the additional insurance issued to the owner of the fee, since such additional insurance was not issued to or for the benefit of those insured under its policy. Bryan v. Old Colony Ins. Co., 213 N.C. 391, 196 S.E. 345 (1938).

Same — Condition May Be Waived by Agent. — Where the insured before taking out additional insurance mentioned his intention to the insurer's subagent who had issued its policy to the insured, and was told that it was all right, this constituted a waiver of the condition. Grubbs v. North Carolina Home Ins. Co., 108 N.C. 472, 13 S.E. 236 (1891).

Permit When House Unoccupied. — The provision in the standard fire insurance policy requiring a permit in writing from the insurer when the house insured is unoccupied for more than 10 (now 60) days must be complied with to make the insurer liable for damages by fire occurring after 10 (now 60) days' vacancy, and after the policy has been issued and is in binding effect, the local agent of the insurer is without authority to bind his principal by acts and parol representations made contrary to the terms of this provision. Greene v. Aetna Ins. Co., 196 N.C. 335, 145 S.E. 616 (1928).

Operating Mill at Night. — Where an insured mill was operated at night, in violation of the former standard policy, but under a permit from the insurance agent, such operation was no defense to an action on the policy for a loss happening three months after the violation had ceased. Strause v. Palatine Ins. Co., 128 N.C. 64, 38 S.E. 256 (1901).

Condition or Use of Property Provision May Be Waived. — An insurance company may waive, or be estopped to rely on, a provision or condition in a policy of insurance relating to use or condition of property. Northern Assurance Co. of America v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

The "iron-safe clause" in policies of insurance is upheld by the courts as a reasonable contract limitation upon the insurer's risk. Coggins v. Aetna Ins. Co., 144 N.C. 7, 56 S.E. 506 (1907). See § 58-177, subdivision (3).

A substantial compliance with an "iron-safe" provision will suffice. Arnold v. Indemnity Fire Ins. Co., 152 N.C. 232, 67 S.E. 574 (1910).

Waiver of "Iron-Safe" Provision. — If the company, knowing the insured has not complied with the "iron-safe" clause, collects the premiums and recognizes the validity and binding force and effect of the policy it has issued, it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived. Bullard v. Pilot Fire Ins. Co., 189 N.C. 34, 126 S.E. 179 (1925).

Inventory. — An inventory of a stock of general merchandise containing the number of articles and cost of each class at a date, made about one month before the fire, and testified to as being practically the same as on the date of the

fire, is a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and is competent as evidence upon the trial. Mortt v. Liverpool & London & Globe Ins. Co., 192 N.C. 8, 133 S.E. 337 (1926). See also Coggins v. Aetna Ins. Co., 144 N.C. 7, 56 S.E. 506 (1907).

Time for Filing Proof of Loss and Bringing Action. — After the occurrence of loss insurer's local agent advised insured to defer filing formal claim until such time as materials could be obtained for repairs, and insured failed to file proof of loss within the time specified in the policy and did not institute action on the policy until after the expiration of the time limited therein. There was no denial of liability by insurer on other grounds within the time limited for filing proof of loss. It was held that insurer's demurrer should have been sustained. Zibelin v. Pawtucket Mut. Fire Ins. Co., 229 N.C. 567, 50 S.E.2d 290 (1948).

Under the terms of the standard fire insurance policy in effect in this State, no action may be maintained on a policy unless proof of loss shall be filed within the prescribed period. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Same — Waiver of Proof of Loss. — The insurer's denial of liability upon its fire insurance policy is a waiver of its right to require the proof of loss therein specified. Profitt Mercantile Co. v. State Mut. Fire Ins. Co., 176 N.C. 545, 97 S.E. 476 (1918).

An insurance company which causes or induces the insured to delay in furnishing sufficient notice and proofs of loss thereby waives such delay. Northern Assurance Co. of America v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

Same — Violation of Provision Does Not Work Forfeiture. — A clause in a policy requiring proof of loss and forbidding the bringing of any suit upon the policy until 60 days thereafter is a continuing one, and does not mean that failure to file proof within 60 days of the fire works a forfeiture of the policy. Higson v. North River Ins. Co., 152 N.C. 206, 67 S.E. 509 (1910).

Limitation of Suit — Generally. — In earlier statutes the limitation agreement as to suit in the standard fire insurance policy reads as follows: "Nor unless commenced within twelve months next after the fire," whereas the new section of the 1945 act reads, "and unless commenced within twelve months next after the inception of the loss." In other words, the provisions of the limitation in the 1945 act are used conjunctively, that is, there must be compliance with all the requirements of the policy, and the suit or action must be commenced within 12 months next after inception of the loss. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

In this connection the word "inception" as defined by Webster means "act or process of beginning; commencement; initiation." Hence as used above "inception" necessarily means that the beginning, the commencement, the initiation of the loss was that caused by the fire. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Same — Pleading Statutory Exception. — The statutory requirement that an action on a fire insurance policy must be instituted within 12 months after the loss unless a longer time to institute suit is agreed upon between the parties and such agreement appears on the face of the policy, is binding upon the parties in the absence of waiver or estoppel, and where insured, instituting action more than 12 months after the loss, relies upon the statutory exception he must plead facts bringing himself thereunder. Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950); Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Same — Noncompliance Bars Action. — If, in an action upon a fire insurance policy, the judge sustained a demurrer to the complaint and a new complaint was filed more than 12 months "after the inception of the loss," nothing else appearing, the action would be barred for failure to comply with this section. Gaskins v. Hartford Fire Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963).

Same — Waiver of Policy Provision. — Where insurer enters into negotiations with insured and promises that the claim will be paid or satisfactorily adjusted upon completion of investigation, and thereafter insurer demands additional proof of loss without denying the claim after it is too late for suit to be brought within the 12 months' period, insurer waives the policy provision requiring action to be instituted within 12 months next after loss. Meekins v. Aetna Ins. Co., 251 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950).

Where plaintiff insured filed a complaint stating an enforceable cause of action within 12 months of the loss by fire, and after the expiration of the 12-month period the parties consented that defendant's demurrer should be sustained, and thereafter an amended complaint was filed in accordance with the consent order, defendant insurer was not permitted to assert the provision of the policy that action be instituted within 12 months after loss, since the provision was contractual and subject to waiver or estoppel. Gaskins v. Hartford Fire Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963).

Same — Nonsuit Proper When Record Discloses That More than 12 Months Elapsed. — In an action upon a policy of fire insurance in the standard form, judgment of nonsuit is proper when the record discloses that more than 12 months elasped between the inception of the loss and the commencement of the suit. Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

Same — Effect of Agreement for Appraisal. — The valid provision of a standard fire insurance policy, approved by statute, limiting to 12 months from the time of loss by fire the time within which an action may be maintained, is not waived by the time taken under an agreement for an appraisal and award for the damage sustained by the insured. John Tatham & Co. v. Liverpool, London & Globe Ins. Co., 181 N.C. 434, 107 S.E. 450 (1921).

Same — Not Construed as Statute of Limitations. — As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892). See Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950).

The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute have no effect upon it. Hence, the imprisonment of the insured will not give him a right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. Holly v. London Assurance Co., 170 N.C. 4, 86 S.E. 694 (1915).

A provision in a standard fire insurance policy that action on it must be commenced within 12 months after inception of the loss is contractual. It is, therefore, subject to waiver or estoppel. Gaskins v. Hartford Fire Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963).

Same — Construed with § 58-31. — The provisions of a standard fire insurance policy, as set out in this section, must be construed with the provisions of § 58-31, and when the action is brought within the time therein prescribed it will not be barred. Modlin v. Atlantic Fire Ins. Co., 151 N.C. 35, 65 S.E. 605 (1909).

Under the standard policy and § 58-31, the insured has 60 days to file his proof of loss, and then he has 12 months within which to commence his suit. Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891); Dibbrell v. Georgia Home Ins. Co., 110 N.C. 193, 14 S.E. 783 (1892); Lowe v. United States Mut. Accident Ass'n, 115 N.C. 18, 20 S.E. 169 (1894); Gerringer v. North Carolina Home Ins. Co., 133 N.C. 407, 45 S.E. 773 (1903).

Standard Loss-Payable Clause — Effect of Issuance to Mortgagor. — A standard loss-payable clause in a policy of fire insurance issued to the mortgagor constitutes a separate contract insuring the mortgage interest, and loss paid by insurer thereunder must be applied to the reduction of the mortgage debt. Employers' Fire Ins. Co. v. British America Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

Same — Limitation on Mortgagee's Interest. — The clause in the standard policy that provides the insured shall not collect "in any event for more than the interest of the insured," limits a mortgagee's interest to the debt due him. Employers' Fire Ins. Co. v. British America Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

Same — Proration of Loss between Insurers. — Where property, destroyed by fire, was insured by two policies, one issued to the mortgagee under authority of the mortgagor, the mortgagor being liable for the premiums thereon; one issued to the mortgagor; and both containing a standard loss-payable clause, it was proper to prorate the loss between the insurers. Employers' Fire Ins. Co. v. British America Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

Waiver of Stipulations Generally. — The terms and conditions of standard form of a fire insurance policy and the stipulations as to a valid waiver thereof are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N.C. 139, 147 S.E. 812 (1929).

Knowledge of Insurer as Waiver. — Argall v. Old N. State Ins. Co., 84 N.C. 355 (1881), holds that a breach of a condition in the policy will not avoid it, if the insurer has knowledge thereof, and does not object, in which case the breach is considered as waived. Scottish Fire Ins. Co. v. Stuyvesant Ins. Co., 161 N.C. 485, 76 S.E. 728 (1913).

Waiver by Agent. — An agent of a fire insurance company, whether general or local, cannot waive the requirements of a standard policy except in the form prescribed by the statute. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

The provision restricting the agent's power to waive conditions does not, as a general rule, refer to or include conditions existing at the inception of the contract, but those arising after the policy is issued. Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be the knowledge of his principal. Bullard v. Pilot Fire Ins. Co., 189 N.C. 34, 126 S.E. 179 (1925). See Hayes v. United States Fire Ins. Co., 132 N.C. 702, 44 S.E. 404 (1903); Weddington v. Piedmont Fire Ins. Co., 141 N.C. 234, 54 S.E. 271 (1906); Johnson v. Rhode Island Ins. Co., 172 N.C. 142, 90 S.E. 124 (1916); Fireman's Fund Ins. Co. v. Rowland Lumber Co., 186 N.C. 269, 119 S.E. 362 (1923); Smith v. National Ben Franklin Fire Ins. Co., 193 N.C. 446, 137 S.E. 310 (1927). See also ante, this note, "General Consideration," I.

Sending a check in payment of the claim may constitute a waiver, whether received or not, of unfulfilled conditions. Roper v. National Fire Ins. Co., 161 N.C. 151, 76 S.E. 869 (1912).

IV. LIABILITY OF INSURER IN CASE OF LOSS; SUBROGATION.

Amount Recoverable. — The standard policy set out in this section refers to "actual cash value." In cases decided prior to the enactment of this statute, it was held that the measure of the amount the insured was entitled to recover was the "fair" cash value of the property at the time and place of the loss. Fowler v. Old N. State Ins. Co., 74 N.C. 89 (1876); Grubbs v. North Carolina Home Ins. Co., 108 N.C. 472, 13 S.E. 236, 23 Am. St. R. 62 (1891); Boyd v. Royal Ins. Co., 111 N.C. 372, 16 S.E. 389 (1892).

The amount which the company is obligated to pay is measured not by the cost of such replacement at the inception of the policy but by the cost of such replacement at the time of the fire. In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969).

Loss by theft is excluded from the standard policy set out in this section. However, it was formerly held that such loss consequent on the removal of goods in case of fire was fairly within a contract to insure against fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N.C. 352 (1859).

Damage by Water. — In an early case decided prior to the enactment of this section it was held that an insurance company was liable on a fire insurance policy for damages done to goods by water used in saving them from destruction by fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N.C. 352 (1859).

Option to Repair, Rebuild, or Replace Property. — A provision in a policy of fire insurance by which, in case of loss, it is made optional with the insurer to repair, rebuild, or replace the property destroyed, by giving notice within a certain time, constitutes a contract exclusively between insurer and insured; and neither a judgment creditor nor a mortgagee can interpose to prevent its performance; and if the insurer has not given notice of an intention to repair, etc., within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead. Stamps v. Commercial Fire Ins. Co., 77 N.C. 209, 24 Am. R. 443 (1877).

The appointment of an umpire is made at the request of either the insurer or insured and no notice to the other is required, no hearing is contemplated. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

It is Not Judgment of Court. — The appointment of an umpire pursuant to the "appraisal" clause is not the judgment of a court, it is a mere ministerial act pursuant to contract, albeit authorized by statute. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

It Need Not Be Made at Any Particular Time or Place. — There is no requirement that the appointment of an umpire be made in term or at any particular time or place. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

The appointment of an umpire may be challenged only by an action instituted for that purpose. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

The legal effect of the appointment of an umpire and any acts done pursuant thereto may be challenged in any action in which they arise. In re Roberts Co., 258 N.C. 184, 128 S.E.2d 137 (1962).

Insurer Subrogated to Rights of Insured. — Upon paying the loss by fire, the insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by provision of this section and under equitable principles. Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916); Lumberman's Mut. Ins. Co. v. Southern Ry., 179 N.C. 255, 102 S.E. 417 (1920); Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936), citing Cunningham v. Railroad, 139 N.C. 427, 51 S.E. 1029 (1905); Fidelity Ins. Co. v. Atlantic Coast Line R.R., 165 N.C. 136, 80 S.E. 1069 (1914); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953); General Ins. Co. of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963); Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

Subrogation to Rights of Mortgagee. — Where the mortgagee has insured the mortgaged property for his own benefits, and where the mortgagor has assumed the risk of loss under his contract of purchase, the insurer, having paid the loss, is subrogated to the rights of the mortgagee. Stuyvesant Ins. Co. v. Reid, 171 N.C. 513, 88 S.E. 779 (1916).

Where, pursuant to the terms of a deed of trust, the mortgagee insured the property and added the amount of the premiums to the mortgage debt, and the contract of insurance provided that in case of loss the insurer should be subrogated to the rights of the mortgagee, and that in case of conflict between the contract of insurance and the standard policy set out in this section the standard policy should prevail, and the mortgagor had no notice of the subrogation agreement, it was held that the insurer had no right to subrogation, either under the terms of the policy or on any equitable principle, and that the mortgagor was entitled to have the amount paid by the insurer applied on the mortgage debt. Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936).

When a mortgagee purchases with his funds insurance solely for his protection, the insurer, upon payment of the mortgagee's loss as provided in the policy, is subrogated to the rights of the mortgagee against the mortgagor; but where the insurance is procured by the mortgagee pursuant to the authorization and at the

expense of the mortgagor, no right of subrogation exists and the amount paid by the insurer must be applied to discharge or reduce mortgagor's obligation to mortgagee. Employers' Fire Ins. Co. v. British America Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963).

V. LIABILITY OF AGENT.

Apparent Authority of Employee Ordinarily Determines Extent of Agent's Liability. — One dealing with an insurance agency under ordinary circumstances need not concern himself with the extent of the authority of an employee in the agent's office who undertakes to act for the agent; the apparent authority with which such employee is clothed by the agent renders him and his principal liable regardless of the actual limits of the authority of the employee. Northern Assurance Co. of America v. Spencer, 246 F. Supp. 730 (W.D.N.C. 1965).

Loss Occasioned Insured When Policy Invalid. — Where the general agent of a fire insurance company for a limited territory, through the negligence of an employee, fails to write into the policy a statement required to make it valid, the agents are liable in damages to the insured for loss by fire, in an action based solely on the ground of negligence and not upon the invalid contract of insurance negligently issued by them. Case v. Ewbanks, Ewbanks & Co., 194 N.C. 775, 140 S.E. 709 (1927).

Election of Remedies. — Where a nonresident defendant fire insurance company has upon petition removed a cause from the State to the federal court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the courts of this State, and the federal court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them occasioned by their own neglect in not inserting a provision in the policy that would have rendered it valid, the subject matter of the latter action being based upon negligence and not on the policy contract, and the doctrine of the election of remedies does not apply. Case v. Ewbanks, Ewbanks & Co., 194 N.C. 775, 140 S.E. 709 (1927).

§ 58-177. Standard policy; permissible variations. — No fire insurance company shall issue fire insurance policies, except policies of automobile fire, theft, comprehensive and collision, marine and inland marine insurance, on property in this State other than those of the standard form as set forth in G.S. 58-176, and as provided in G.S. 58-126.1, except as follows:

(1) A company may print on or in its policies the date of incorporation, the amount of its paid-up capital stock, the names of its officers, and to the words at the top of the back of said policy, "Standard Fire Insurance Policy for" may be added after or before the words "North Carolina" the names of any states or political jurisdiction in which the said policy form may be standard when the policy is used.

(2) A company may print in its policies or use in its policies written or printed forms of description and specification of the property insured.

(3) A company may write or print upon the margin or across the face of a policy, in unused spaces or upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by an officer or agent of the company so using them. Provided, however, such provisions shall not have the effect of making the provisions of the standard policy form more restrictive except for such restrictions as are provided for in the charter or bylaws of a domestic mutual fire insurance company doing business in no more than three adjacent counties of the state and chiefly engaged in writing policies of insurance on rural properties upon an assessment or nonpremium basis, provided all such restrictions contained in the charter and bylaws of such domestic mutual fire insurance company shall be actually included within the printed terms of the policy contract so affected as a condition precedent to their being effective and binding on any policyholder. The iron safe or any similar clause requiring the taking of inventories, the keeping of books and producing the same in the adjustment of any loss, shall not be used or operative in the settlement

of losses on buildings, furniture and fixtures, or any property not subject to any change in bulk and value.

(4) Binders or other contracts for temporary insurance may be made, orally or in writing, for a period which shall not exceed 60 days, and shall be deemed to include all the terms of such standard fire insurance policy and all such applicable endorsements, approved by the Commissioner, as may be designated in such contract of temporary insurance; except that the cancellation clause of such standard fire insurance policy, and the clause thereof specifying the hour of the day at which the insurance shall commence, may be superseded by the express terms of such contract of temporary insurance.

(5) Two or more companies authorized to do in this State the business of fire insurance, may, with the approval of the Commissioner, issue a combination standard form of fire insurance policy which shall contain the following provisions:

a. A provision substantially to the effect that the insurers executing such policy shall be severally liable for the full amount of any loss or damage, according to the terms of the policy, or for specified percentages or amounts thereof, aggregating the full amount of such insurance under such policy.

b. A provision substantially to the effect that service of process, or of any notice or proof of loss required by such policy, upon any of the companies executing such policy, shall be deemed to be service upon all such insurers.

(6) Appropriate forms of supplemental contract or contracts or extended coverage endorsements and other endorsements whereby the interest in the property described in such policy shall be insured against one or more of the perils which the company is empowered to assume, in addition to the perils covered by said standard fire insurance policy may be approved by the Commissioner, and their use in connection with a standard fire insurance policy may be authorized by him. In his discretion the Commissioner may authorize the printing of such supplemental contract or contracts or extended coverage endorsements and other endorsements in the form of the standard fire insurance policy. The first page of the policy may in form approved by the Commissioner be arranged to provide space for listing of amounts of insurance, rates and premiums, description of construction, occupancy and location of property covered for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached or printed therein, and such other data as may be conveniently included for duplication on daily reports for office records.

(7) A company may print on or in its policy, with the approval of the Commissioner, any provisions which it is required by law to insert in its policies not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to Be Inserted in This Policy." (1899, c. 54, s. 43; 1901, c. 391, s. 4; Rev., s. 4759; 1907, c. 800, s. 1; 1915, c. 109, s. 10; C. S., s. 6436; 1925, c. 70, s. 5; 1945, c. 378; 1949, c. 418; 1951, c. 767; c. 781, s. 5; 1955, c. 807, s. 3.)

Cross Reference. — See § 58-176 and note.

Editor's Note. — For brief comment on the second 1951 amendment, see 29 N.C.L. Rev. 398.

No specific form is necessary to constitute a binder as a valid contract of insurance. Mayo v. American Fire and Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

Binder Not Required to Set Forth All Terms of Contract. — It is not required that the writing, or oral communication, intended as a binder

set forth all the terms of the contemplated contract of insurance. Mayo v. American Fire & Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

"Binder". — In an insurance parlance, a "binder" is insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insured gives notice of its election to terminate. Mayo v. American Fire & Cas. Co., 15 N.C. App. 309, 190 S.E.2d 398 (1972).

An extension of credit to the insured for the premium does not destroy the validity of the binder. Mayo v. American Fire & Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

Getting a rating from the Rating Bureau is not a prerequisite to entering into a contract of insurance. Mayo v. American Fire & Cas. Co., 282 N.C. 346, 192 S.E.2d 828 (1972).

Applied in Faircloth v. Ohio Farmers Ins. Co., 253 N.C. 522, 117 S.E.2d 404 (1960).

Cited in Hodges v. Home Ins. Co., 233 N.C. 289, 63 S.E.2d 819 (1951); Cuthrell v. Milwaukee Mechanics Ins. Co., 234 N.C. 137, 66 S.E.2d 649 (1951); Pruitt v. Great Am. Ins. Co., 241 N.C. 725, 86 S.E.2d 401 (1955); Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 96 S.E.2d 703 (1957).

§ 58-177.1. Optional provisions as to loss or damage from nuclear reaction, nuclear radiation or radioactive contamination. — Insurers issuing the standard fire insurance policy pursuant to G.S. 58-176, or any permissible variation thereof, and policies issued pursuant to G.S. 58-177 and 58-126.1, are hereby authorized to affix thereto or include therein a written statement that the policy does not cover loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination, all whether directly or indirectly resulting from an insured peril under said policy; provided, however, that nothing herein contained shall be construed to prohibit the attachment to any such policy of an endorsement or endorsements specifically assuming coverage for loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination. (1963, c. 1148.)

§ 58-178. Notice by insured or agent as to increase of hazard, unoccupancy and other insurance. — If notice in writing signed by the insured, or his agent, is given before loss or damage by any peril insured against under the standard fire insurance policy to the agent of the company of any fact or condition stated in paragraphs (a), (b) or with respect to "other insurance" of the standard form of policy set out in G.S. 58-176 it is equivalent to an agreement in writing added thereto, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the waiver; but this notice does not affect the right of the company to cancel the policy as therein stipulated. (1899, c. 54, s. 43; Rev., s. 4761; 1907, c. 578, s. 1; 1915, c. 109, s. 11; C. S., s. 6438; 1929, c. 60, s. 1; 1945, c. 378.)

Cited in State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

§ 58-178.1. Judge to select umpire. — The resident judge of the superior court of the district in which the property insured is located is designated as the judge of the court of record to select the umpire referred to in the standard form of policy. (1945, c. 378.)

§ 58-179: Repealed by Session Laws 1945, c. 378.

§ 58-180. Effect of failure to give notice of encumbrance. — No policy of insurance issued upon any property shall be held void because of the failure to give notice to the company of a mortgage or deed of trust existing thereon or thereafter placed thereon, except during the life of the mortgage or deed of trust. (1915, c. 109, s. 4; C. S., s. 6440.)

Cross Reference. — See § 58-177 and note thereto.

Cited in State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

§ 58-180.1. Policy issued to husband or wife on joint property. — Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof. (1945, c. 378.)

Editor's Note. — For article on tenancy by the entirety in North Carolina, see 41 N.C.L. Rev. 67 (1962).

Right of Wife to Proceeds of Policy Issued to Husband Alone. — A policy of fire insurance issued to a husband on a house held by the entirety but occupied by him alone while separated from his wife inured to the benefit of the entire estate as owned by both husband and wife, and where the entire estate, as so insured, was severed by absolute divorce after the fire, the wife was entitled to receive half the proceeds of the insurance moneys paid into court. Carter v. Continental Ins. Co., 242 N.C. 578, 89 S.E.2d 122 (1955), commented on in 35 N.C.L. Rev. 134 (1956).

Where husband and wife sell lands held by entireties and take a note secured by a deed of trust in part payment of the purchase price, the wife's interest in the note is personalty and she owns no interest in the dwelling on the land so as to bring her within the purview of this section and, therefore, she is not covered by the mortgage clause in a policy of fire insurance on the premises in which she is not named. Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960).

§ 58-180.2. Bar to defense of failure to render timely proof of loss. — In any action brought to enforce an insurance policy subject to the provisions of this Article, any party claiming benefit under the policy may reply to the pleading of any other party against whom liability is sought which asserts as a defense, the failure to render timely proof of loss as required by the terms of the policy that such failure was for good cause and that the failure to render timely proof of loss has not substantially harmed the party against whom liability is sought in his ability to defend. The issues raised by such reply shall be determined by the jury if jury trial has been demanded. (1973, c. 1391.)

Editor's Note. — Session Laws 1973, c. 1391, provides: "This act shall become effective upon ratification and shall not apply to pending litigation or disputes, nor any claim based upon a loss arising prior to ratification." The act was ratified April 12, 1974.

§ 58-181: Repealed by Session Laws 1945, c. 378.

Article 20.

Deposits by Insurance Companies.

§ 58-182. Amount of deposits required of foreign or alien fire and/or marine insurance companies. — Unless otherwise provided in this Article, every fire, marine, or fire and marine insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the Commissioner in the following amounts:

(1) Companies whose premium income derived from this State is less than fifty thousand dollars ($50,000) per annum, ten thousand dollars ($10,000);

(2) Companies whose premium income is more than fifty thousand dollars ($50,000) but less than one hundred thousand dollars ($100,000) per annum, twenty thousand dollars ($20,000);

(3) Companies whose premium income is more than one hundred thousand dollars ($100,000) per annum, twenty-five thousand dollars ($25,000),

for which deposit the Commissioner shall give a receipt. (1909, c. 923, s. 1; 1911, c. 164, s. 1; Ex. Sess. 1913, c. 62, ss. 1, 2, 3; 1915, c. 166, s. 6; C. S., s. 6442; 1933, c. 60; 1945, c. 384.)

Editor's Note. — The 1933 amendment is discussed in 11 N.C.L. Rev. 234.

§ 58-182.1. Amount of deposits required of foreign or alien fidelity, surety and casualty insurance companies. — Unless otherwise provided in this Article every fidelity, surety or casualty insurance company chartered by any other state or foreign government shall make and maintain deposits of securities with the Commissioner in the following amounts:

(1) Companies whose premium income derived from this State is less than one hundred thousand dollars ($100,000), twenty-five thousand dollars ($25,000);

(2) Companies whose premium income is in excess of one hundred thousand dollars ($100,000), fifty thousand dollars ($50,000),

for which deposit the Commissioner shall give a receipt. (1945, c. 384.)

Title and Rights to Deposited Securities. — It is the manifest intention of the North Carolina legislature that the title and rights to securities deposited in accord with §§ 58-182.1, 58-182.3, 58-182.5, 58-182.6, and 58-188.5 be vested in the Commissioner, the Treasurer, and the State. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Federal Receiver of Foreign Insurance Company Not Entitled to Recover Deposit. — A federal receiver of a foreign insurance company, who pursuant to an order of the federal court appointing him filed a petition and motion to recover the deposit of the foreign insurance company from State officials, was not entitled to recover the deposit, since such a deposit is not the property of the foreign insurance company, but is held in trust by the State Treasurer for payment of qualified claimants against the foreign insurance company. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Quoted in Resolute Ins. Co. v. North Carolina, 276 F. Supp. 660 (E.D.N.C. 1967).

§ 58-182.2. Minimum deposit required upon admission. — Upon admission to do business in the State of North Carolina every foreign or alien fire, marine, or fire and marine, fidelity, surety or casualty company shall deposit with the Commissioner securities in the minimum amounts required under the provisions of G.S. 58-182 and 58-182.1. (1945, c. 384.)

§ 58-182.3. Type of deposits. — The deposits required to be made under the provisions of G.S. 58-182 and 58-182.1 shall be composed of bonds of the United States, or of the State of North Carolina, or of the cities or counties of this State. (1945, c. 384.)

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-182.4. Replacements upon depreciation of securities. — Whenever any of the securities deposited by companies under the provisions of G.S. 58-182 and 58-182.1 shall be depreciated or reduced in value, such company shall forthwith increase the deposit in order to maintain the required deposit in accordance with the amounts required by the said sections. (1945, c. 384.)

§ 58-182.5. Power of attorney. — With the securities deposited in accordance with G.S. 58-182 and 58-182.1 the company shall at the same time deliver to the Commissioner of Insurance a power of attorney executed by its president and secretary or other proper officers authorizing the sale or transfer of said

securities or any part thereof for the purpose of paying any of the liabilities provided for in this Article. (1945, c. 384.)

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-182.6. Securities held by Treasurer; faith of State pledged therefor; nontaxable. — The securities required to be deposited by each insurance company in this Article shall be delivered for safekeeping by the Commissioner to the Treasurer of the State who shall receipt him therefor. For the securities so deposited the faith of the State is pledged that they shall be returned to the companies entitled to receive them or disposed of as herein provided for. The securities deposited by any company under this Article shall not, on account of such securities being in this State, be subjected to taxation but shall be held exclusively and solely for the protection of contract holders. (1945, c. 384.)

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-182.7. Authority to increase deposit. — When, in the opinion of the Commissioner, it is necessary for the protection of the public interest to increase the amount of deposits specified in G.S. 58-182 and 58-182.1, the companies described in said sections shall, upon demand, make additional deposits in such sums as the Commissioner may require, and such additional deposits shall be held in accordance with and for the purposes set out in this Article. (1945, c. 384.)

§ 58-182.8. Deposits of domestic companies. — The Commissioner may in the public interest require domestic fire, marine or fire and marine, fidelity, surety or casualty companies to make and maintain deposits under the provisions of G.S. 58-182 to 58-182.7 inclusive. (1945, c. 384.)

§ 58-183. Right of company to receive interest on deposits. — The Commissioner of Insurance, at the time of receiving the securities, shall give to the company authority to draw the interest thereon, as the same may become due and payable, for the use of the company, and this authority shall continue in force until the company fails to pay any liability arising upon any policy made in favor of any person, firm, or corporation which shall be, at the time the liability arises, a resident of this State, or which shall own property in the State covered by policies issued. In case of such failure the corporation charged with the payment of such interest shall be forthwith notified, and thereafter the interest, so long as the liability exists, shall be payable to the Commissioner of Insurance, to be applied, if necessary, to the payment of such liability. (1909, c. 923, s. 2; C. S., s. 6443.)

Company Entitled to Interest Until It Fails to Satisfy Liability. — A foreign insurance company which makes a deposit of securities is entitled to the interest income of the securities deposited until such time as the company fails to satisfy a liability. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-184. Sale of deposits for payment of liabilities. — If the company fails to pay any of its liabilities on its contracts according to the terms thereof, after the liabilities have been adjusted between the parties in the manner prescribed by the contracts, if any manner is prescribed thereby, or after the same have been ascertained in any manner agreed upon by the parties or by the judgment, order, or decree of the court having jurisdiction of the subject, the Commissioner

of Insurance shall, upon application of the party to whom the debt or money is due, and upon satisfactory proof that the notice herein required has been given to the company, proceed to sell at public auction such an amount of the securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; and the company shall be required forthwith to make good any deficit in the amount of the deposit caused by such sale. The party making application shall give to the company or to its agent in this State 20 days' notice of his intention to apply to the Commissioner of Insurance for the sale of securities. The Commissioner of Insurance shall advertise the sale of the securities for 30 days prior to the day of the sale in some daily newspaper published in the City of Raleigh, and shall state in the advertisement the securities to be sold and the company depositing them, and shall mail a copy to the company. (1909, c. 923, s. 3; C. S., s. 6444.)

Injunction against Sale of Securities under This Section Denied. — See Resolute Ins. Co. v. North Carolina, 276 F. Supp. 660 (E.D.N.C. 1967), aff'd, 397 F.2d 586 (4th Cir. 1968).

Cited in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-185. Lien of policyholders; action to enforce. — Upon the securities deposited with the Commissioner of Insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the Superior Court of the County of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance. (1909, c. 923, s. 4; C. S., s. 6445.)

The federal receiver of a foreign insurance company would be entitled to appear and contest any doubtful claim in an action brought under this section to subject the insurance company's deposit to the payment of unsatisfied claims of State claimants. Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

Cited in State ex rel. Boney v. Central Mut. Ins. Co., 213 N.C. 470, 196 S.E. 837, 117 A.L.R. 231 (1938).

§ 58-186. Substitution for securities paid. — Where the principal of any of the securities so deposited is paid to the Commissioner of Insurance, he shall notify the company or its agent in this State, and pay the money so received to the company upon receiving other securities of the character named in this Article to an equal amount, or, upon the failure of the company for 30 days after receiving notice to deliver such securities to an equal amount to the Commissioner of Insurance, he may invest the money in any such securities and hold the same as he held those which were paid. (1909, c. 923, s. 5; C. S., s. 6446.)

§ 58-187. Return of deposits. — If such company ceases to do business in this State and its liabilities, whether fixed or contingent upon its contracts, to persons residing in this State or having policies upon property situated in this State have been satisfied or have been terminated, or have been fully reinsured, with the approval of the Commissioner, in a solvent company licensed to do an

insurance business in North Carolina approved by the Commissioner, upon satisfactory evidence of this fact to the Commissioner of Insurance the State Treasurer shall deliver to such company, upon the order of the Commissioner of Insurance, the securities in his possession belonging to it, or such of them as remain after paying the liabilities aforesaid. (1909, c. 923, s. 6; C. S., s. 6447; 1951, c. 781, s. 1.)

Editor's Note. — For brief comment on 1951 amendment, see 29 N.C.L. Rev. 398.

§ 58-188. Deposit required before license granted; exception. — When any fire insurance company files an application with the Commissioner of Insurance to be admitted to do business in this State, he shall require of it a compliance with the provisions of this Article before issuing a license to such company; but this Article shall not apply to companies licensed to do a reinsurance business only. (1909, c. 923, s. 7; 1915, c. 166, s. 6; C. S., s. 6448.)

§ 58-188.1. Deposits held in trust by Commissioner or Treasurer. — (a) Deposits by Domestic Company. — The Commissioner of Insurance or the Treasurer, in his official capacity, shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable the company to do business in that state. The company making the deposits is entitled to the income thereof, and may, from time to time, with the consent of the Commissioner of Insurance or Treasurer, and when not forbidden by the law under which the deposit was made, change in whole or in part the securities which compose the deposit for other solvent securities of equal par value. Upon request of any domestic insurance company such officer may return to the company the whole or any portion of the securities of the company held by him on deposit, when he is satisfied that they are subject to no liability and are not required to be longer held by any provision of law or purpose of the original deposit.

(b) Deposits by Foreign or Alien Company. — The Commissioner or Treasurer may return to the trustees or other representatives authorized for that purpose any deposit made by a foreign or alien insurance company, when it appears that the company has ceased to do business in the State and is under no obligation to policyholders or other persons in the State for whose benefit the deposit was made.

(c) Action to Enforce or Terminate the Trust. — An insurance company which has made a deposit in this State pursuant to this Chapter, or its trustees or resident managers in the United States, or the Commissioner of Insurance, or any creditor of the company, may at any time bring an action in the Superior Court of Wake County against the State and other parties properly joined therein, to enforce, administer, or terminate the trust created by the deposit. The process in this action shall be served on the officer of the State having the deposit, who shall appear and answer in behalf of the State and perform such orders and judgments as the court may make in such action. (1899, c. 54, s. 17; 1901, c. 391, s. 2; 1903, c. 438, s. 1; c. 536, s. 4; Rev., s. 4709; C. S., s. 6313; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-55.

§ 58-188.2. Deposits subject to approval and control of Commissioner. — The deposits of securities required to be made by any insurance company of this State shall be approved by the Commissioner of Insurance of the State, and he may examine them at all times, and may order all or any part thereof changed

for better security, and no change or transfer of the same may be made without his assent. (1903, c. 536, s. 5; Rev., s. 4710; C. S., s. 6314; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-56.

§ 58-188.3. Deposits by alien companies required and regulated. — An alien company, other than life, shall not be admitted to do business in this State until, in addition to complying with the conditions by law prescribed for the licensing and admission of such companies to do business in this State, it has made a deposit with the Treasurer or Commissioner of Insurance of this State, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this Chapter. This deposit must be in exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States, and may be made in the securities, but subject to the limitations, specified in this Chapter with regard to the investment of the capital of domestic companies formed and organized under the provisions of this Chapter. The deposit shall be deemed for all purposes of the insurance law the capital of the company making it. (1899, c. 54, s. 64; 1903, c. 438, s. 6; Rev., s. 4711; C. S., s. 6315; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-57.

§ 58-188.4. Deposits by life companies not chartered in United States. — Every alien life insurance company organized under the laws of any other country than the United States must have and keep on deposit with some state insurance department or in the hands of trustees, in exclusive trust for the security of its contracts with policyholders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than three hundred thousand dollars ($300,000). (1899, c. 54, s. 56; Rev., s. 4712; C. S., s. 6316; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-58.

§ 58-188.5. Registration of bonds deposited in name of Treasurer. — The Commissioner of Insurance is hereby empowered, upon the written consent of any insurance company depositing with the Commissioner or the State Treasurer under any law of this State, any state, county, city, or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by or in behalf of the issuing state, county, city or town, such registration to be in the name of the Treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-59.

Stated in Continental Bank & Trust Co. v. Gold, 140 F. Supp. 252 (E.D.N.C. 1956).

§ 58-188.6. Notation of registration; release. — Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signature of the State Treasurer. (1925, c. 145, s. 3; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-60.

§ 58-188.7. Expenses of registration. — The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4; 1945, c. 384.)

Editor's Note. — This section was transferred from § 58-61.

§ 58-188.8. Bond in lieu of deposit. — In lieu of any deposit required in this Chapter a company may give a surety bond issued by a company licensed in this State, the form of which bond shall be approved by the Commissioner. (1945, c. 384.)

ARTICLE 21.

Insuring State Property.

§ 58-189. State Property Fire Insurance Fund created. — Upon the expiration of all existing policies of fire insurance upon state-owned buildings, fixtures, furniture, and equipment, including all such property the title to which may be in any State department, institution, or agency, the State of North Carolina shall not reinsure any of such properties.

There is hereby created a "State Property Fire Insurance Fund," which shall be as a special fund in the State treasury, for the purpose of providing a reserve against loss from fire at State departments and institutions. The Sinking Fund Commission shall invest all funds deposited in the "State Property Fire Insurance Fund" in the same type of securities in which State sinking funds may be invested and all earnings of the fund shall become a part of the fund and be held and invested as contributions are invested. The unexpended appropriations of State departments and institutions for fire insurance premiums for the fiscal year 1944-45 and the appropriations for fire insurance premiums made for the biennium 1945-47 or that may thereafter be made for this purpose shall be transferred to the "State Property Fire Insurance Fund." (1945, c. 1027, s. 1; 1963, c. 462.)

§ 58-190. Appropriations; fund to pay administrative expenses. — Upon the expiration of the existing fire insurance policies on said properties and in making appropriations for any biennium after the next biennium, the Commissioner of Insurance shall file with the budget bureau his estimate of the appropriations which will be necessary in order to set up and maintain an adequate reserve to provide a fund sufficient to protect the State, its departments, institutions, and agencies from loss or damage to any of said properties up to fifty per centum (50%) of the value thereof. Appropriations made for the creating of such fire insurance reserves against property of the Department of Agriculture, or the Board of Transportation or any special operating fund shall be charged against the funds of such departments.

The State Property Fire Insurance Fund is authorized and empowered to pay all the administrative expenses occasioned by the administration of Article 21

of Chapter 58 of the General Statutes. (1945, c. 1027, s. 2; 1957, c. 65, s. 11; 1959, c. 182, s. 1; 1973, c. 507, s. 5.)

Editor's Note. — The 1973 amendment substituted "Board of Transportation" for "State Highway Commission" in the second sentence of the first paragraph.

§ 58-191. Payment of losses; rules and regulations; sprinkler leakage insurance. — In case of total loss of any property of any State institution or partial loss thereof or the loss or damage of any other aforesaid state-owned property, the Commissioner of Insurance is authorized, empowered and directed to determine the amount of the loss and to certify the amount of loss to the department or institution concerned, to the budget bureau and to the Governor and Council of State. The Governor and Council of State may authorize transfers from the "State Property Fire Insurance Fund" to the State agency having suffered a fire damage in such amounts as they may consider necessary to restore the loss sustained, and in the event there is not a sufficient sum in said State Property Fire Insurance Fund, the Governor and Council of State may supplement said fund from the Contingency and Emergency Fund, and if there is not a sufficient amount therein, then from the State Postwar Reserve Fund. Such funds as shall be allocated from such reserve fund shall be paid therefrom upon warrant of the State Auditor.

The Commissioner of Insurance, with the approval of the Council of State, is authorized and empowered to adopt and promulgate all such rules and regulations as may be necessary to carry out the purpose and intent of the provisions of this Article and all such rules and regulations as may be adopted in accordance herewith shall be binding upon all the departments, bureaus, agencies and institutions of the State. The Commissioner of Insurance, with the approval of the Governor and Council of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss on any one building and contents in excess of not less than fifty thousand dollars ($50,000). The premiums on such coverage shall be paid from the State Property Fire Insurance Fund hereinbefore provided.

Upon request of any State department, agency or institution, sprinkler leakage insurance shall be provided on designated state-owned property of such department, agency or institution which is insured by the State Property Fire Insurance Fund. Premiums for such insurance coverage shall be paid by each requesting department, agency or institution in accordance with rates fixed by the Commissioner of Insurance. Losses covered by such insurance may be paid out of the State Property Fire Insurance Fund in the same manner as fire losses. The Commissioner of Insurance, with the approval of the Governor and Council of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss with respect to such insurance coverage. (1945, c. 1027, s. 3; 1951, c. 802; 1959, c. 182, s. 2.)

§ 58-191.1. Extended coverage insurance. — Upon request of any State department, agency or institution, extended coverage insurance shall be provided on designated state-owned property of such department, agency or institution which is insured by the State Property Fire Insurance Fund. Premiums for such insurance coverage shall be paid by each requesting department, agency or institution in accordance with rates fixed by the Commissioner of Insurance. Losses covered by such insurance may be paid for out of the State Property Fire Insurance Fund in the same manner as fire losses. The Commissioner of Insurance, with the approval of the Governor and Council

of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss with respect to such insurance coverage. The words "extended coverage insurance," as used in this section, mean insurance against loss or damage caused by windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles or smoke. (1957, c. 67.)

§ 58-191.2. Use and occupancy and business interruption insurance. — Upon request of any State department, agency or institution, use and occupancy and business interruption insurance shall be provided on state-owned property of such department, agency or institution which is insured by the State Property Fire Insurance Fund. Premiums for such insurance coverage shall be paid by each requesting department, agency or institution in accordance with rates fixed by the Commissioner of Insurance. Losses covered by such insurance may be paid for out of the State Property Fire Insurance Fund in the same manner as fire losses. The Commissioner of Insurance, with the approval of the Governor and Council of State, is authorized and empowered to purchase from insurers admitted to do business in North Carolina such insurance or reinsurance as may be necessary to protect the State Property Fire Insurance Fund against loss with respect to such insurance coverage. (1957, c. 67.)

§ 58-192. Information furnished Commissioner by officers in charge. — It is the duty of the different officers or boards having in their custody any property belonging to the State to inform the Commissioner, giving him in detail a full description of same, and to keep him informed of any changes in such property or its location or surroundings. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 2; Rev., s. 4828; C. S., s. 6452.)

§ 58-193. Commissioner to inspect State property; plans submitted. — It is the duty of the Commissioner at least once in each year, or oftener, if deemed necessary, to visit, inspect, and thoroughly examine each State institution or other State property with a view to its protection from fire, as well as to the safety of its inmates or the property therein in case of fire, and call to the attention of the board or officer having the same in charge any defect noted by him or any improvement deemed necessary. No board, commission, superintendent, or other person or persons authorized and directed by law to select plans and erect buildings for the use of the State of North Carolina or any institution thereof, or for the use of any county, city, or incorporated town or school district shall receive and approve of any plans until they are submitted to and approved by the Commissioner of Insurance of the State as to the safety of the proposed buildings from fire, as well as the protection of the inmates in case of fire. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 3; Rev., s. 4829; 1909, c. 880; 1919, c. 186, s. 3; C. S., s. 6453.)

§ 58-194. Report required of Commissioner. — The Commissioner of Insurance must submit to the Governor a full report of his official action under this Article, with such recommendations as commend themselves to him, and it shall be embodied in or attached to his biennial report to the General Assembly. (1901, c. 710, ss. 1, 2; 1903, c. 771, s. 4; Rev., s. 4830; C. S., s. 6454; 1945, c. 386.)

§ 58-194.1. Liability insurance required for state-owned vehicles. — Every department, agency or institution of the State shall acquire motor vehicle liability insurance on all state-owned motor vehicles under its control. A general fund department, agency or institution which does not have sufficient funds within its existing budget to pay the premiums for such insurance may, with the approval of the Advisory Budget Commission, make application to the Director of the Budget for allocation of funds for payment of premiums out of

the contingent or emergency appropriation in the manner prescribed by G.S. 143-12. (1959, c. 1248.)

SUBCHAPTER IV. LIFE INSURANCE.

ARTICLE 22.

General Regulations of Business.

§ 58-195. Definitions; requisites of contract. — All corporations or associations doing business in this State, under any charter or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract, or pledge for the payment of endowments or annuities, or who employ agents to solicit such business, are life insurance companies, in all respects subject to the laws herein made and provided for the government of life insurance companies, and shall not make any such insurance, guaranty, contract, or pledge in this State with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, the consideration therefor and such other provisions as the Commissioner may require. (1899, c. 54, s. 55; Rev., s. 4773; C. S., s. 6455; 1945, c. 379.)

Editor's Note. — The 1945 amendment which amended, inserted or repealed a large number of sections of this Chapter, provides: "This act shall not apply to common carriers having relief departments, pension or annuity plans, or other organizations or associations for the benefit of their employees or former employees; or to associations of such common carriers administering such departments, plans or organizations."

§ 58-195.1. Industrial life insurance defined. — Industrial life insurance is hereby declared to be that form of life insurance under which the premiums are payable monthly or oftener, provided the face amount of insurance stated in the policy does not exceed one thousand dollars ($1,000) and the words "Industrial Policy" are printed upon the policy as a part of the descriptive matter. (1945, c. 379; 1947, c. 721.)

§ 58-195.2. Credit life insurance defined. — Credit life insurance is declared to be insurance upon the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor. Credit life insurance may include the granting of additional benefits in the event of total and permanent disability of the debtor. (1953, c. 1096, s. 1.)

Public Policy. — The long established public policy of this State prevents one who lacks a legally recognized insurable interest in the life of another from taking out and enforcing for his own benefit a policy of insurance on such other person's life. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Creditor has an insurable interest in debtor's life. Hatley v. Johnston, 265 N.C. 73, 143 S.E.2d 260 (1965).

Credit life insurance, as between the creditor and insured debtor, is collateral security. Hatley v. Johnston, 265 N.C. 73, 143 S.E.2d 260 (1965).

Credit life insurance, as between the creditor and insured debtor, is collateral security. Consequently, payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, just as payment with any collateral security is payment by the owner thereof. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

As between the creditor and the insured debtor the credit life insurance is collateral security, but this does not place the defendant insurance company in the position of a surety or in any sense render it secondarily liable on the debt. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Credit life insurance, as between the creditor and the insured debtor, is collateral security, but this does not place the insurance company in the position of a surety or in any sense render it secondarily liable on the debt, the insurance company becoming liable solely because, for a premium paid to it, it assumed the risk of the debtor's continued life and his death occurs while the insurance policy is in effect. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Payment by Such Insurance Is Payment by Debtor. — Payment of the debt with credit life insurance, when the insured authorizes the creditor to procure the policy and pays the premium himself, is payment by the insured debtor, just as payment with any collateral security is payment by the owner thereof. The presence of an assuming grantee, who has no right to change the beneficiary under the policy, and therefore no claim of ownership, should not alter that result. Hatley v. Johnston, 265 N.C. 73, 143 S.E.2d 260 (1965).

When Liability Established. — Liability of the insurer under a credit life insurance policy is established at the moment of the insured debtor's death, and payment thereafter of the debt to the creditor, thereby terminating the creditor's insurable interest in the life of the debtor, does not terminate the insurer's liability under its policy of insurance. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Insurer is liable upon its policy of credit life insurance where the creditor repossesses the mortgaged chattel subsequent to the insured debtor's death, notwithstanding the policy provided that it should terminate automatically upon repossession of the chattel, since insurer's liability under the policy became fixed when the debtor died before repossession of the chattel occurred. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Beneficiary May Sue to Enforce Terms of Contract. — North Carolina has long recognized the right of one for whose benefit a contract has been made to sue to enforce its terms, even though he is not directly a party to the contract. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Action by Debtor's Administratrix to Recover Policy Proceeds. — The fact that the insured debtor's estate is not named directly as beneficiary in a credit life insurance policy is no bar to the right of the insured's administratrix to maintain an action upon the policy, since one for whose benefit a contract has been made may sue to enforce its terms even though he is not directly a party to the contract, the credit life insurance being for the benefit of insured's estate in that the proceeds of the policy are, by contractual and statutory provision, to be applied to discharge an indebtedness of the estate. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

When the debt to the creditor is satisfied subsequent to the insured debtor's death by repossession of the mortgaged chattel, the debtor's estate becomes subrogated to the rights of the creditor as beneficiary under the credit life insurance policy as against the insurer, and the debtor's administratrix may maintain an action against the insurer to recover the proceeds of the policy. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Payment of Indebtedness After Debtor's Death. — When a creditor named as beneficiary of a credit life insurance policy effects payment of its indebtedness after the death of the insured debtor by repossessing the chattel purchased by the debtor under a conditional sales contract, thereby giving up its rights in the proceeds of the policy, the credit life insurance policy becomes one for the benefit of the insured collectible by his executors or administrators. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

The creditor who is named as beneficiary loses all interest in the proceeds of the policy upon payment of the indebtedness, and the policy then becomes one for the benefit of the insured, collectible by his executors or administrators. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Repossession of Chattel After Debtor's Death. — Creditor relinquished its rights in the proceeds of a credit life insurance policy when, following the death of the insured debtor, it effected payment of its indebtedness by repossession of the chattel purchased by debtor under a conditional sales contract, and the creditor could not thereafter collect and retain for its own account the proceeds of the credit life insurance policy since it no longer had an insurable interest in the life of the debtor. Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

§ 58-195.3. Any type of survivorship fund in life insurance contract prohibited. — No life insurance company shall hereafter deliver in this State, as a part of or in combination with any insurance, endowment or annuity contract, any agreement or plan, additional to the rights, dividends, and benefits

arising out of any such insurance, endowment or annuity contract, which provides for the accumulation of profits over a period of years and for payment of all or any part of such accumulated profits only to members or policyholders of a designated group or class who continue as members or policyholders until the end of a specified period of years. Nor shall any such company deliver in this State any individual life insurance policy which provides that on the death of anyone not specifically named therein, the owner or beneficiary of the policy shall receive the payment or granting of anything of value. (1955, c. 492.)

§ 58-195.4. Tie-in sales with life insurance prohibited. — No life insurance company shall hereafter deliver in this State, as a part of or in combination with any insurance, endowment or annuity contract, any agreeement or plan, additional to the rights, dividends, and benefits arising out of any such insurance, endowment, or annuity contract which provides for the sale, solicitation, or delivery of any stock or shares of stock in the company issuing the policy or in any other insurance company or other corporation, or benefit certificate, securities, or any special advisory board contract, or other contracts or resolutions of any kind promising returns and profits, or dividends equivalent to stock dividends as an inducement to or in connection with the sale of the insurance or to the taking of the policy. Nothing herein contained shall be construed as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits. (1957, c. 752.)

§ 58-196: Transferred to G.S. 58-151.1 by Session Laws 1945, c. 379.

§ 58-197. Soliciting agent represents the company. — A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured. (1907, c. 958, s. 1; C. S., s. 6457.)

This section does not attempt to prescribe the extent of the agent's authority or to convert a special or limited agency into one with general powers. Fountain & Herrington, Inc. v. Mutual Life Ins. Co., 55 F.2d 120 (4th Cir. 1932). See also Provident Mut. Life Ins. Co. v. Parsons, 70 F.2d 863 (4th Cir. 1934).

Insurer Liable for Delay of Agent. — "If the defendant's agent wrongfully failed to deliver the policy within a reasonably short time after its receipt, during which time the plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff's intestate having thereafter become ill, the defendant could not withhold the delivery so as to release it from responsibility. American Trust Co. v. Life Ins. Co., 173 N.C. 558, 92 S.E. 706 (1917)." Fox v. Volunteer State Life Ins. Co., 185 N.C. 121, 116 S.E. 266 (1923).

When Knowledge of Agent Imputed to Company. — In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same. However, it is otherwise when it clearly appears that an insurance agent and the insured participated in a fraud by inserting false answers with respect to material facts in an application for insurance. The knowledge of the agent in such instances will not be imputable to his principal. Thomas-Yelverton Co. v. State Capital Life Ins. Co., 238 N.C. 278, 77 S.E.2d 692 (1953); Faircloth v. Ohio Farmers Ins. Co., 253 N.C. 522, 117 S.E.2d 404 (1960).

Responsibility of Insured for False Answers Inserted by Agent in Application. — The rule that the insured is not responsible for false answers in the application where they have been inserted by the agent through mistake, negligence, or fraud is not absolute, and applies only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud. Jones v. Home Security Life Ins. Co., 254 N.C. 407, 119 S.E.2d 215 (1961).

§ 58-198. Discrimination between insurants forbidden. — A life insurance company doing business in this State shall not make any distinction or

discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell, or purchase, or offer to give, sell, or purchase as inducement to insurance or in connection therewith any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue therein, or anything of value whatsoever not specified in the policy. (1899, c. 54, s. 57; 1903, c. 438, ss. 5, 10; Rev., s. 4775; 1911, c. 196, s. 7; C. S., s. 6458.)

The purpose of the statute is to prevent discrimination among policyholders of like class and expectancy, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurant and the company in reference thereto shall be plainly expressed in the policy. Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

The purpose of the statute is to require all of the contract between the parties to be set forth in the policy and to afford protection to the policyholder. The purpose is to require the parties to incorporate in the insurance contract anything pertaining to its validity at the time it is written. New York Life Ins. Co. v. Guyes, 22 F. Supp. 454 (M.D.N.C. 1938).

The prohibition of discrimination is a restriction applicable to the insurer, and the statute purports to operate upon insurance companies alone. Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913).

Instance of Illegal Discrimination. — The exercise of option given by a mutual life insurance company to one of its policyholders of greater value than that given to the others is an illegal and void discrimination, prohibited by our statute and general principles of law. Graham v. Mutual Life Ins. Co., 176 N.C. 313, 97 S.E. 6 (1918).

Statute Does Not Invalidate Policies. — This section does not invalidate contracts of insurance made in violation of its provisions. Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913); Security Life & Annuity Co. v. Costner, 149 N.C. 293, 63 S.E. 304 (1908).

And Insured May Recover for Cancellation of Policy. — Where the insured has, in good faith, entered into a policy contract with the company whereby he has secured a policy at a reduced rate of premium, the parties are not in pari delicto; and he may recover damages, upon the cancellation by the company of his policy, for its discrimination forbidden by the statute. Robinson v. Security Life & Annuity Co., 163 N.C. 415, 79 S.E. 681 (1913).

Transactions up to the issuance of a life policy merge therein upon its issuance and acceptance by the insured. Graham v. Mutual Life Ins. Co., 176 N.C. 313, 97 S.E. 6 (1918); New York Life Ins. Co. v. Guyes, 22 F. Supp. 454 (M.D.N.C. 1938); Floars v. Aetna Life Ins. Co., 144 N.C. 232, 56 S.E. 915 (1907).

And Collateral Agreements Are Not Binding Unless Included in Policy. — Under this section, the terms and conditions of the insurance must be plainly expressed in the policy as issued, and collateral agreements with local agents are not binding unless included in the policy. Graham v. Mutual Life Ins. Co., 176 N.C. 313, 97 S.E. 6 (1918).

It would seem that an agreement by a local agent that the policy would be in effect from the date of application and payment of the first premium, where the policy provided it would be effective from delivery, would be in contravention of this section. Jones v. Gate City Life Ins. Co., 216 N.C. 300, 4 S.E.2d 848 (1939).

A policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by this statute, upon the principle that the law was not passed for the benefit of the company resisting recovery, but for the protection of the policyholders when it appears that the agreement is executory in character and gives him a preference over the general body of policyholders for whose benefit the statute was passed. In such cases, the parties are in pari delicto. Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

When a collateral agreement delivered to insured with his policy provided for the reduction of premiums to be paid thereon, and is claimed to be the sole inducement moving him to take the policy, it is necessary for these inducements so claimed to be specified in the policy contract. Otherwise the collateral agreement

is prohibited by the statute and not enforceable. Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

A valid policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by the statute. Security Life & Annuity Co. v. Costner, 149 N.C. 293, 63 S.E. 304 (1908).

And Insurer May Recover on Note Given in Payment of Policy. — When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for the deduction of a certain amount by way of renewal commissions in violation of the provisions of this section. Security Life & Annuity Co. v. Costner, 149 N.C. 293, 63 S.E. 304 (1908); Smathers v. Bankers Life Ins. Co., 151 N.C. 98, 65 S.E. 746 (1909).

§ 58-199. Misrepresentations of policy forbidden. — No life insurance company doing business in this State, and no officer, director, solicitor, or other agent thereof, shall make, issue, or circulate, or cause to be made, issued, or circulated any estimate, illustration, circular, or statement of any sort misrepresenting the terms of the policy issued by it or the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Nor shall any such company, agent, or broker make any misrepresentation to any person insured in said company or in any other insurer or governmental agency for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. (1913, c. 95; C. S., s. 6459; 1947, c. 721.)

§ 58-200: Repealed by Session Laws 1945, c. 379.

§ 58-201. Reserve fund of domestic companies to be calculated. — The valuation of the reserves on the policies and bonds of every life insurance company incorporated by the laws of this State shall be based upon any recognized standard of valuation and mortality table as the Commissioner should deem best for the security of the business and the safety of the persons insured. The Commissioner shall annually value or cause to be valued the reserves on all policies and annuities of each domestic company and may accept the valuation of such reserves made by the company upon such evidence of its correctness as he may require. Upon this valuation being made by the Commissioner and a certificate thereof furnished by him, each company shall pay to such officer, to defray the expenses thereof, the sum of one cent (1¢) for every thousand dollars ($1,000) of the whole amount insured by its policies so valued. The reserve fund hereinbefore provided for shall not be available for or used for any other purpose than the discharge of policy obligations, but is a trust fund to be held and expended only for the benefit of policyholders. In case of the insolvency of the company, the reserve on outstanding policies may, with the consent of the Commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (1903, c. 536, s. 4; 1905, c. 410; Rev., s. 4777; 1907, c. 1000, s. 7; C. S., s. 6461; 1945, c. 379.)

§ 58-201.1. Standard Valuation Law. — (a) This section shall be known as the Standard Valuation Law.

(b) The Commissioner shall annually value, or cause to be valued, the reserve liabilities (hereinafter called reserves) for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurance company doing business in this State, except that in the case of an alien company, such valuation shall be limited to its United States business, and may certify the amount of such reserves, specifying the mortality table or tables, rate or rates of interest and methods (net level premium method or other) used in the calculation of such reserves. Group methods and approximate averages for fractions of a year or otherwise may be used in calculating such reserves and the valuation made by the company may be accepted by the Commissioner upon

such evidence of its correctness as the Commissioner may require. In lieu of the valuation of the reserves herein required of any foreign or alien company, he may accept any valuation made, or caused to be made, by the insurance supervisory official of any state or other jurisdiction when such valuation complies with the minimum standard herein provided and if the official of such state or jurisdiction accepts as sufficient and valid for all legal purposes the certificate of valuation of the Commissioner when such certificate states the valuation to have been made in a specified manner according to which the aggregate reserves would be at least as large as if they had been computed in the manner prescribed by the law of that state or jurisdiction.

(c) The minimum standard for the valuation of all such policies and contracts issued prior to the operative date of G.S. 58-201.2 shall be that provided by the laws in effect immediately prior to such date. The minimum standards for the valuation of all such policies and contracts issued on or after the operative date of G.S. 58-201.2 shall be the Commissioner's reserve valuation method defined in subsection (d), three and one-half percent (3½%) interest, and the following tables:

(1) For all ordinary policies of life insurance issued on the standard basis, excluding any disability and accidental death benefits in such policies, the Commissioner's 1941 Standard Ordinary Mortality Table for such policies issued prior to the operative date of subdivision (e)(2) of G.S. 58-201.2, and the Commissioner's 1958 Standard Ordinary Mortality Table for such policies issued on or after such operative date; provided that for any category of such policies issued on female risks all modified net premiums and present values referred to in this section may be calculated according to an age not more than three years younger than the actual age of the insured.

(2) For all industrial life insurance policies issued on the standard basis, excluding any disability and accidental death benefits in such policies the 1941 Standard Industrial Mortality Table for such policies issued prior to the operative date of subdivision (e)(3) of G.S. 58-201.2, and the Commissioner's 1961 Standard Industrial Mortality Table for such policies issued on or after such operative date.

(3) For individual annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies — the 1937 Standard Annuity Mortality Table or, at the option of the company, the Annuity Mortality Table for 1949, Ultimate, or any modification of either of these tables approved by the Commissioner.

(4) For group annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies — the Group Annuity Mortality Table for 1951, any modification of such table approved by the Commissioner, or, at the option of the company, any of the tables or modifications of tables specified for individual annuity and pure endowment contracts.

(5) For total and permanent disability benefits in or supplementary to ordinary policies or contracts — for policies or contracts issued on or after January 1, 1966, the tables of Period 2 disablement rates and the 1930 to 1950 termination rates of the 1952 Disability Study of the Society of Actuaries, with due regard to the type of benefit; for policies or contracts issued on or after January 1, 1961, and prior to January 1, 1966, either such tables or, at the option of the company, the Class (3) Disability Table (1926); and for policies issued prior to January 1, 1961, the Class (3) Disability Table (1926). Any such table shall, for active lives, be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(6) For accidental death benefits in or supplementary to policies — for policies issued on or after January 1, 1966, the 1959 Accidental Death Benefits Table; for policies issued on or after January 1, 1961, and prior to January 1, 1966, either such table or, at the option of the Company, the Inter-Company Double Indemnity Mortality Table; and for policies issued prior to January 1, 1961, the Inter-Company Double Indemnity Mortality Table. Either table shall be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(7) For group life insurance, life insurance issued on the substandard basis and other special benefits, such tables as may be approved by the Commissioner.

(d) Reserves according to the Commissioner's reserve valuation method, for the life insurance and endowment benefits of policies providing for a uniform amount of insurance and requiring the payment of uniform premiums shall be the excess, if any, of the present value, at the date of valuation, of such future guaranteed benefits provided for by such policies, over the then present value of any future modified net premiums therefor. The modified net premiums for any such policy shall be such uniform percentage of the respective contract premiums for such benefits that the present value, at the date of issue of the policy, of all such modified net premiums shall be equal to the sum of the then present value of such benefits provided for by the policy and the excess of (1) over (2), as follows:

(1) A net level annual premium equal to the present value, at the date of issue, of such benefits provided for after the first policy year, divided by the present value, at the date of issue, of an annuity of one per annum payable on the first and each subsequent anniversary of such policy on which a premium falls due; provided, however, that such net level annual premium shall not exceed the net level annual premium on the 19-year premium whole life plan for insurance of the same amount at an age one year higher than the age at issue of such policy.

(2) A net one year term premium for such benefits provided for in the first policy year.

Reserves according to the Commissioner's reserve valuation method for

(1) Life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums,

(2) Annuity and pure endowment contracts,

(3) Disability and accidental death benefits in all policies and contracts, and

(4) All other benefits, except life insurance and endowment benefits in life insurance policies,

Shall be calculated by a method consistent with the principles of this section, except that any extra premiums charged because of impairments or special hazards shall be disregarded in the determination of modified net premiums.

(e) In no event shall a company's aggregate reserves for all life insurance policies, excluding disability and accidental death benefits, issued on or after the operative date of G.S. 58-201.2, be less than the aggregate reserves calculated in accordance with the method set forth in subsection (d) and the mortality table or tables and rate or rates of interest used in calculating nonforfeiture benefits for such policies.

(f) Reserves for all policies and contracts issued prior to the operative date of G.S. 58-201.2 may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for all such policies and contracts than the minimum reserves required by the laws in effect immediately prior to such date.

Reserves for any category of policies, contracts or benefits as established by the Commissioner, issued on or after the operative date of G.S. 58-201.2, may be calculated, at the option of the company, according to any standards which

produce greater aggregate reserves for such category than those calculated according to the minimum standard herein provided, but the rate or rates of interest used shall not be higher than the corresponding rate or rates of interest used in calculating any nonforfeiture benefits provided for therein. Provided, however, that reserves for participating life insurance policies issued on or after the operative date of G.S. 58-201.2 may, with the consent of the Commissioner, be calculated according to a rate of interest lower than the rate of interest used in calculating the nonforfeiture benefits in such policies, with the further proviso that if such lower rate differs from the rate used in the calculation of the nonforfeiture benefits by more than one-half percent (½%), the company issuing such policies shall file with the Commissioner a plan providing for such equitable increases, if any, in the cash surrender values and nonforfeiture benefits in such policies as the Commissioner shall approve.

Any such company which at any time shall have adopted any standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard herein provided may, with the approval of the Commissioner, adopt any lower standard of valuation, but not lower than the minimum herein provided.

(g) If the gross premium charged by any life insurance company on any policy or contract is less than the net premium for the policy or contract according to the mortality table, rate of interest and method used in calculating the reserve thereon, there shall be maintained on such policy or contract a deficiency reserve in addition to all other reserves required by law. For each such policy or contract the deficiency reserve shall be the present value, according to such standard, of an annuity of the difference between such net premium and the premium charged for such policy or contract, running for the remainder of the premium-paying period. (1945, c. 379; 1959, c. 484, s. 1; 1961, c. 255, ss. 1-3; 1963, c. 791, ss. 1, 2.)

§ 58-201.2. Standard nonforfeiture provisions. — (a) This section shall be known as the Standard Nonforfeiture Law.

(b) In the case of policies issued on or after the operative date of this section, as defined in subsection (h), no policy of life insurance, except as stated in subsection (g), shall be issued or delivered in this State unless it shall contain in substance the following provisions, or corresponding provisions which in the opinion of the Commissioner are at least as favorable to the defaulting or surrendering policyholder:

(1) That, in the event of default in any premium payment after premiums have been paid for at least one full year in the case of ordinary insurance or three full years in the case of industrial insurance, the company will grant, upon proper request not later than 60 days after the due date of the premium in default, a paid-up nonforfeiture benefit on a plan stipulated in the policy, effective as of such due date, of such value as may be hereinafter specified.

(2) That, upon surrender of the policy within 60 days after the due date of any premium payment in default after premiums have been paid for at least three full years in the case of ordinary insurance or five full years in the case of industrial insurance, the company will pay, in lieu of any paid-up nonforfeiture benefit, a cash surrender value of such amount as may be hereinafter specified.

(3) That a specified paid-up nonforfeiture benefit shall become effective as specified in the policy unless the person entitled to make such election elects another available option not later than 60 days after the due date of the premium in default. Nothing herein shall prevent the use of an automatic premium loan provision.

(4) That, if the policy shall have become paid-up by completion of all premium payments or if it is continued under any paid-up nonforfeiture

benefit which became effective on or after the third policy anniversary in the case of ordinary insurance or the fifth policy anniversary in the case of industrial insurance, the company will pay, upon surrender of the policy within 30 days after any policy anniversary, a cash surrender value of such amount as may be hereinafter specified.

(5) A statement of the mortality table and interest rate used in calculating the cash surrender values and the paid-up nonforfeiture benefits available under the policy, together with a table showing the cash surrender value, if any, and paid-up nonforfeiture benefit, if any, available under the policy on each policy anniversary either during the first 20 policy years or during the term of the policy, whichever is shorter, such values and benefits to be calculated upon the assumption that there are no dividends or paid-up additions credited to the policy and that there is no indebtedness to the company on the policy.

(6) A brief and general statement of the method to be used in calculating the cash surrender value and the paid-up nonforfeiture benefit available under the policy on any policy anniversary with an explanation of the manner in which the cash surrender values and the paid-up nonforfeiture benefits are altered by the existence of any paid-up additions credited to the policy or any indebtedness to the company on the policy.

Any of the foregoing provisions or portions thereof not applicable by reason of the plan of insurance may, to the extent inapplicable, be omitted from the policy.

The company shall reserve the right to defer the payment of any cash surrender value for a period of six months after demand therefor with surrender of the policy.

(c) Any cash surrender value available under the policy in the event of default in a premium payment due on any policy anniversary, whether or not required by subsection (f), shall be an amount not less than the excess, if any, of the present value, on such anniversary, of the future guaranteed benefits which would have been provided for by the policy, including any existing paid-up additions, if there had been no default, over the sum of (i) the then present value of the adjusted premiums as defined in subsection (e), corresponding to premiums which would have fallen due on and after such anniversary, and (ii) the amount of any indebtedness to the company on the policy. Any cash surrender value available within 30 days after any policy anniversary under any policy paid up by completion of all premium payments or any policy continued under any paid-up nonforfeiture benefit, whether or not required by subsection (b), shall be an amount not less than the present value, on such anniversary, of the future guaranteed benefits provided for by the policy, including any existing paid-up additions, decreased by any indebtedness to the company on the policy.

(d) Any paid-up nonforfeiture benefit available under the policy in the event of default in a premium payment due on any policy anniversary shall be such that its present value as of such anniversary shall be at least equal to the cash surrender value then provided for by the policy or, if none is provided for, at least equal to that cash surrender value which would have been required by this section in the absence of the condition that premiums shall have been paid for at least a specified period.

(e) (1) Except as provided in the third paragraph of this subdivision, the adjusted premiums for any policy shall be calculated on an annual basis and shall be such uniform percentage of the respective premiums specified in the policy for each policy year, excluding any extra premiums charged because of impairments or special hazards, that the present value, at the date of issue of the policy, of all such adjusted premiums shall be equal to the sum of (i) the then present value of the

future guaranteed benefits provided for by the policy; (ii) two percent (2%) of the amount of insurance, if the insurance be uniform in amount, or of the equivalent uniform amount, as hereinafter defined, if the amount of insurance varies with duration of the policy; (iii) forty percent (40%) of the adjusted premium for the first policy year; (iv) twenty-five percent (25%) of either the adjusted premium for the first policy year or the adjusted premium for a whole life policy of the same uniform or equivalent uniform amount with uniform premiums for the whole of life issued at the same age for the same amount of insurance, whichever is less. Provided, however, that in applying the percentages specified in (iii) and (iv) above, no adjusted premium shall be deemed to exceed four percent (4%) of the amount of insurance or uniform amount equivalent thereto. The date of issue of a policy for the purpose of this subsection shall be the date as of which the rated age of the insured is determined.

In the case of a policy providing an amount of insurance varying with duration of the policy, the equivalent uniform amount thereof for the purpose of this section shall be deemed to be the uniform amount of insurance provided by an otherwise similar policy, containing the same endowment benefit or benefits, if any, issued at the same age and for the same term, the amount of which does not vary with duration and the benefits under which have the same present value at the date of issue as the benefits under the policy, provided, however, that in the case of a policy providing a varying amount of insurance issued on the life of a child under age 10, the equivalent uniform amount may be computed as though the amount of insurance provided by the policy prior to the attainment of age 10 were the amount provided by such policy at age 10.

The adjusted premiums for any policy providing term insurance benefits by rider or supplemental policy provision shall be equal to (i) the adjusted premiums for an otherwise similar policy issued at the same age without such term insurance benefits, increased, during the period for which premiums for such term insurance benefits are payable, by (ii) the adjusted premiums for such term insurance, the foregoing items (i) and (ii) being calculated separately and as specified in the first two paragraphs of this section except that, for the purposes of (ii), (iii) and (iv) of the first such paragraph, the amount of insurance or equivalent uniform amount of insurance used in the calculation of the adjusted premiums referred to in (ii) of this paragraph shall be equal to the excess of the corresponding amount determined for the entire policy over the amount used in the calculation of the adjusted premiums in (i).

Except as otherwise provided in subdivisions (2) and (3) of this subsection, all adjusted premiums and present values referred to in this section shall for all policies of ordinary insurance be calculated on the basis of the Commissioner's 1941 Standard Ordinary Mortality Table, provided that for any category of ordinary insurance issued on female risks, adjusted premiums and present values may be calculated according to an age not more than three years younger than the actual age of the insured, and such calculations for all policies of industrial insurance shall be made on the basis of the 1941 Standard Industrial Mortality Table. All calculations shall be made on the basis of the rate of interest, not exceeding three and one-half percent (3½%) per annum, specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits. Provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure

endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may not be more than one hundred and thirty percent (130%) of the rates of mortality according to such applicable table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the Commissioner.

(2) In the case of ordinary policies issued on or after the operative date of this subdivision (2) as defined herein, all adjusted premiums and present values referred to in this section shall be calculated on the basis of the Commissioner's 1958 Standard Ordinary Mortality Table and the rate of interest, not exceeding three and one-half percent (3½%) per annum, specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits, provided that for any category of ordinary insurance issued on female risks, adjusted premiums and present values may be calculated according to an age not more than three years younger than the actual age of the insured; provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than those shown in the Commissioner's 1958 Extended Term Insurance Table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the Commissioner.

After May 12, 1959, any company may file with the Commissioner a written notice of its election to comply with the provisions of this subdivision (2) after a specified date before January 1, 1966. After the filing of such notice, then upon such specified date (which shall be the operative date of this subdivision (2) for such company), this subdivision (2) shall become operative with respect to the ordinary policies thereafter issued by such company. If a company makes no such election, the operative date of this subdivision (2) for such company shall be January 1, 1966.

(3) In the case of industrial policies issued on or after the operative date of this subdivision (3) as defined herein, all adjusted premiums and present values referred to in this section shall be calculated on the basis of the Commissioner's 1961 Standard Industrial Mortality Table and the rate of interest, not exceeding three and one-half percent (3½%) per annum, specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits; provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than those shown in the Commissioner's 1961 Industrial Extended Term Insurance Table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the Commissioner.

After June 11, 1963, any company may file with the Commissioner a written notice of its election to comply with the provisions of this subdivision (3) after a specified date before January 1, 1968. After the filing of such notice, then upon such specified date (which shall be the operative date of this subdivision (3) for such company), this subdivision (3) shall become operative with respect to the industrial policies thereafter issued by such company. If a company makes no such

election, the operative date of this subdivision (3) for such company shall be January 1, 1968.

(f) Any cash surrender value and any paid-up nonforfeiture benefit, available under the policy in the event of default in a premium payment due at any time other than on the policy anniversary, shall be calculated with allowance for the lapse of time and the payment of fractional premiums beyond the last preceding policy anniversary. Any values referred to in subsections (c), (d) and (e) may be calculated upon the assumption that any death benefit is payable at the end of the policy year of death. The net value of any paid-up additions, other than paid-up term additions, shall be not less than the dividends used to provide such additions. Notwithstanding the provisions of subsection (c), additional benefits payable (i) in the event of death or dismemberment by accident or accidental means, (ii) in the event of total and permanent disability, (iii) as reversionary annuity or deferred reversionary annuity benefits, (iv) as term insurance benefits provided by a rider or supplemental policy provision to which, if issued as a separate policy, this section would not apply, (v) as term insurance on the life of a child or on the lives of children provided in a policy on the life of a parent of the child, if such term insurance expires before the child's age is 26, is uniform in amount after the child's age is one, and has not become paid up by reason of the death of a parent of the child, and (vi) as other policy benefits additional to life insurance and endowment benefits, and premiums for all such additional benefits, shall be disregarded in ascertaining cash surrender values and nonforfeiture benefits required by this section, and no such additional benefits shall be required to be included in any paid-up nonforfeiture benefits.

(g) The provisions of this section shall not apply to any industrial sick benefit insurance as defined in this Chapter, nor to any reinsurance, group insurance, pure endowment, annuity or reversionary annuity contract, nor to any term policy of uniform amount, or renewal thereof, of 20 years or less, for which uniform premiums are payable during the entire term of the policy, nor to any term policy of decreasing amount on which each adjusted premium, calculated as specified in subsection (e), is less than the adjusted premium so calculated, on such 20-year term policy issued at the same age and for the same initial amount of insurance, nor to any policy which shall be delivered outside this State through an agent or other representative of the company issuing the policy.

(h) After March 6, 1945, any company may file with the Commissioner a written notice of its election to comply with the provisions of this section after a specified date before January 1, 1950. After the filing of such notice then upon such specified date (which shall be the operative date for such company) this section shall become operative with respect to the policies thereafter issued by such company. If a company makes no such election, the operative date of this section for such company shall be January 1, 1950. (1945, c. 379; 1959, c. 484, s. 2; 1961, c. 255, ss. 4-7; 1963, c. 791, ss. 3, 4.)

§ 58-202. Reinsurance of companies regulated. — The receiver of any life insurance company organized under the laws of this State, when the assets of the company are sufficient for that purpose, and the consent of two thirds of its policyholders has been secured in writing, may reinsure all the policy obligations of such company in some other solvent life insurance company, or, when the assets are insufficient to secure the reinsurance of all the policies in full, he may reinsure such a percentage of each and every policy outstanding as the assets will secure; but there must be no preference or discrimination as against any policyholder, and the contract for such reinsurance by the receiver must be approved by the Commissioner of Insurance of this State before it has effect. (1899, c. 54, s. 58; 1903, c. 536, s. 9; Rev., s. 4778; C. S., s. 6462; 1945, c. 379.)

§ 58-203: Repealed by Session Laws 1945, c. 379.

§ 58-204. Insurable interest as between stockholders, partners, etc. — Where two or more persons have heretofore contracted or hereafter contract with one another for the purchase, at the death of one, by the survivor or survivors, of the stock, share or interest of the deceased in any corporation, partnership or business association of any kind, the person or persons making the contract of purchase shall be deemed to have, and are hereby declared to have, an insurable interest in the life or lives of the person or persons contracting to sell. (1941, c. 201; 1969, c. 751, s. 44.)

Editor's Note. — For comment on this section, see 19 N.C.L. Rev. 490.

§ 58-204.1. Insurable interest in life and physical ability of employee or agent. — An employer, whether a partnership, joint venture, business trust, mutual association, corporation, any other form of business organization, or one or more individuals, or any religious, educational, or charitable corporation, institution or body, has an insurable interest in and the right to insure the physical ability or the life, or both the physical ability and the life, of an employee for the benefit of such employer. Any principal shall have a life insurable interest in and the right to insure the physical ability or the life, or both the physical ability and the life, of an agent for the benefit of such principal. (1951, c. 283, s. 1; 1957, c. 1086.)

Editor's Note. — For brief comment on this and the three following sections, see 29 N.C.L. Rev. 401.

§ 58-204.2. Insurable interest in life and physical ability of partner. — Any partner has an insurable interest in and the right to insure the physical ability or the life, or both the physical ability and the life, of any other partner or partners who are members of the same partnership for his benefit, either alone or jointly with another partner or partners of the same partnership. A partnership has a like insurable interest in and the right to insure the physical ability or the life, or both the physical ability and the life, of one or more partners of the partnership. (1951, c. 283, s. 2.)

§ 58-204.3. Insurable interest in life of person covered by pension plan. — A trustee under a written document providing for a pension plan for payments of money or delivery of other benefits to be made to persons eligible to receive them under the terms and provisions of such written document shall be deemed to have and is hereby declared to have an insurable interest in the lives of any person or persons covered by the pension plan, to the extent that contracts or policies of insurance are in conformity with and in furtherance of the purposes of the pension plan. (1951, c. 283, s. 2½.)

Stated in Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

§ 58-204.4. Construction of §§ 58-204.1 to 58-204.3. — Sections 58-204.1 to 58-204.3 shall not be construed to limit or abridge any insurable interest or right to insure now existing at common law or by statute, and shall be construed liberally to sustain insurable interest, whether as a declaration of existing law or as an extension of or addition to existing law. (1951, c. 283, s. 3.)

§ 58-205. Rights of beneficiaries. — When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other

than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, is entitled to its proceeds against the creditors and representatives of the person effecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, and whether the assignment or transfer is made by her husband or by any other person, inures to her separate use and benefit and to that of her children, if she dies in his lifetime. (Const., Art. X, s. 7; 1899, c. 54, s. 59; Rev., ss. 4771, 4772; C. S., s. 6464.)

Cross References. — See § 58-206 and note. As to wife insuring life of husband, see § 52-9. As to receipt and disbursement of insurance for minors and incapacitated adults, see § 7A-111.

Editor's Note. — See 13 N.C.L. Rev. 95.

Section 58-206 is actually an amendment of this section. In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Section 58-206 supersedes this section where there are variations or conflicts. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

Change of Beneficiary. — A beneficiary in a policy of life insurance has only a contingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so, and where upon the death of the beneficiary the insured changes the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors may not claim that the change in the beneficiary was void as being fraudulent as to them. Teague v. Pilot Life Ins. Co., 200 N.C. 450, 157 S.E. 421 (1931).

Where a policy of life insurance reserves the right in the insured to change the beneficiary therein named, the named beneficiary has only a contingent interest therein, and the insured may change the beneficiary in accordance with the terms of the policy at any time, and where the insured has done all that is possible under the circumstances to change the beneficiary in accordance with the terms of the policy, such change of beneficiary will be given effect under the principle that equity regards as done that which ought to have been done, and where the insured's wife is thus made the beneficiary the proceeds inure to her sole benefit free from the claims of his creditors. Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933).

Same — By Insolvent Insured. — By reason of the provisions of this statute, it was held in Pearsall v. Bloodworth, 194 N.C. 628, 140 S.E. 303 (1927), that where the insured in a policy of life insurance, payable at his death to his estate, procured a change of beneficiary in said policy in accordance with its provisions, by which his wife became the beneficiary, such change was not void as against creditors although at the date of the change made at his request the insured was insolvent. Teague v. Pilot Life Ins. Co., 200 N.C. 450, 157 S.E. 421 (1931); Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933).

Same — Change Not Effected. — Where deceased had expressed an intention to change the beneficiary in a policy of insurance on his life, but had done no affirmative act to effect such change, the court's judgment that no change of beneficiary had been effected was upheld. Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933).

Where Beneficiary Dead. — When A insured his life for the benefit of "his wife and children," and at the time the policy was issued he had no wife, but did have two children, one of whom died before A, it was held that upon A's death the money due on the policy should be divided between the surviving child and the administrator of the dead child. The insertion of "his wife" as a beneficiary, when he had no wife living, was a nullity. Hooker v. Sugg, 102 N.C. 115, 8 S.E. 919 (1889).

Applied in Russell v. Owen, 203 N.C. 262, 165 S.E. 687 (1932).

Cited in Philadelphia Life Ins. Co. v. Crosland-Cullen Co., 234 F.2d 780 (4th Cir. 1956).

§ 58-205.1. Minors may enter into insurance or annuity contracts and have full rights, powers and privileges thereunder. — All minors in North Carolina of the age of 15 years and upwards shall have full power and authority to make contracts of insurance or annuity with any life insurance company authorized to do business in the State of North Carolina, either domestic or foreign, and to exercise all the powers, rights, and privileges of ownership conferred upon

them under the terms of any and all such contracts applied for by and issued to them, and with full power to surrender, assign, modify, pledge, or change such contracts, and to receive any dividends thereon and generally to have the full power and authority in the premises that persons 18 years and upwards could and would have relative to any and all such contracts. (1945, c. 379; 1947, c. 721; 1971, c. 1231, s. 1.)

Stated in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud. — If a policy of insurance is effected by any person on his own life or on another life in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or the executor or administrator of such insured or of the person effecting such insurance, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: Provided, that subject to the statute of limitations, the amount of any premiums for said insurance paid with the intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms unless, before such payment, the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed. (1931, c. 179, s. 1; 1947, c. 721.)

Cross Reference. — See § 58-205 and note.

Constitutionality. — This section exempts the cash surrender values of policies of life insurance in which the "wife and/or children" of the insured (bankrupt) are designated beneficiaries, and N.C. Const., Art. X, § 5, does not conflict with and nullify this section in those instances where the "wife and/or children" are designated beneficiaries but on the contrary is in accord therewith. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

North Carolina Const., Art. X, § 5, was adopted for the express purpose of protecting insurance for wives and children from creditors during the life of the insured. The intent of the General Assembly and of the electorate would be thwarted if § 5 were construed as providing a lesser benefit than that provided by this section for the "wife and/or children." Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

Section Amendatory of § 58-205. — This section, in form an independent statute, is actually an amendment of § 58-205. It makes six changes in the statutory exemption of the beneficiary of a life insurance policy from the claims of creditors of the insured. It leaves out the requirement of § 58-205 that the beneficiary to be so protected must have an insurable interest. This is said to be undesirable in the case where the insurance is effected by one on the life of another for a third person. Vance, Insurance, (2d ed.) p. 154, n. 1. The section extends the exemption to include beneficiaries made such by a change of beneficiaries and to include assignees of the policy. Compare, as to the need for an insurable interest in the assignee, Powell v. Dewey, 123 N.C. 103, 31 S.E. 381 (1898); Hinton v. Insurance Co., 135 N.C. 314, 47 S.E. 474 (1904), where wife assigned insurance payable to her estate to her husband's creditors; Hardy v. Aetna Life Ins. Co., 152 N.C. 286, 67 S.E. 767 (1910); Hardy v. Aetna Life Ins. Co., 154 N.C. 430, 70 S.E. 828 (1911), where uncle assigned insurance payable to his estate to nephew. As to bona fide assignment, see Johnson v. Mutual Benefit Life Ins. Co., 157 N.C. 106, 72 S.E. 847 (1911); McNeal v. Life & Cas. Ins. Co., 192 N.C. 450, 135 S.E. 300 (1926). See 9 N.C.L. Rev. 377.

This section is actually an amendment of § 58-205. In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

The significance of this section is to be considered in the light of the general rule of statutory construction that where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense unless by qualifying or explanatory addition the contrary intent of the legislature is made clear. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

"Proceeds" or "Proceeds and Avails". — The words "proceeds" or "proceeds and avails" when used in life insurance exemption statutes comprehend the protection of cash surrender values and other values built up during the life of the policies as well as the death benefits. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

This section supersedes § 58-205 where there are variations or conflicts. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

Cash Surrender Value Exempt. — The cash surrender value of a policy of life insurance is exempt from the claims of the trustee in bankruptcy of the insured even though the right to change the beneficiary is reserved. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970). But see In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

A trustee in bankruptcy is not entitled to the cash surrender value of a life insurance policy in which the wife is the named beneficiary notwithstanding the insured (bankrupt) has reserved the right to change the beneficiary. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970). But see In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

The cash surrender value of a life insurance policy issued on the life of a bankrupt for the benefit of his wife, with the bankrupt reserving the right to change the beneficiary, is not an asset of the bankrupt's estate and is therefore exempt from the claims of the trustee in bankruptcy. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970). But see In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Unquestionably, under this section, considered alone, the "proceeds and avails," including the cash surrender value, of a policy in which the wife is named as beneficiary, are exempt from the claims of the trustee in bankruptcy, "whether or not the right to change the beneficiary is reserved or permitted." Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970). But see In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Wives and children of bankrupts are protected from claims of the bankrupt's creditors, both during his life and at his death, if life policies are for their sole benefit. In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

Third-Party Beneficiaries Protected. — The protection afforded by this section is not limited to any particular class of beneficiaries. It relates to a policy on the life of the insured payable to any third-party beneficiary. Home Security Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970).

Statute Not Retroactive. — This section cannot affect policies written before the effective date of the statute. Commissioner of Banks ex rel. Goldsboro Sav. & Trust Co. v. Yelverton, 204 N.C. 441, 168 S.E. 505 (1933).

Cited in Meadows Fertilizer Co. v. Godley, 204 N.C. 243, 167 S.E. 816 (1933); Philadelphia Life Ins. Co. v. Crosland-Cullen Co., 234 F.2d 780 (4th Cir. 1956).

§ 58-207. Notice of nonpayment of premium required before forfeiture. — No life insurance corporation doing business in this State shall, within one year after the default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed, except policies on which premiums are payable monthly or at shorter intervals and except group insurance contracts and term insurance contracts for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured, or to the assignee or owner of the policy, or to the person designated in writing by such insured, assignee or owner, if notice of the assignment has been given to the corporation, at his or her last known post-office

address in this State, by the corporation or by any officer thereof or person appointed by it to collect such premium, at least 15 and not more than 45 days prior to the day when the same is payable, as regards policies which do not contain a provision for grace or are not entitled to grace in the payment of premiums and at least five and not more than 45 days prior to the day when the same is payable as regards policies which do contain a provision for grace or are entitled to grace in the payment of premiums. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued. (1909, c. 884; C. S., s. 6465; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379.)

The insurance company must give notice that the premiums are due and the policy is not subject to forfeiture until the statutory time after such notice is given. Aiken v. Atlantic Life Ins. Co., 173 N.C. 400, 92 S.E. 184 (1917).

New Policy in Lieu of Policy Issued before Statute. — Where an old policy issued before this statute was withdrawn and a new policy issued after this statute, notice must be given in accordance with the statute in order to have a legal forfeiture. Garland v. Jefferson Std. Life Ins. Co., 179 N.C. 67, 101 S.E. 616 (1919).

Notice Is Prerequisite to Forfeiture Unless Premiums Are Payable Monthly. — Notice that any premium or premiums are in default is a prerequisite to forfeiture of the policy under this section except as to policies on which premiums are payable monthly. Wiles v. Nationwide Life Ins. Co., 334 F.2d 296 (4th Cir. 1964).

Notice as to Extension Notes Not Required. — Where there has been a default and forfeiture and the insured has furnished a health certificate and secured a reinstatement and an extension of time for payment, it is not necessary to again give the statutory notice of the time when the extension notes will become due. Philadelphia Life Ins. Co. v. Hayworth, 296 F. 339 (4th Cir. 1924).

Notice of Next Premium Not Waiver of Forfeiture. — Where a policy of life insurance is forfeited for failure to pay at maturity a note given for extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with this section, which notice does not demand payment of the balance due on the extended premium, is not a waiver by the insurer of forfeiture. Sellers v. Life Ins. Co., 205 N.C. 355, 171 S.E. 328 (1933).

Tender Need Not Be Kept Open. — After tender and failure of insurer to accept the tender the insured does not have to keep the tender open. An application for reinstatement does not alter the insured's rights, if the policy has not been forfeited. Aiken v. Atlantic Life Ins. Co., 173 N.C. 400, 92 S.E. 184 (1917).

Limitation of Actions. — In an action for the recovery of premiums paid on forfeited policies issued on the lives of relatives, where the evidence was to the effect that these policies were canceled for the nonpayment of premiums on March 19, 1936, and that summons was issued February 17, 1942, the action was barred by this section and § 1-52. Bynum v. Life Ins. Co., 222 N.C. 742, 24 S.E.2d 613 (1943).

Cited in Felts v. Shenandoah Life Ins. Co., 221 N.C. 148, 19 S.E.2d 259 (1942); Abrams v. Metropolitan Life Ins. Co., 223 N.C. 500, 27 S.E.2d 148 (1943); Abrams v. Metropolitan Life Ins. Co., 224 N.C. 1, 29 S.E.2d 130 (1944).

§ 58-208. Minimum premium rates for assessment life insurance companies. — No assessment life insurance corporation, organization or association of any kind issuing policies or contracts upon the life of any resident of this State shall hereafter be organized or licensed by the Commissioner of Insurance unless such corporation, organization or association adopt premium rates based upon the attained age of the assured at the time of issuance of the contract and such rates shall not be less than those fixed by the American Experience Table of Mortality or any other recognized table of mortality approved by the Commissioner of Insurance. Nothing contained in this section shall be construed to affect burial associations regulated under G.S. 58-224 to 58-241, or railroad burial associations. (1939, c. 161.)

Editor's Note. — For comment on this section, see 17 N.C.L. Rev. 362.

§ 58-209. Distribution of surplus in mutual companies. — Every life insurance company doing business in this State upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof, may distribute the surplus annually, or once in two, three, four, or five years, as its directors determine. No payments shall be made to policyholders by way of dividends unless the company possesses admitted assets in the amount of such payments in excess of its capital and/or minimum required surplus and all other liabilities. (1903, c. 536, s. 10; Rev., s. 4776; C. S., s. 6466; 1945, c. 379.)

§ 58-210. Group life insurance defined. — No policy of group life insurance shall be delivered in this State unless it conforms to one of the following descriptions:

(1) A policy issued to an employer, or to the trustee of a fund established by an employer, which employer or trustee shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer subject to the following requirements:

a. The employees eligible for insurance under the policy shall be all of the employees of the employer, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term "employees" shall include the employees of one or more subsidiary corporations, and the employees, individual proprietors, and partners of one or more affiliated corporations, proprietors or partnerships if the business of the employer and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract, or otherwise. The policy may provide that the term "employees" shall include the individual proprietor or partners if the employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include retired employees. The term "employer" as used herein may be deemed to include any county, municipality, or the proper officers, as such, of any unincorporated municipality or any department, division, agency, instrumentality or subdivision of a county, unincorporated municipality or municipality. In all cases where counties, municipalities or unincorporated municipalities or any officer, agent, division, subdivision or agency of the same have heretofore entered into contracts and purchased group life insurance for their employees, such transactions, contracts and insurance and the purchase of the same is hereby approved, authorized and validated.

b. The premium for the policy shall be paid by the policyholder, either wholly from the employer's funds or funds contributed by him, or

partly from such funds and partly from funds contributed by the insured employees. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured employees. A policy on which part of the premium is to be derived from funds contributed by the insured employees may be placed in force only if at least seventy-five percent (75%) of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured employees must insure all eligible employees, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy must cover at least 10 employees at date of issue.

d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employees or by the employer or trustee. No policy may be issued which provides insurance on any employee which together with any other insurance under any group life insurance policy or policies issued to the employer or to the trustee of a fund established in whole or in part by the employer exceeds one hundred thousand dollars ($100,000), except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.

(2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:

a. The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in installments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract or otherwise.

b. The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors or identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations outstanding at its date of issue without evidence of individual insurability unless at least seventy-five percent (75%) of the then eligible debtors elect to pay the required charges. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if

less than seventy-five percent (75%) of the new entrants become insured.

d. The amount of life insurance on the life of any debtor shall at no time exceed the amount owed by him which is repayable in installments to the creditor, or ten thousand dollars ($10,000), whichever is less.

e. The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.

(3) A policy issued to a labor union, which shall be deemed the policyholder, to insure members of such union for the benefit of persons other than the union or any of its officials, representatives or agents, subject to the following requirements:

a. The members eligible for insurance under the policy shall be all of the members of the union, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the union, or both.

b. The premium for the policy shall be paid by the policyholder, either wholly from the union's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least seventy-five percent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy must cover at least 25 members at date of issue.

d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the union. No policy may be issued which provides insurance on any union member which together with any other insurance under any group life insurance policies, issued to the union exceeds one hundred thousand dollars ($100,000).

(4) A policy issued to the trustee of a fund established by two or more employers in the same industry or kind of business or by two or more labor unions, which trustee shall be deemed the policyholder, to insure employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following requirements:

a. The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to memberships in the unions, or to both. The policy may provide that the term "employees" shall include the individual proprietor or partners if an employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include the trustee or the employees of the trustee, or both, if their duties are principally connected with such

trusteeship. The policy may provide that the term "employees" shall include retired employees.

b. The premium for the policy shall be paid by the trustee wholly from funds contributed by the employers of the insured persons. The policy must insure all eligible persons, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

c. The policy must cover at least 100 persons at date of issue.

d. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the insured persons or by the policyholder, employers, or unions. No policy may be issued which provides insurance on any person, which together with any other insurance under any group life insurance policy or policies issued to the employers, or any of them, or to the trustee of a fund established in whole or in part by the employers, or any of them, exceeds one hundred thousand dollars ($100,000), except that this limitation shall not apply to amounts of group permanent life insurance issued in connection with a pension or profit-sharing plan.

(5) A policy issued to an association of persons having a common professional or business interest, which association shall be deemed the policyholder, to insure members of such association for the benefit of persons other than the association or any of its officials, representatives or agents, subject to the following requirements:

a. Such association shall have had an active existence for at least two years immediately preceding the purchase of such insurance, was formed for purposes other than procuring insurance and does not derive its funds principally from contributions of insured members toward the payment of premiums for the insurance.

b. The members eligible for insurance under the policy shall be all of the members of the association or all of any class or classes thereof determined by conditions pertaining to their employment, or the membership in the association, or both. The policy may provide that the term "members" shall include the employees of members, if their duties are principally connected with the member's business or profession.

c. The premium for the policy shall be paid by the policyholder, either wholly from the association's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance, nor if the Commissioner finds that the rate of such contributions will exceed the maximum rate customarily charged employees insured under like group life insurance policies issued in accordance with the provisions of subdivision (1). A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least seventy-five percent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

d. The policy must cover at least 25 members at date of issue.

e. The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the association. No policy may be issued which provides insurance on any member which together with any other insurance under any group life insurance policies issued to the association exceeds one hundred thousand dollars ($100,000).

(6) Notwithstanding the provisions of this section, or any other provisions of law to the contrary, a policy may be issued to the employees of the State or any other political subdivision where the entire amount of premium therefor is paid by such employees. (1925, c. 58, s. 1; 1931, c. 328; 1943, c. 597, s. 1; 1947, c. 834; 1951, c. 800; 1955, c. 1280; 1957, c. 998; 1959, c. 287; 1965, c. 869; 1971, c. 516; 1973, c. 249.)

Editor's Note. — The 1973 amendment inserted "life" preceding "insurance" and substituted "ten thousand dollars ($10,000)" for "$5,000" in paragraph d of subdivision (2).

For comment on the former section and amendments thereto, see 3 N.C.L. Rev. 145; 12 N.C.L. Rev. 167; 21 N.C.L. Rev. 355. For comment on the 1947 amendment, see 25 N.C.L. Rev. 432.

Inapplicability of Statutory Limit on Amount of Group Life Insurance. — See opinion of Attorney General to Mr. A.C. Barefoot, Jr., Chairman, Teachers' and State Employees' Benefits Study Commission, 40 N.C.A.G. 631 (1970).

Quoted in Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

Cited in Clayton v. Prudential Ins. Co. of America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

§ 58-211. Group life insurance standard provisions. — No policy of group life insurance shall be delivered in this State unless it contains in substance the following provisions, or provisions which in the opinion of the Commissioner are more favorable to the persons insured, or at least as favorable to the persons insured and more favorable to the policyholder, provided, however, (i) that subdivisions (6) to (10) inclusive shall not apply to policies issued to a creditor to insure debtors of such creditor; (ii) that the standard provisions required for individual life insurance policies shall not apply to group life insurance policies; and (iii) that if the group life insurance policy is on a plan of insurance other than the term plan, it shall contain a nonforfeiture provision or provisions which in the opinion of the Commissioner is or are equitable to the insured persons and to the policyholder, but nothing herein shall be construed to require that group life insurance policies contain the same nonforfeiture provisions as are required for individual life insurance policies:

(1) A provision that the policyholder is entitled to a grace period of 31 days for the payment of any premium due except the first, during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the policy. The policy may provide that the policyholder shall be liable to the insurer for the payment of a pro rata premium for the time the policy was in force during such grace period.

(2) A provision that the validity of the policy shall not be contested, except for nonpayment of premiums, after it has been in force for two years from its date of issue; and that no statement made by any person insured under the policy relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made after such insurance has been in force prior to the contest for a period of two years during such person's lifetime nor unless it is contained in a written instrument signed by him.

(3) A provision that a copy of the application, if any, of the policyholder shall be attached to the policy when issued, that all statements made by the policyholder or by the persons insured shall be deemed representations and not warranties, and that no statement made by any person insured shall be used in any contest unless a copy of the instrument containing the statement is or has been furnished to such person or to his beneficiary.

(4) A provision setting forth the conditions, if any, under which the insurer reserves the right to require a person eligible for insurance to furnish evidence of individual insurability satisfactory to the insurer as a condition to part or all of his coverage.

(5) A provision specifying an equitable adjustment of premiums or of benefits or of both to be made in the event the age of a person insured has been misstated, such provision to contain a clear statement of the method of adjustment to be used.

(6) A provision that any sum becoming due by reason of the death of the person insured shall be payable to the beneficiary designated by the person insured, subject to the provisions of the policy in the event there is no designated beneficiary as to all or any part of such sum living at the death of the person insured, and subject to any right reserved by the insurer in the policy and set forth in the certificate to pay at its option a part of such sum not exceeding two hundred fifty dollars ($250.00) to any person appearing to the insurer to be equitably entitled thereto by reason of having incurred funeral or other expenses incident to the last illness or death of the person insured.

(7) A provision that the insurer will issue to the policyholder for delivery to each person insured an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom the insurance benefits are payable, and the rights and conditions set forth in (8), (9) and (10) following.

(8) A provision that if the insurance, or any portion of it, on a person covered under the policy ceases because of termination of employment or of membership in the class or classes eligible for coverage under the policy, such person shall be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits, provided application for the individual policy shall be made, and the first premium paid to the insurer, within 31 days after such termination, and provided further that,

a. The individual policy shall, at the option of such person, be on any one of the forms, except term insurance, then customarily issued by the insurer at the age and for the amount applied for;

b. The individual policy shall be in an amount not in excess of the amount of life insurance which ceases because of such termination, provided that any amount of insurance which shall have matured on or before the date of such termination as an endowment payable to the person insured, whether in one sum or in installments or in the form of an annuity, shall not, for the purposes of this provision, be included in the amount which is considered to cease because of such termination; and

c. The premium on the individual policy shall be at the insurer's then customary rate applicable to the form and amount of the individual policy, to the class of risk to which such person then belongs, and to his age attained on the effective date of the individual policy.

(9) A provision that if the group policy terminates or is amended so as to terminate the insurance of any class of insured persons, every person

insured thereunder at the date of such termination whose insurance terminates and who has been so insured for at least five years prior to such termination date shall be entitled to have issued to him by the insurer an individual policy of life insurance, subject to the same conditions and limitations as are provided by (8) above, except that the group policy may provide that the amount of such individual policy shall not exceed the smaller of (i) the amount of the person's life insurance protection ceasing because of the termination or amendment of the group policy, less the amount of any life insurance for which he is or becomes eligible under any group policy issued or reinstated by the same or another insurer within 31 days after such termination, and (ii) two thousand dollars ($2,000).

(10) A provision that if a person insured under the group policy dies during the period within which he would have been entitled to have an individual policy issued to him in accordance with (8) or (9) above and before such an individual policy shall have become effective, the amount of life insurance which he would have been entitled to have issued to him under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made. (1925, c. 58, s. 2; 1943, c. 597, s. 2; 1947, c. 834.)

Editor's Note. — For comment on the 1943 amendment, see 21 N.C.L. Rev. 355; on the 1947 amendment, see 25 N.C.L. Rev. 435.

This section relates to a policy of life insurance delivered in this State. Clayton v. Prudential Ins. Co. of America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

Applied in Haneline v. Turner White Casket Co., 238 N.C. 127, 76 S.E.2d 372 (1953).

Cited in Conger v. Travelers Ins. Co., 266 N.C. 496, 146 S.E.2d 462 (1966); Newsome v. Prudential Ins. Co. of America, 4 N.C. App. 161, 166 S.E.2d 487 (1969).

§ 58-211.1. Group annuity contracts defined; requirements. — Any policy or contract, except a joint, reversionary or survivorship annuity contract, whereby annuities are payable dependent upon the continuation of the lives of more than one person, shall be deemed a group annuity contract. The person, firm or corporation to whom or to which such contract is issued, as herein provided, shall be deemed the holder of such contract. The term "annuitant" as used herein, refers to any person upon whose continued life such annuity is dependent. No authorized insurer shall deliver or issue for delivery in this State any group annuity contract except upon a group of annuitants which conforms to the following: under a contract issued to an employer, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, the stipulated payments on which shall be paid by the holder of such contract either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the employees covered by such contract, and providing a plan of retirement annuities under a plan which permits all of the employees of such employer or of any specified class or classes thereof to become annuitants. Any such group of employees may include retired employees, and may include officers and managers as employees, and may include the employees of subsidiary or affiliated corporations of a corporation employer, and may include the individual proprietors, partners and employees of affiliated individuals and firms controlled by the holders through stock ownership, contract or otherwise. (1947, c. 721.)

Editor's Note. — For comment on this section, see 25 N.C.L. Rev. 437.

§ 58-211.2. Employee life insurance defined. — Employee life insurance is hereby declared to be that plan of life insurance other than salary savings life insurance under which individual policies are issued to the employees of any employer where such policies are issued on the life of more than one employee at date of issue. Premiums for such policies shall be paid by the employer or the trustee of a fund established by the employer either wholly from the employer's funds, or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. (1947, c. 721; 1957, c. 1008.)

Editor's Note. — For comment on this section, see 25 N.C.L. Rev. 436.

§ 58-211.3. Assignment of interest in group policies and annuity contracts. — Any individual insured under a group insurance policy or group annuity contract shall have the right, unless expressly prohibited under the terms of the policy or contract of insurance, to assign to any other person his rights and benefits under the policy or contract, including, but not limited to the right to designate the beneficiary or beneficiaries and the right of conversion guaranteed by G.S. 58-211, and, subject to the provisions of the policy relating to assignments thereunder, any such assignment, made either before or after April 28, 1969, shall be valid for the purpose of vesting in the assignee all such rights and benefits so assigned. (1969, c. 319.)

§ 58-212. Voting power under policies of group life insurance. — In every group policy issued by a domestic life insurance company, the employer shall be deemed to be the policyholder for all purposes within the meaning of this Chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. (1925, c. 58, s. 3.)

§ 58-213. Exemption from execution. — No policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other person who may have a right thereunder, either before or after payment; but the proceeds thereof, when made payable to the estate of the employee insured, shall constitute a part of the estate of such employee available for the payment of debts. (1925, c. 58, s. 4; 1957, c. 1361.)

ARTICLE 23.

Registered Policies.

§ 58-214. Deposits to secure registered policies. — Any life insurance company, incorporated under the laws of this State, may deposit with the Commissioner securities of the kind authorized for the investment of the funds of life insurance companies, which shall be legally transferred by it to him as Commissioner and his successors for the common benefit of all the holders of its "registered" policies and annuity bonds issued under the provisions of this Article; and these securities shall be held by him and his successors in office in trust for the purposes and objects specified herein.

All securities offered to the Commissioner for deposit under this section shall be received and held pursuant to regulations promulgated by the Commissioner. (1905, c. 504, s. 12; Rev., s. 4780; 1909, c. 920, ss. 1, 2; 1911, c. 140, s. 1; 1917, c. 191, s. 2; C. S., s. 6467; 1945, c. 379.)

Cross References. — As to investments in bonds guaranteed by the United States, see § 53-44. As to investments in bonds and notes secured by mortgages insured by the Secretary of Housing and Urban Development, etc., see § 53-45. See also § 53-60 as to investments in federal farm loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

§ 58-215. Additional deposits may be required. — Each company which has made deposits herein provided for shall make additional deposits from time to time, as the Commissioner of Insurance prescribes, in amounts of not less than five thousand dollars ($5,000) and of such securities as are described in the preceding section [G.S. 58-214], so that the admitted value of the securities deposited shall equal the net value of the registered policies and annuity bonds issued by the company, less such liens not exceeding such value as the company has against it. The Commissioner shall annually value or cause to be valued such policies and shall prepare an estimate based upon probable changes in the minimum amounts to be kept on deposit for each month of the ensuing year. (1905, c. 504, s. 15; Rev., s. 4781; 1909, c. 920, s. 3; 1911, c. 140, s. 2; 1917, c. 191, s. 3; C. S., s. 6468; 1945, c. 379.)

§ 58-216. Withdrawal of deposits. — Any such company whose deposits exceed the net value of all registered policies and annuity bonds it has in force, less such liens not exceeding such value as the company holds against them, may withdraw such excess or it may withdraw any of such securities at any time by depositing in their place others of equal value and of the character authorized by law; and as long as such company remains solvent and keeps up its deposits, as herein required, it may collect the interest and coupons on the securities deposited as they accrue; and any life insurance company may withdraw such securities by and with the consent of the policyholder only; and in case of such withdrawal, the certificate of registration in each case must be surrendered for cancellation, or a receipt from the policyholder, satisfactory to the Commissioner of Insurance, must be produced before such withdrawal of deposits shall be allowed. (1905, c. 504, s. 18; Rev., s. 4782; 1911, c. 134; C. S., s. 6469.)

§ 58-217: Repealed by Session Laws 1945, c. 379.

§ 58-218. Record of securities kept by Commissioner; deficit made good. — The Commissioner of Insurance shall keep a careful record of the securities deposited by each company, and when furnishing the annual certificates of value required in this Article, he may enter thereon the face and market value of the securities deposited by such company. If at any time it appears from such certificate or otherwise that the value of securities held on deposit is less than the net value of the registered policies and annuity bonds issued by such companies, it is not lawful for the Commissioner of Insurance to execute the certificate on any additional policies or annuity bonds of such company until it has made good the deficit. If any company fails or neglects to make such deposits for 60 days the Commissioner may suspend its license to do business until such deposit be made. (1905, c. 504, s. 16; Rev., s. 4784; C. S., s. 6471; 1945, c. 379.)

§ 58-219. Registered policies certified. — After making the deposits provided for in this Article no company may issue a policy of insurance or endowment or an annuity bond known or designated as "registered" unless it has upon its face a certificate in the following words: "This policy or annuity bond is registered and secured by pledge of bonds, stocks, or securities deposited with this Department as provided by law," which certificate shall be signed by the Commissioner of Insurance and sealed with the seal of his office. Such policies and bonds shall be known as "registered" policies and annuity bonds, and a sample copy of such kind, class, and issue shall be kept in the office of the Commissioner of Insurance. All policies and bonds of each kind and class issued, and the copies thereof, filed in the office of the Commissioner of

Insurance must have imprinted thereon some appropriate designating letter, combination of letters or terms identifying the special forms of contract, together with the year of adoption of such form, and whenever any change or modification is made in the form of contracts, policy, or bond, the designating letters or terms and year of adoption thereon shall be changed accordingly. (1905, c. 504, s. 13; Rev., s. 4785; C. S., s. 6472.)

§§ 58-220, 58-221: Repealed by Session Laws 1945, c. 379.

§ 58-222. Power of Commissioner in case of insolvency. — If at any time the affairs of a life insurance company which has deposited securities under the provisions of this Article, in the opinion of the Commissioner of Insurance, appear in such condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the Commissioner of Insurance may take such proceedings against the company as are authorized by law to be taken against other insolvent companies, and said companies are in all respects subject to the provisions of law affecting other companies. (1905, c. 504, s. 20; Rev., s. 4788; C. S., s. 6475.)

§ 58-223. Fees for registering policies. — Every company making deposits under the provisions of this Article must pay to the Commissioner of Insurance for each certificate on registered policies or annuity bonds, including seal, a fee of fifty cents (50¢) for those exceeding ten thousand dollars ($10,000) in amount and twenty-five cents (25¢) for all under ten thousand dollars ($10,000) in amount, except policies for one hundred dollars ($100.00) and not exceeding five hundred dollars ($500.00) the fee shall be fifteen cents (15¢); for policies of one hundred dollars ($100.00) or less the fee shall be ten cents (10¢). (1905, c. 504, s. 21; Rev., s. 4789; C. S., s. 6476; 1945, c. 379.)

§ 58-223.1. Registration of policies. — After January 1, 1947, the Commissioner shall not register any new policies that are issued by any company, nor accept any deposits covering reserves on business thereafter written. (1945, c. 379.)

ARTICLE 24.

Mutual Burial Associations.

§ 58-224. Mutual burial associations placed under supervision of Burial Association Commissioner. — All mutual burial associations now organized and operating in the State of North Carolina, and all mutual burial associations hereafter organized and operating within said State, shall be under the general supervision of a Burial Association Commissioner to be appointed by the Governor of the State of North Carolina, whose term shall be for a period of four years and his salary to be fixed by the Governor subject to the approval of the Advisory Budget Commission. (1941, c. 130, s. 2; 1957, c. 541, s. 4.)

§ 58-224.1. North Carolina Mutual Burial Association Commission; membership; election; duties. — There is hereby created the North Carolina Mutual Burial Association Commission to be composed of five members.

(1) Initial Commission. — The members of the initial Commission shall be elected and chosen as follows:

a. The North Carolina Burial Association Commissioner, the president and vice-president of the North Carolina Funeral Directors Association shall unanimously select the names of four persons who are members of said association and are mutual burial association officers. The four names so selected shall be printed on a ballot by the Commissioner and one ballot mailed to each

burial association operator in the State who is or would be eligible to join said association. No burial association operator shall be entitled to more than one ballot. Each operator shall vote for two names on the ballot and shall return the ballot by posting same in the mail on or before November 15, 1967, to the Burial Association Commissioner. The two persons receiving the highest number of votes shall be deemed elected to the Commission. The person receiving the highest number of votes shall serve for a term of five years and the person receiving the second highest number of votes shall serve for two years. If less than two or more than two persons are voted for, the ballot shall be void. The names of persons may be "written in" on the ballot. In case of a tie, the winner shall be chosen by lot, unless the two persons receiving the greatest number of votes tie, in which case both shall be deemed elected and the person to serve the five-year term on the Commission shall be chosen by lot.

b. The North Carolina Burial Association Commissioner, the president and vice-president of the Funeral Directors and Morticians Association of North Carolina shall unanimously select the names of two persons who are members of said association and are mutual burial association officers. The names of the two persons so selected shall be printed on a ballot by the Commissioner and one ballot mailed by him to each burial association operator in the State who is or would be eligible to join said association. No burial association operator shall be entitled to more than one vote. Each operator shall vote for one name on the ballot and shall return the ballot by mail by posting same on or before November 15, 1967, to the Burial Association Commissioner. The person receiving the highest number of votes shall be deemed elected to the Commission and shall serve for a term of four years. The name of a person may be "written in" on a ballot. In case of a tie vote, the winner shall be selected by lot.

c. The North Carolina Burial Association Commissioner, the president and vice-president of the North Carolina Perpetual Care Cemetery Association shall unanimously select the names of two persons who are members of said association and are perpetual care cemetery operators. The names of the two persons so selected shall be printed on a ballot by the Commissioner and one ballot mailed by him to each perpetual care cemetery operator in the State. Each operator shall vote for one name on the ballot and shall return the ballot by mail to the Commissioner by posting same on or before November 15, 1967. No operator shall be entitled to more than one vote. The name of a person may be "written in" on a ballot. The person receiving the highest number of votes shall be deemed elected to the Commission and shall serve for a term of one year. In case of a tie, the winner shall be selected by lot.

d. One member of the Commission shall be a citizen of North Carolina, who is a member of a mutual burial association authorized by this Article. He shall be appointed by the Governor and shall serve for a term of three years.

e. In the event of a vacancy on the initial Commission by resignation, death, or otherwise, a successor to serve for the unexpired term shall be chosen within 90 days of the occurrence of the vacancy in the same manner as that used to elect or appoint the member of the Commission whose seat is vacant.

f. At any time between November 20, 1967, and November 25, 1967, the Burial Association Commissioner, at his office in Raleigh, shall, in the presence of the president of the North Carolina Funeral Directors Association, the president of the Funeral Directors and Morticians Association of North Carolina, and the president of the North Carolina Perpetual Care Cemetery Association, or any person by them designated in their stead, open and tabulate all ballots received pursuant to this section. The results of the election shall be mailed to any person requesting same and shall be published in at least three newspapers having, in the opinion of the Commissioner, general circulation in the area they serve.

g. All initial members of the Commission shall take office on the first Monday in December 1967, and shall serve until their successors are elected or appointed (as the case may be) and qualified.

(2) After the terms of the initial members of the Commission or their successors to serve unexpired terms, have expired, all five members of the Commission shall serve for a term of five years and shall be elected or appointed, as the case may be, as follows:

a. At least 90 days prior to the expiration of the term of the Commission member who was elected pursuant to the provisions of subdivision (1)a or (1)e, the persons who were eligible to vote under the provisions of subdivision (1)a shall nominate and elect a successor, under such rules and regulations as they shall determine, as approved by the North Carolina Burial Commission, provided that all mutual burial association operators shall be entitled to vote. The person so elected shall be certified to the Burial Association Commissioner by the president of the North Carolina Funeral Directors Association as qualifying under the requirements of subdivision (1)a.

b. At least 90 days prior to the expiration of the term of the Commission member who was elected pursuant to the provisions of subdivision (1)b or (1)e, the persons who were eligible to vote under the provisions of subdivision (1)b shall nominate and elect a successor, under such rules and regulations as they shall determine; as approved by the North Carolina Burial Commission, provided that all mutual burial operators shall be entitled to vote. The person so elected shall be certified to the Burial Association Commissioner by the president of the Funeral Directors and Morticians Association of North Carolina as qualifying under the requirement of subdivision (1)b.

c. At least 90 days prior to the expiration of the term of the Commission member who was elected pursuant to the provisions of subdivision (1)c or (1)e, the persons who were eligible to vote under the provisions of subdivision (1)c shall nominate and elect a successor under such rules and regulations as they shall determine; as approved by the North Carolina Burial Commission, provided that, all perpetual care cemetery operators in North Carolina shall be entitled to vote. The person so elected shall be certified to the Burial Association Commissioner by the president of the North Carolina Perpetual Care Cemetery Association as qualifying under the requirements of subdivision (1)c.

d. In the event that any association, entitled by the provisions of this Article to representation on the North Carolina Mutual Burial Association Commission, shall fail to select by November 1 of the year of the expiring term, persons for the election to membership on the Commission, the Commissioner may declare the seat vacant

and appoint, from the appropriate association, any person or persons to serve the term of the vacant seat(s).

e. Any vacancy on the Commission, other than on the initial Commission, as provided in subdivision (1)e, shall be filled by election by the appropriate organization within 90 days of the vacancy, or by appointment of the Governor, as the case may be, such election or appointment to be for the unexpired term.

f. Other than the initial Commission, no member may be elected for two successive terms.

(3) All members of the Commission, before assuming the duties of their office, shall take an oath for the faithful performance of their duties. (1967, c. 1197, s. 1.)

State Government Reorganization. — The Burial Commission was transferred to the Department of Commerce by § 143A-184, enacted by Session Laws 1971, c. 864.

§ 58-224.2. Duties of Commission; meetings; Burial Commissioner; secretary. — It shall be the duty of the North Carolina Mutual Burial Commission to supervise, pursuant to this Article, all burial associations authorized by this Article to operate in North Carolina, to determine that such associations are operated in conformity with this Article and pursuant to the rules and regulations of the Commission adopted pursuant to this Article; to assist the Commissioner with prosecution of violations of this Article or rules and regulations adopted pursuant thereto; to counsel with and advise the Burial Association Commissioner in the performance of his duties and to protect the interests of members of mutual burial associations.

The Burial Association Commissioner, with the consent of the Commission, and after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this Article and in order to carry out the intent thereof. The Commission is authorized and directed to adopt specific rules and regulations to provide for the orderly transfer of a member's benefits in cash or merchandise and services from the official funeral director of the member's association to any funeral establishment registered under the provisions of G.S. 90-210.17 and which furnishes a funeral service, or merchandise, or both, for the burial of the member.

The Commission shall elect its own chairman, who shall vote only when the Commission is evenly divided.

The Commission shall hold regular meetings at least twice each year, and more often if called by the Commissioner, in Raleigh, or such place in North Carolina as the Commissioner may direct. Special meetings of the Commission may also be called in Raleigh, or such other place in North Carolina as they may direct, by a majority of the Commission.

The Burial Association Commissioner shall serve as secretary of the Commission and shall keep minutes of all regular and special meetings.

All regular or special meetings of the Commission, unless a majority of the members of the Commission vote otherwise, shall be open to the public. All regular meetings shall be advertised in at least three newspapers having intercounty circulation in North Carolina.

Members of the Commission shall receive, when attending such regular or special meetings, such per diem, expense allowance and travel allowance as are allowed other commissions and boards of the State. The legal adviser to the Commission shall be entitled to actual expenses when attending regular or special meetings of the Commission held other than in Raleigh. All expenses of the Commission shall be paid from funds coming to the Commissioner pursuant to this Article. (1967, c. 1197, s. 2; 1971, c. 1151; 1973, c. 1147, s. 1.)

Editor's Note. — The 1973 amendment substituted the language beginning "any funeral establishment" for "the official funeral director of any other mutual burial association in good standing under the provisions of this Article" at the end of the second sentence of the second paragraph.

Session Laws 1973, c. 1147, s. 2, provides: "The provisions of this act shall apply to all mutual burial association policies heretofore or hereafter issued under the provisions of this Article."

State Government Reorganization. — The Burial Commissioner was transferred to the Department of Commerce by § 143A-183, enacted by Session Laws 1971, c. 864.

Conflict with § 58-226. — See Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905 (1974).

Modification to Permit Selection of Funeral Director by Decedent's Representatives Was Reasonable. — The modification in the statute and regulations which would permit the selection of a funeral director by representatives of decedent is a reasonable change and would seem to be within the general purpose for which the association was formed. Present-day society is so mobile that provisions which will facilitate transfer of benefits would appear to be in the public interest. Adair v. Orrell's Mut. Burial Ass'n, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905 (1974).

§ 58-225: Repealed by Session Laws 1967, c. 1197, s. 3.

§ 58-226. Requirements as to rules and bylaws. — All burial associations now operating within the State of North Carolina, and all burial associations hereafter organized and operating within the State of North Carolina shall have and maintain rules and bylaws embodying the following:

Article 1. The name of this association shall be . . . . . , which shall indicate that said association is a mutual burial association.

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of operation of any association already organized, shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which benefit shall consist of a funeral in merchandise and service, with no free embalming or free ambulance service included in such benefits. No other free service or any other thing free shall be held out, promised or furnished, in any case. Such funeral benefit shall be in the amount of one hundred dollars ($100.00) of merchandise and service, without free embalming or free ambulance service, for persons of the age of 10 years and over, or in the amount of fifty dollars ($50.00) for persons under the age of 10 years; provided, however, that any member of any association may purchase a double benefit (for a total benefit of two hundred dollars ($200.00)); however, any additional benefit shall be based on the assessment rate as provided in article 6 of this section, at the attained age of applicant at the time the double benefit takes effect. The purchase of a double benefit shall not be available to any member who cannot fulfill the requirements as set forth in article 3 of this section, excluding the payment of the twenty-five cents (25¢) membership fee. Any funeral director who sells or promotes the sale of a membership shall provide a funeral at a cost of the face amount of the policy, or give credit in the amount of the face value on such funeral as may be selected by the family of the member of the association.

Article 3. Any person of either the white or colored race who has passed his or her first birthday, and who has not passed his or her sixty-fifth birthday, and who is in good health and not under treatment of any physician, nor confined in any institution for the treatment of mental or other disease, may become a member of such burial association by the payment of a membership fee by such person, or for such person, of twenty-five cents (25¢). Applicant's birthday must be written in the application and subject to verification by any record the Burial Association Commissioner may deem necessary to prove or establish a true date of the birth of any applicant.

Article 4. The annual meeting of the association shall be held at . . . . . (here insert the place, date and hour); each member shall have one vote at said annual meeting and 15 members of the association shall constitute a

quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership, as provided in the rules and bylaws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. Among other duties that the secretary-treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these articles and the bylaws of the association, and subject to such modification as may be made or authorized by an act of the General Assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the Burial Association Commissioner or his duly constituted auditors or representatives. It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up-to-date so that the financial standing of the association may be readily ascertained by the Burial Association Commissioner or any auditor or representative employed by him. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the Burial Association Commissioner to take charge of the books of the association and do whatever work is necessary to bring the books up-to-date. The actual costs of said work may be charged the burial association and shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Whenever in the opinion of the Burial Association Commissioner, it is necessary to audit the books of any burial association more than three times in any calendar year, the Burial Association Commission shall have authority to assess such burial association the actual cost of any audit in excess of three per calendar year, provided that no more than three audits may be deemed necessary unless a discrepancy exists at the last regular audit. Such cost shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Every burial association shall file with the Burial Commission an annual report of its financial condition on a form furnished to it by the Burial Commissioner. Such report shall be filed on or before February 15 of each calendar year and shall cover the complete financial condition of the burial association for the immediate preceding calendar year. The Burial Association Commission may levy and collect a penalty of twenty-five dollars ($25.00) for each day after February 15 that the report called for herein is not filed. The Commission may, in its discretion, grant any reasonable extension of the above

filing date without the penalty provided in this section. Such penalty shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association. Any secretary or secretary-treasurer who fails to file such financial report on or before February 15 of each calendar year shall be guilty of a misdemeanor and shall be punished by a fine of not in excess of one hundred dollars ($100.00) and imprisoned for not in excess of 30 days, or both fined and imprisoned. Each day after February 15 that said report is not filed by the secretary or secretary-treasurer of a burial association, shall constitute a separate offense.

Article 5. Upon the death of any officer, his successor shall be elected by the board of directors for the unexpired term. The president, vice-president and secretary-treasurer shall be elected for a term of from one to five years, and shall hold office until his successor is elected and qualified, subject to the power of the board of directors to remove any officer for good cause shown: Provided, that any officer removed by the board of directors shall have the right of appeal to the membership of the association, such appeal to be heard at the next ensuing annual meeting of said membership.

Article 6. Each member shall be assessed according to the following schedule (or in multiples thereof) at the age of entry of the member: Provided, those members joining at ages under 10 shall be charged with the assessment for age 10 when they reach their tenth birthday:

ASSESSMENT RATE FOR AGE GROUPS:

First to tenth birthday	five cents (5¢)
Tenth to thirtieth birthday	ten cents (10¢)
Thirtieth to fiftieth birthday	twenty cents (20¢)
Fiftieth to sixty-fifth birthday	thirty cents (30¢)

(Ages shall be defined as having passed a certain birthday instead of nearest birthday.) Assessment shall always be made on the entire membership in good standing.

Article 7. No benefit will be paid for natural death occurring within 30 days from the date of the certificate of membership, which certificate shall express the true date such person becomes a member of this association, and the certificate issued shall be in acknowledgment of membership in this association. Benefits will be paid for death caused by accidental means occurring any time after date of membership certificate. No benefits will be paid in case of suicidal death of any member within one year from the date of the membership certificate. No agent or other person shall have authority to issue membership certificates in the field, but such membership certificates shall be issued at the home office of the association by duly authorized officers: the president, vice-president or secretary, and a record thereof duly made.

Article 8. Any member failing to pay any assessment within 30 days after notice shall be in bad standing, and unless and until restored, shall not be entitled to benefits. Notice shall be presumed duly given when mailed, postage paid, to the last known address of such members: Provided, moreover, that notice to the head of a family shall be construed as notice to the entire membership of such family in said association. Any member or head of a family changing his or her address shall give notice to the secretary-treasurer in writing of such change, giving the old address as well as the new, and the head of a family notifying the secretary-treasurer of change in address shall list with the secretary in such notice all the members of his or her family having membership in said association. Any member in bad standing may, within 90 days after the date of an assessment notice, be reinstated to good standing by the payment of all delinquent dues and assessments: Provided such person shall at the same time submit to the secretary-treasurer satisfactory evidence of good health, in

writing, and no benefit will be paid for natural death occurring within 30 days after reinstatement. In case of death caused by accidental means, benefit will be in force immediately after reinstatement. Any person desiring to discontinue his membership for any reason shall communicate such desire to the secretary-treasurer immediately and surrender his or her certificate of membership. Any adult member who is the head of a family, and who, with his family, has become in bad standing, shall furnish to the secretary-treasurer satisfactory evidence of the good health of each member desired to be reinstated in writing.

Article 9. The benefits herein provided are for the purpose of furnishing a funeral and burial service for a deceased member. The service shall be in keeping with the services and casket, sold at the same price, similar to that provided and charged by reputable funeral directors of this or other like communities.

Article 10. It is understood and stipulated that the funeral and burial service provided in article 9 hereof shall be rendered by (give name of funeral director and town), which funeral director is designated in these rules and bylaws as the official funeral director of this association, and such funeral director shall be, by the secretary-treasurer of this association, immediately notified upon the death of any member, and upon the death of any member it shall be the duty of his or her nearest relative to notify the secretary-treasurer of the association of the death of such member. In the event a member in good standing shall die at a place beyond the territory served by the above-named funeral director, the secretary of this association, being notified of such death, shall cause the deceased to receive a funeral and burial service equal to that provided for in these bylaws. The benefits provided for are to be payable to the funeral director rendering such funeral and burial service, which payment the secretary-treasurer is authorized to make. If the secretary-treasurer of the association shall fail, on demand, to provide the benefits as listed in article 9 of these rules and bylaws by arrangement with the official funeral director serving the community in which the services are required, then the benefits shall be paid in cash to the representative of the deceased qualified under law to receive such payments.

Article 11. Assessments shall be made as provided in G.S. 58-237.1. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

Article 12. In the event the proceeds of one assessment on the entire membership does not prove sufficient at any time to yield the benefit provided for in these bylaws, then the secretary-treasurer shall notify the Burial Association Commissioner who shall be authorized, unless the membership is increased to that point where such assessment is sufficient, to cause liquidation of said association, and may transfer all members in good standing to a like organization or association.

Article 13. All legitimate operating expenses of the association shall be paid out of the assessments, but in no case shall the entire expenses exceed thirty percent (30%) of the total of the assessments collected and the net income carried upon investment of surplus funds in one calendar year. In the event the association fails to expend the thirty percent (30%) allowed herein by the thirty-first day of December of any year, then the amount not used shall be placed in the surplus.

Article 14. Special meetings of the association membership may be called by the secretary-treasurer when by him deemed necessary or advisable, and he shall call a meeting when petitioned to do so by sixty-six and two-thirds percent ($66^2/_3\%$) of the members of said association who are in good standing.

Article 15. The secretary-treasurer shall, upon satisfactory evidence that membership was granted to any person not qualified at the time of entry as provided under article 3 of these bylaws, refund any amounts paid as assessment, and shall remove the name from the membership roll.

Article 16. Any member may pay any number of assessments in advance, in which case such member will not be further assessed until a like number of assessments shall have been levied against the remaining membership.

Article 17. No person may maintain active membership in two separate burial associations and, upon evidence that membership is maintained contrary to this article, the secretary-treasurer may call upon such member to forfeit all benefits and fees paid in either one or the other of the associations. Any person who is found to have maintained membership in two associations shall forfeit all benefits and fees paid in the second association of which he became a member, unless the membership in the original association was discontinued or such association had been placed in liquidation.

Article 18. Each year, before the annual meeting of the membership of this association, the association shall cause to be published in a newspaper of general circulation in the county in which such association has its principal place of business, or shall cause to be mailed to each member in good standing a statement showing total income collected, expenses paid and burial benefits provided for by such association during the next preceding year.

Article 19. These rules and bylaws shall not be modified, canceled or abridged by any association or other authority except by act of the General Assembly of North Carolina. (1941, c. 130, s. 4; 1943, c. 272, ss. 1, 2; 1945, c. 125, s. 1; 1947, c. 100, s. 1; 1949, c. 201, ss. 1, 2; 1953, c. 1201; 1955, c. 259, ss. 3, 4; 1967, c. 1197, s. 4; 1969, c. 1041, ss. 2, 3; 1973, c. 688.)

Editor's Note. — The 1973 amendment deleted, at the end of the first sentence of article 2, "and in no case shall any cash be paid."

The General Assembly may reserve the right to amend bylaws and regulations of a mutual burial association which it created so as to bind the association and its members. Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905 (1974).

Members are bound by subsequent legislation making changes in the rules and bylaws of burial associations, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. Spearman v. United Mut. Burial Ass'n, 225 N.C. 185, 33 S.E.2d 895 (1945).

And Statutory Changes Subsequent to Issuance of Certificate Did Not Impair Contract. — Where the provisions of this section and the certificate issued to the member by her burial association contained an express reservation of power by the General Assembly to modify, cancel, or abridge the rules and bylaws of the association, this was ample notice to both of the reservation of power by the General Assembly, and the statutory changes subsequent to the issuance of the certificate did not result in impairment of contract in violation of Art. I, § 10, clause 1, of the United States Constitution. Adair v. Orrell's Mut. Burial Ass'n, 284 N.C. 534, 201 S.E.2d 905 (1974).

Payment of Benefits in Cash to Funeral Director of Another Association. — When funeral services are provided by a funeral director of any mutual burial association in good standing in North Carolina for a decedent who was a member of another such association, the benefits of the decedent are not forfeited but are required to be paid in cash to the funeral director who actually renders the services. Adair v. Orrell's Mut. Burial Ass'n, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905 (1974).

§ 58-227. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates. — Each burial association shall have for each funeral home serving the said burial association not more than five agents or representatives soliciting members other than the secretary-treasurer and president, and before any agent or representative shall or may represent any burial association in North Carolina, he or she shall first apply to the Burial Association Commissioner of North Carolina for a license, and the Burial Association Commissioner shall have full power and authority to issue such license upon proof satisfactory to such Commissioner that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association

in behalf of which such membership solicitations are to be made. The Burial Association Commissioner may reject the application of any person who does not meet the requirements set out by him, as to capacity and moral fitness on recommendations by the association. The Burial Association Commissioner may, upon proof satisfactory to himself that said licensed agent has violated any section of this law, revoke said license. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the Burial Association Commissioner, the sum of five dollars ($5.00); moneys derived from this fee or charge to be and remain in the department or office of such Burial Association Commissioner, for supervision of burial associations in this State, subject to withdrawal for expenses of supervision by authority of the Burial Association Commissioner. It shall not be necessary that the president or secretary-treasurer of any burial association shall obtain a license for soliciting membership in any association, of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time such certificate is so issued. (1941, c. 130, s. 5; 1945, c. 125, s. 2; 1947, c. 100, s. 2; 1949, c. 201, s. 3.)

§ 58-228. Assessments against associations for expenses of Burial Commissioner. — In order to meet the expenses of the supervision of the burial associations, the Burial Association Commissioner shall prorate the amount of supervisory costs over and above any other funds in his hands for this purpose and assess each association on a pro rata basis in accordance with the number of members of each association, which total assessment shall, in the aggregate, amount to seventy per centum (70%) of the total budget of the Burial Association Commissioner as approved by the Director of the Budget and the Advisory Budget Commission; provided that, said total assessment shall not exceed fifty-nine thousand five hundred dollars ($59,500). Each burial association shall remit to the Burial Association Commissioner its pro rata part of the assessment, which expense shall be included in the thirty per centum (30%) expense allowance as provided in article 13 of G.S. 58-226. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within 30 days thereafter. If any association shall fail or refuse to pay such assessment within 30 days, the Burial Association Commissioner is authorized to transfer all memberships and assets of every kind and description to the nearest next association that is found by the Burial Association Commissioner to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3; 1945, c. 125, s. 3; 1947, c. 100, s. 3; 1949, c. 201, s. 4; 1951, c. 901, s. 1; 1955, c. 259, ss. 1, 2; 1967, c. 985, s. 1; 1969, c. 1006, s. 2; 1973, c. 1476, s. 1.)

Editor's Note. — The 1973 amendment decreased the total assessment from 80% or a maximum of $68,000 to 70% or a maximum of $59,500.

§ 58-229. Unlawful to operate without written authority of Commissioner. — It shall be unlawful for any person, firm or corporation, association or organization to organize, operate, or in any way solicit members for a burial association, or for participation in any plan, scheme, or device similar to burial associations, without the written authority of the Burial Association Commissioner, and any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than 12 months, or both, in the discretion of the court: Provided, however, the Burial Association Commissioner shall not withhold authority for the organization or operation of a bona fide burial association, meeting the

requirements of this Article, unless it shall be found and established to the satisfaction of the Burial Association Commissioner that the person or persons applying for authority to organize and operate such bona fide burial association is disqualified or does not meet the requirements of Article 24. (1941, c. 130, s. 7.)

§ 58-229.1. Revocation of license. — In the event it is proven to the satisfaction of the Burial Association Commissioner that any burial association is being operated not in conformity with one or more sections of Chapter 58, Article 24 of the General Statutes of North Carolina, or it is proven to the satisfaction of the Burial Association Commissioner that the official funeral director, or directors, are not adequately equipped to render the services provided for by said Article, then it shall become the duty of the Burial Association Commissioner upon hearing to revoke the license of said burial association and transfer said burial association, its membership and all its assets of every kind and description to another burial association that is found by the Burial Association Commissioner to be in good sound financial condition: Provided, that if said burial association gives notice of appeal as provided for in G.S. 58-236, then said burial association shall continue to operate as before the revocation and until final adjudication. (1945, c. 125, s. 4.)

§ 58-229.2. Deposit or investment of funds of mutual burial associations. — Funds belonging to each mutual burial association over and above the amount determined by the Burial Association Commissioner to be necessary for operating capital, shall be deposited in banks located in the State of North Carolina which are members of the Federal Deposit Insurance Corporation or shall be invested in building and loan or savings and loan institutions in this State insured by an instrumentality of the U.S. government or invested in securities of the State of North Carolina or any governmental unit thereof which are of bank grade as rated by the North Carolina Securities Advisory Committee or in obligations of the United States or securities the payment of which, both as to principal and interest, is guaranteed either by the United States or the State of North Carolina.

Violation of the provisions of this section shall, after hearing, be cause for revocation or suspension of license to operate a mutual burial association. (1957, c. 820, s. 1.)

§ 58-229.3. Unclaimed funds of defunct burial association. — Any funds on deposit in any bank or other financial institution in this State in the name of any burial association that is no longer in operation and has no members shall be transferred to the office of the State Burial Commissioner for the operation of such office and the purposes provided in G.S. 58-228. (1969, c. 1083.)

§ 58-230. Penalty for failure to operate in substantial compliance with Article 24. — If any burial association or other organization or official thereof, or any person operates or allows to be operated a burial association on any plan, scheme or bylaws not in substantial compliance with the bylaws set forth in G.S. 58-226, the Burial Association Commissioner may revoke any authority or license granted for the operation of such burial association, and any person, firm or corporation or association convicted of the violation of this section shall be guilty of a misdemeanor and shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 8.)

§ 58-231. Penalty for wrongfully inducing person to change membership. — Any burial association official, agent or representative thereof or any person who shall use fraud or make any promise not part of the printed bylaws, or who shall offer any rebate, gratuity or refund to cause a member of one association

to change membership to another association, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 9.)

§ 58-232. Penalty for making false and fraudulent entries. — Any person or burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the Burial Association Commissioner or his deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the Burial Association Commissioner, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned in the common jail for not less than 12 months, or both, in the discretion of the court. (1941, c. 130, s. 10; 1945, c. 125, s. 5.)

§ 58-233. Accepting application without collecting fee. — Any burial association official, agent or representative, or any other person who shall accept an application for membership in any association without collecting the fee from any such person making such application for membership, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned not less than 12 months in the common jail, or both, in the discretion of the court. (1941, c. 130, s. 11.)

§ 58-234. Removal of secretary-treasurer for failure to maintain proper records. — Any burial association secretary or secretary-treasurer who fails to maintain records to the minimum standards required by the Burial Association Commissioner shall be by such Commissioner removed from office and another elected in his stead, such election to be immediate and by the board of directors of said burial association upon notice of such removal. (1941, c. 130, s. 12.)

§ 58-235. Free services; failure to make proper assessments, etc., made a misdemeanor. — Any person or persons who offer free funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred fifty dollars ($250.00) or imprisoned for not less than 12 months, or both, in the discretion of the court. (1941, c. 130, s. 13; 1967, c. 1197, s. 5.)

§ 58-236. Right of appeal upon revocation or suspension of license. — Upon the revocation or suspension of any license or authority by Burial Association Commissioner, under any of the provisions of Article 24, the said association or individual whose license has been revoked or suspended shall have right of appeal from the action of said Burial Association Commissioner revoking or suspending such license or authority to the superior court of the county in which such burial association may be located: Provided, said association shall give notice of appeal in writing to the Burial Association Commissioner within 10 days from the date of order revoking or suspending the said license and the said association giving notice of appeal shall deposit with the Burial Association Commissioner an amount sufficient to cover appeal fees, which the Burial Association Commissioner shall pay to the clerk of the superior court. Upon receipt of said notice of appeal, the Burial Association Commissioner shall file with the clerk of the superior court of the county in which the burial association is located the decision of the Burial Association Commissioner and the clerk of the superior court shall transfer the appeal to the civil issue docket and the same shall be heard de novo. If upon the revocation or suspension of a license of a burial association by the Burial Association Commissioner and

where the burial association gives the proper notice of appeal, the burial association shall be permitted to operate until a final decision has been made by the higher court. (1941, c. 130, s. 14; 1943, c. 272, s. 4; 1957, c. 820, s. 3; 1973, c. 108, s. 20.)

Editor's Note. — The 1973 amendment deleted "as in cases of appeal from a justice of the peace" following "docket" in the second sentence.

§ 58-237. Bond of secretary or secretary-treasurer of burial associations. — The secretary or secretary-treasurer of each burial association shall, before entering upon the duties of his office, and for the faithful performance thereof, execute a bond payable to the Burial Commissioner as trustee for the burial association in some bonding company licensed to do business in this State, to be approved by the Burial Association Commissioner. Said bond shall be in an amount not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), in the discretion of the Commissioner, for those associations whose assets, as determined by the Commissioner's audit, are ten thousand dollars ($10,000) or less. For those associations whose assets, as determined by the Commissioner's audit, are in excess of ten thousand dollars ($10,000), said bond shall be in an amount of ten thousand dollars ($10,000) plus twenty-five per centum (25%) of all assets over ten thousand dollars ($10,000); provided however, that the bond required by this section shall not in any event exceed fifty thousand dollars ($50,000). If any association operates a branch or subsidiary and the officers of both associations are the same, for purposes of this section, it shall be treated as one association. Any burial association, with the consent of the Burial Association Commissioner, may give a bond secured by a deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company. The bond thus given shall not be acceptable in excess of the ad valorem tax value for the current year of the real estate securing said bond. The deed of trust shall be recorded in the county or counties wherein the land lies and shall be deposited with the Burial Association Commissioner, name the Commissioner as trustee for the burial association and must constitute a first lien on the property secured by the deed of trust. Said deed of trust shall contain a description of the encumbered property by metes and bounds together with evidence by title insurance policy or by certificate of an attorney-at-law, certifying that said trustor is the owner of a marketable fee simple title to such lands. (1941, c. 130, s. 15; 1943, c. 272, s. 5; 1967, c. 985, s. 2.)

§ 58-237.1. Assessments. — Every burial association now or hereinafter organized shall make 12 assessments, or their equivalent, per year per member. The Burial Commissioner shall order any association to make more than 12 assessments per year when, after notice and hearing, it shall appear to the Burial Commissioner that the death loss of any association so requires in order to protect the interest of the members. (1943, c. 272, s. 6; 1969, c. 1041, s. 1; 1971, c. 650.)

§ 58-237.2. Minimum membership required. — Each burial association shall at all times maintain an active membership of at least 800 members and should any association fail to secure the same within 90 days from the date of the granting of its charter, or at any time allow its active membership to fall below 800 members, the Burial Association Commissioner shall revoke its license and transfer its membership to another association. (1943, c. 272, s. 6.)

§ 58-237.3: Repealed by Session Laws 1947, c. 100, s. 4.

§ 58-237.4. Making false or fraudulent statement a misdemeanor. — Any officer or employee of any burial association authorized to do business under this Article, who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership or for the purpose of obtaining money from or benefit any burial association transacting business under this Article, or who shall make any false financial statement to the Burial Association Commissioner or to its membership shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1943, c. 272, s. 6.)

§ 58-238. Statewide organization of associations. — It shall be lawful for the several mutual burial associations of the State of North Carolina, in good standing, to organize and provide for a statewide organization of mutual burial associations, which organization shall be for the mutual and general suggestive control of mutual burial associations in the State of North Carolina. Such organization shall have such name as agreed upon by the membership in meetings, and to be composed of members as are lawfully operating in the State and who pay their dues to such association. (1941, c. 130, s. 16.)

§ 58-239. Article 24 deemed exclusive authority for organization, etc., of mutual burial associations. — Article 24 shall be deemed and held exclusive authority for the organization and operation of mutual burial associations within the State of North Carolina, and such associations shall not be subject to any other laws respecting insurance companies of any class. (1941, c. 130, s. 17.)

§ 58-240. Operation of association in violation of law prohibited. — No person, firm or corporation shall operate as a burial association in this State unless incorporated under the laws of the State of North Carolina, or be composed of a membership constituting an association complying with all the rules, regulations, sections and articles of Article 24; and licensed and approved by the Burial Association Commissioner of the State of North Carolina. (1941, c. 130, s. 18.)

§ 58-241. Appointment and removal of Burial Association Commissioner; bond. — The Burial Association Commissioner provided for in this Article shall be appointed by the Governor for a term of four years, subject to removal for cause, and shall hold office until his successor is appointed and qualified. Such Burial Association Commissioner shall give bond approved by the Commissioner of Insurance of the State of North Carolina in the sum of ten thousand dollars ($10,000), conditioned for his faithful application of all funds coming into his hands by virtue of his office. (1941, c. 130, s. 19; 1943, c. 170.)

§ 58-241.1. Election for benefits or return of assessments on death of member in armed forces. — If any member of a burial association who is in good standing should die while serving in the military or naval forces of the United States, the spouse, if there is one, or the next of kin in the event there is no spouse, shall be entitled to elect between the benefits prescribed in the bylaws of the burial association and the return of assessments paid into the burial association by the deceased member. Such election must be made within one year from the official notification of death. Acceptance by the spouse or the next of kin of paid-in assessments shall be a complete release to the burial association. In the event the spouse or next of kin shall not elect to receive the paid-in assessments as settlement of all claims against the burial association, then the spouse or next of kin shall be entitled to the benefits prescribed by the bylaws of the burial association at any time the body of the deceased is returned for burial to the territory served by the burial association. (1943, c. 732, s. 1.)

No Recovery by Personal Representative of Deceased. — The spouse or next of kin of a member of a mutual burial association serving in the armed forces, who dies overseas may elect to have return of the paid-in assessments in settlement, or to have the prescribed funeral benefits at any time the body of deceased is returned for burial to the territory served by the burial association; and the personal representative of the deceased may not recover the prescribed funeral benefits. Spearman v. United Mut. Burial Ass'n, 225 N.C. 185, 33 S.E.2d 895 (1945).

§ 58-241.2. Member in armed forces failing to pay assessments; reinstatement. — If a member of a burial association who is in the military or naval forces of the United States fails to pay any assessment, he shall be in bad standing, and unless and until restored, shall not be entitled to benefits. However, the said member shall be reinstated in the burial association upon application made by him at any time until 12 months after his discharge from the military or naval forces of the United States, notwithstanding his physical condition and without the payment of assessments which have become due during his service in the military or naval forces of the United States. Benefits will be in force immediately after such reinstatement. (1943, c. 732, s. 2.)

§ 58-241.3. Prior death of member in armed forces. — If a member of a burial association who was in good standing has, before March 9, 1943, died while serving in the military or naval forces of the United States, the provisions of G.S. 58-241.1 shall be applicable: Provided, the spouse, if there is one, or the next of kin in the event there is no spouse, must elect to receive the paid-in assessments within one year after March 9, 1943, or be deemed to have elected to receive benefits provided by the bylaws of the burial association. (1943, c. 732, s. 3.)

§ 58-241.4. Hearing by Commissioner of dispute over liability for funeral benefits; appeal. — In case of a disagreement between the representative of a deceased member of any burial association and the association a hearing may be held by the Burial Association Commissioner on request of either party to determine whether the association is liable for the benefits set forth in the policy issued to the said deceased member of said burial association. The Burial Commissioner shall render a decision which shall have the same force and effect as judgments rendered by courts of competent jurisdiction in North Carolina. Either party may appeal from the decision of the Burial Commissioner to the superior court of the county in which the burial association is located as provided in G.S. 58-236 hereof. (1947, c. 100, s. 5.)

§ 58-241.5. Commissioner authorized to subpoena witnesses, administer oaths and compel attendance at hearings. — For the purpose of holding hearings the Burial Association Commissioner shall have power to subpoena witnesses, administer oaths, and compel attendance of witnesses and parties. (1957, c. 820, s. 2.)

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25.

Regulation of Automobile Liability Insurance Rates.

§§ 58-242 to 58-245: Repealed by Session Laws 1945, c. 381, s. 2.

§ 58-246. North Carolina Automobile Rate Administrative Office created; objects and functions; hearings on rates. — There is hereby created a bureau to be known as the North Carolina Automobile Rate Administrative Office which office shall be established in the Compensation Rating and Inspection Bureau of North Carolina, created under G.S. 97-102 and shall be a branch and under

the management of the general manager of the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(1) To maintain rules and regulations and fix rates for automobile bodily injury and property damage insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau.

(2) To furnish upon request of any person carrying this form of insurance in the State or to any member of the North Carolina Automobile Rate Administrative Office, upon whose risk a rate has been promulgated, information as to the rating, including the method of its capitulation, and to encourage safety on the highways and streets of the State by adjusting premiums and rates, through the use of credits and debits or other proper factors, under such uniform system of experience or other form of merit rating as may be approved by the Commissioner of Insurance.

(3) The bureau shall provide reasonable means to be approved by the Commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing or rating committee or other proper executive of the bureau.

(4) The bureau shall have the duty and responsibility of promulgating and proposing rates for liability insurance for motor vehicles which are private passenger vehicles, taxicabs, commercial cars, and for garage liability insurance as determined by classification plans promulgated by the bureau and approved by the Commissioner. The bureau also shall have authority to maintain rules and regulations and promulgate and propose rates for automobile medical payments insurance, uninsured motorists coverage and other insurance coverages written in connection with the sale of automobile liability insurance on private passenger cars, taxicabs and commercial cars and garage liability insurance, and such other jurisdiction over insurance rates, rating methods, classifications, classification assignments, forms, and rules and regulations as the Commissioner may by general regulation provide. The provisions of this subdivision shall not apply to motor vehicles operated under certificates of authority from the Utilities Commission, the Interstate Commerce Commission, or their successor agencies, where insurance or other proof of financial responsibility is required by law or by regulation specifically applicable to such certificated vehicles.

(5) The bureau shall maintain and furnish to the Commissioner of Insurance on an annual basis the statistics on income derived by member companies from the investment of unearned premium reserves on automobile liability policies written in this State. Whenever the bureau has propounded a rate under this Article, it shall prepare a separate exhibit for the experience years in question showing the combined earnings realized from the investment of such unearned premium reserves on policies written in this State. The Commissioner may require further information as to such earnings and may require calculations of the bureau bearing on such earnings. (1939, c. 394, s. 1; 1945, c. 381, s. 2; 1947, cc. 1068, 1073; 1953, c. 674, s. 1; 1969, c. 1252, s. 1; 1971, c. 1115, s. 1.)

Editor's Note. — Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

For note discussing compulsory rating bureaus and the antitrust laws, see 54 N.C. Law Rev. 481 (1967).

Purpose, etc., of Office and of State Fire Insurance Rating Bureau Compared. — The purpose and duties of the North Carolina Fire Insurance Rating Bureau created by § 58-125 are quite similar to the purpose and duties of the North Carolina Automobile Rate Administrative Office created by this section. The Commissioners have similar statutory guidelines in considering adjustment of fire insurance rates and adjustment of automobile bodily injury and property damage insurance rates. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

A casualty insurance company, unlike a public utility, has no monopolistic or exclusive rights. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

All competing companies are required to issue policies at the rate fixed by a State agency as a condition of doing business in North Carolina. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Rules of Evidence. — Former §§ 143-317 and 143-318 were not applicable to a public hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the rate office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

Cited in Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

§ 58-247. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses; Commissioner of Insurance ex officio chairman. — (a) Before the Commissioner of Insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write automobile bodily injury and property damage insurance in this State, it shall be a requisite that they shall subscribe to and become members of the North Carolina Automobile Rate Administrative Office.

(b) Each member of the North Carolina Automobile Rate Administrative Office writing the above classes of insurance in North Carolina shall, as a requisite thereto, be represented in the aforesaid bureau and shall be entitled to one representative and one vote in the administration of the affairs of the bureau. They shall, upon organization, elect a governing committee which governing committee shall be composed of equal representation by stock and nonstock members.

(c) The bureau, when created, shall adopt such rules and regulations for its orderly procedure as shall be necessary for its maintenance and operation. No such rules and regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such contributions to be made in advance by prorating such expense among the members in accordance with the amount of gross premiums derived from automobile bodily injury and property damage insurance in North Carolina during the preceding year ending December 31, 1938, and members entering such bureau since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expense of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee. The bureau shall be empowered to subscribe for or purchase any necessary service.

(d) The Commissioner of Insurance of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the North Carolina Automobile Rate Administrative Office and shall preside over all meetings of the governing committee or other meetings of the bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1939, c. 394, s. 2; 1945, c. 381, s. 2; 1971, c. 1115, s. 2.)

Editor's Note. — Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

Section Is Not in Conflict with Federal Laws. — This section and § 58-248.2 are not in conflict with the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) and the Sherman Anti-Trust Act (15 U.S.C. §§ 1-7). Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

For note discussing compulsory rating bureaus and the antitrust laws, see 54 N.C.L. Rev. 481 (1967).

Bureau Is Body Apart from State but Answerable to Commissioner. — The rating bureau is a body separate and apart from the State in that it is composed of private citizens as to its employees and governing committee, but it is also answerable to the Commissioner at every turn. If it does not give the Commissioner the answers he demands, then he is free to act in his own right and as he "sees fit." Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-248. Personnel and assistants; general manager; submission of rate proposals to Commissioner of Insurance; approval or disapproval. — In order to carry into effect the objects of this Article, the bureau members shall elect its governing committee who shall employ and fix the salaries of such personnel and assistants as are necessary, but the general manager of the Compensation Rating and Inspection Bureau of North Carolina shall be the general manager also of the North Carolina Automobile Rate Administrative Office and the Commissioner of Insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the underwriting experience of automobile liability injury and property damage insurance and the other lines of insurance referred to in this Article, and this information shall be available and for the use of the North Carolina Automobile Rate Administrative Office for the capitulation and promulgation of rates on automobile bodily injury and property damage insurance and on such other lines of insurance as are subject to the rate-making authority of the bureau. All such rates compiled and promulgated by such bureau shall be submitted to the Commissioner of Insurance for approval and no such rates shall be put into effect in this State until approved by the Commissioner of Insurance and not subsequently disapproved. The Commissioner of Insurance in considering any rate compiled and promulgated by the bureau may take into consideration the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State. The amount of earnings may in an equitable manner be included in the rate-making formula to arrive at a fair and equitable rate.

In determining the necessity for an adjustment of rates the Commissioner shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such other reasonable and related factors as are relevant to the inquiry. The bureau in promulgating and fixing rates shall consider the same factors and shall prepare and present such information, data, indexes and exhibits with rate filings.

The Commissioner shall approve proposed changes in rates, classifications or classification assignments to the extent necessary to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. Proposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for

the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit.

On or before July 1 of each calendar year the North Carolina Automobile Rate Administrative Office shall submit to the Commissioner the data hereinabove referred to for bodily injury and property damage insurance on private passenger vehicles and a rate review based on such data. Such rate proposals shall be approved or disapproved by the Commissioner in writing within 90 days after submission to him: Provided, the Commissioner shall have at least 30 days after the completion of hearings and the receipt of any additional data requested from the North Carolina Automobile Rate Administrative Office in which to consider the rate proposals.

The provisions of G.S. 58-246 to G.S. 58-248 shall not apply to publicly owned vehicles except ambulances and rescue squad vehicles which are owned and operated by a county or municipality. (1939, c. 394, s. 3; 1945, c. 381, s. 2; 1965, c. 943; 1969, c. 744, s. 1; c. 1252, s. 2; 1971, c. 1115, s. 3.)

Editor's Note. — Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

For note discussing compulsory rating bureaus and the antitrust laws, see 54 N.C.L. Rev. 481 (1967).

Companies to Furnish Data. — This section contemplates that each company furnish data based on North Carolina experience with reference to the items composing "expense loading" as well as those composing "pure cost." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971), decided prior to the 1971 amendment.

This section formerly required the Commissioner to consider North Carolina rather than countrywide expense data in fixing automobile liability insurance rates. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 19 N.C. App. 263, 198 S.E.2d 575 (1973).

With respect to automobile liability insurance, the General Assembly apparently determined that the policy of requiring North Carolina expense data was an unsatisfactory one, for less than four months after the Automobile Rate Office case was decided, this section was amended so as to eliminate the phrase "in North Carolina." State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 19 N.C. App. 263, 198 S.E.2d 575 (1973).

Power of Commissioner to Fix Rates. — The only power the Commissioner has to fix rates is such power as the General Assembly has delegated to and vested in him. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Fixing Future Rates Is Legislative Power. — The power to fix rates effective from a specified future date, which this section purports to delegate to the Commissioner, is a legislative power, and this is no less true because its exercise is preceded by investigations and hearings. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Increase of Automobile Insurance Rates Upheld. — Though information which was more current might have been available to the Commissioner, the record supported a conclusion that automobile insurance rates should be increased and that substantial justice had been done to all parties concerned: affected insurance companies and the consuming public. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 18 N.C. App. 23, 195 S.E.2d 572 (1973).

When Proposed Rates Proper for Future Use. — Proposed rates will be proper for future use in North Carolina if they provide for anticipated losses, loss adjustment expenses, and other expenses of the companies attributable to that line of insurance business and include in the formula an amount which would provide for a fair and reasonable underwriting profit to the companies. State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972).

Casualty Insurance Premium Components. — For rate-making purposes, the components of a casualty insurance premium are the "pure premium" and "expense loading." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

"Pure Premium" Defined. — The "pure premium" is the amount allocated for the settlement of casualty losses, including loss adjustment expenses. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

"Expense Loading" Defined. — "Expense loading" is the amount allocated for operating expenses and for underwriting profit and contingencies. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Rules of Evidence. — Former §§ 143-317 and 143-318 (now §§ 150A-28 through 150A-30) were not applicable to a public hearing before the

Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the rate office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

§ 58-248.1. Order of Commissioner revising improper rates, classifications and classification assignments. — Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest.

At least 15 days prior to the date set for the hearing of a rate filing under this Article, the respective rate-making staffs of the bureau and the Commissioner shall meet at a prehearing meeting to review the filing and to discuss any points of disagreement which are likely to be in issue at the hearing. Any calls for additional information may be made at such time. The minutes of such meeting shall be made and shall be reduced to writing and shall become a part of the hearing record. Any agreements reached as to preliminary matters shall be set forth in writing and shall be consented to by counsel for the bureau, and the Commissioner. The purpose of the prehearing meeting shall be to avoid unnecessary delay in the rate hearings. (1945, c. 381, s. 2; 1971, c. 1115, s. 4.)

Editor's Note. — Session Laws 1971, c. 1115, s. 6, provides: "In the event the General Assembly enacts a law or laws which repeals the method of rate-making set forth in this Article, this Article shall be suspended upon the effective date of such law or laws but shall remain codified in the event of restoration of prior approval rate-making."

Commissioner's Power to Fix Rates. — The only power the Commissioner has to fix rates is such power as the General Assembly has delegated to and vested in him. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

It is the duty of the Commissioner to hold hearings prior to revising rates, and this is a two-edged sword. Not only may the voluntary members of the rating bureau present their contentions, but the independents may likewise present their contentions. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Anyone who is aggrieved can protest any determinations made by the rating bureau. This is clearly recourse outside the controls of the rating bureau, and is indeed a valuable weapon because the protest is carried to an elected official of the State who must, in turn, answer to the electorate. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Rules of Evidence. — Former §§ 143-317 and 143-318 (now §§ 150A-28 through 150A-30) were not applicable to a public hearing before the Commissioner on proposals for a general revision of insurance rates submitted by a statutory rate-making bureau such as the rate office. In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Applied in In re Blue Bird Taxi Co. of Asheville, Inc., 237 N.C. 373, 75 S.E.2d 156 (1953).

Quoted in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

Stated in State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 18 N.C. App. 23, 195 S.E.2d 572 (1973).

§ 58-248.2. Insurance policy must conform to rates, etc., filed by rating bureau; when higher rate allowed. — No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not

conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. A rate in excess of that promulgated by the rating bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner. (1945, c. 381, s. 2; 1961, c. 1006, s. 1.)

Section Is Not in Conflict with Federal Laws. — This section and § 58-247 are not in conflict with the McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015) and the Sherman Anti-Trust Act (15 U.S.C. §§ 1-7). Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

This Article is not invalid on the ground that it restricts competition by prohibiting the offering of lower premium rates than those made and filed by the rating bureau in violation of the Sherman Act, 15 U.S.C. §§ 1-7 (1958), and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1958). Since the rating bureau is established and administered under the active supervision of the State, it is not subject to attack under the federal antitrust laws, which condemn only private noncompetitive activities. Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966).

Now All Insurers Must Belong to Bureau and Charge Same Rates. — The 1961 amendment to this section resulted in the requirement that all insurers in this State must not only be members of the rating bureau, but that they must also charge the same uniform and minimum rates for all insurance of the same kind. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Or Be Subject to Penalties. — Any insurer failing to comply with the requirements of this section would be subject to a revocation or suspension of its license to do business and might also be subject to criminal sanctions. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

But They May Compete by Offering Greater Dividends. — All forms of deviation from the standards set by the rating bureau are not foreclosed to insurers. On the contrary, they have the privilege of continuing to compete for customers by offering, among other things, greater dividends that other competing insurance carriers. This is the form of competition selected by the legislature as compatible with the automobile liability insurance statutes of the State. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.3. Revocation or suspension of license for violation of Article. — If the Commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this Article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 381, s. 2.)

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right. — Former § 143-317(3) showed that former § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insurance Law." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and the Attorney General, as the legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district court divisions of the General Court of Justice." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.4. Punishment for violation of Article. — Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this Article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). (1945, c. 381, s. 2.)

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 58-248.5. Review of order of Commissioner. — A review of any order made by the Commissioner in accordance with the provisions of this Article shall be by appeal to the Superior Court of Wake County in accordance with the provisions of G.S. 58-9.3. (1945, c. 381, s. 2.)

Applied in In re Blue Bird Taxi Co. of Asheville, Inc., 237 N.C. 373, 75 S.E.2d 156 (1953).

Quoted in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-248.6. Appeal to Commissioner from decision of bureau. — Any member of the bureau may appeal to the Commissioner from any decision of such bureau and the Commissioner shall, after a hearing held on not less than 10 days' written notice to the appellant and to the bureau, issue an order approving the decision of the bureau or directing it to give further consideration to such proposal. In the event the bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 381, s. 2.)

Bureau Is Body Apart from State but Subject to Commissioner. — It is a fact that the rating bureau is a body separate and apart from the State in that it is composed of private citizens as to its employees and governing committee, but it is also answerable to the Commissioner at every turn. If it does not give the Commissioner the answers he demands then he is free to act in his own right and as he "sees fit." Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Anyone Aggrieved Can Protest Its Determinations. — Anyone who is aggrieved can protest any determinations made by the rating bureau. This is clearly recourse outside the controls of the rating bureau, and is indeed a valuable weapon because the protest is carried to an elected official of the State who must, in turn, answer to the electorate. Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

Cited in In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

§ 58-248.7. Validation of experience rating plans in use prior to April 7, 1953. — All acts of the Commissioner of Insurance, prior to April 7, 1953, in authorizing and approving systems of experience rating or other forms of merit rating for use in connection with automobile liability insurance and workmen's compensation insurance, are hereby ratified, confirmed and validated.

All acts of the North Carolina Automobile Rate Administrative Office and of the Compensation Rating and Inspection Bureau of North Carolina, prior to April 7, 1953, in the application of such systems of experience rating or other forms of merit rating and in the promulgation of premium rates and modifications thereof applicable to such kinds of insurance, pursuant to such authorizations and approvals, are hereby ratified, confirmed, and validated.

All acts of insurers and insureds, prior to April 7, 1953, in the issuance and acceptance of contracts of insurance and the premium charges made or collected therefor at rates and modifications thereof pursuant to such authorizations and approvals by the Commissioner of Insurance and in accordance with such promulgations of the North Carolina Automobile Rate Administrative Office, and the Compensation Rating and Inspection Bureau of North Carolina, are hereby ratified, confirmed and validated.

This section shall not affect pending litigation, and shall not apply to or affect the rights of any person which have been judicially determined. (1953, c. 980.)

§ 58-248.8. Rates to distinguish between safe and nonsafe drivers. — (a) The Commissioner of Insurance, in the manner prescribed by Article 25 of Subchapter V of Chapter 58 of the General Statutes, is directed to establish a Safe Driver Reward Plan which adequately and factually distinguishes between classes of drivers having safe-driving records and those having a record of

chargeable accidents, a record of convictions of major traffic violations; a record of a series of minor traffic violations; or a combination thereof; and which plan will provide for automobile property damage and bodily injury insurance premium differentials between such classes of drivers.

(b) The Commissioner of Insurance is empowered and directed to maintain a Safe Driver Reward Plan which will balance the additional premium realized from surcharges assessed against drivers having other than safe-driving records with discounts allowed to those drivers having safe driver records.

(c) Whenever any policy issued pursuant to the provisions of G.S. 20-279.21 loses the safe driver discount provided by the plan adopted pursuant to this section, or the same is surcharged due to an accumulation of points under the Safe Driver Reward Plan, the insurer shall, prior to the billing for additional premium or simultaneously therewith, inform the named insured of the surcharge or loss of discount by mailing to such insured a notice which shall state a valid basis for the surcharge or loss of discount, and which shall advise that upon receipt of a written request from the named insured it will promptly mail to the named insured a statement of the amount of increased premium attributable to the surcharge or loss of discount. Such explanation shall be privileged, and shall not constitute grounds for any cause of action against the insurer or its representatives or any firm, person, or corporation who furnishes to the insurer the information upon which its reasons are based. (1957, c. 1393, s. 11; 1961, c. 1006, s. 2; 1963, c. 1144; 1967, c. 283; 1969, c. 989, s. 1; 1971, c. 1205, s. 5.)

Editor's Note. — Session Laws 1969, c. 989, s. 3, provides: "This act shall be effective January 1, 1970, and shall have application to any surcharging or loss of discount of automobile policies after such date."

Cited in Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir. 1966); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

§ 58-248.9. The power of Commissioner to establish private passenger vehicle rate classification. — The Commissioner of Insurance is directed to establish, or cause to be established, following public hearing, such private passenger vehicle rate classifications, schedules, rules and regulations as may be deemed desirable and equitable to classify drivers of such vehicles for insurance purposes and may likewise, from time to time, withdraw, modify or amend any such classifications, schedules, rules or regulations. The Commissioner is further directed to establish a 260 Plan rate classification or an appropriate modification of that plan, in his discretion. (1971, c. 908.)

Cited in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 19 N.C. App. 548, 199 S.E.2d 479 (1973).

§ 58-248.10. Transfer of coverage; no rate increase for remainder of contract period permitted. — When coverage under an existing automobile liability insurance policy is transferred from one automobile to another after the approval of a rate increase by the Commissioner, the rate for the policy shall not be increased during the remainder of the contract period. Nothing contained herein shall prevent an increase in rates for a change in classification when the risk or underwriting information on a particular policyholder warrants such a change. (1973, c. 456.)

§§ 58-248.11 to 58-248.25: Reserved for future codification purposes.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-248.26. Definitions. — As used in this Article:

(1) "Cede" or "cession" means the act of transferring the profit or loss of otherwise unacceptable business (to the extent permitted in the plan of operation) from the individual insurer to all insurers through the operation of the Facility.

(2) "Commissioner" means the Commissioner of Insurance.

(3) "Company" means each member of the Facility.

(4) "Eligible risk" means a person who is a resident of this State who owns a motor vehicle registered or principally garaged in this State or who has a valid driver's license in this State or who is required to file proof of financial responsibility pursuant to Article 9A or 13 of the North Carolina Motor Vehicle Code in order to register his motor vehicle or obtain a driver's license in this State; or a nonresident of this State who owns a motor vehicle registered or principally garaged in this State, or the State and its agencies and cities, counties, towns and municipal corporations in this State and their agencies, provided, however, that no person shall be deemed an eligible risk if timely payment of premium is not tendered or if there is a valid unsatisfied judgment of record against such person for recovery of amounts due for motor vehicle insurance premiums and such person has not been discharged from paying said judgment, or if such person does not furnish the information necessary to effect insurance.

(5) "Facility" means the North Carolina Motor Vehicle Reinsurance Facility established pursuant to the provisions of this Article.

(6) "Motor vehicle" means any motor vehicle as defined under Article 9A of Chapter 20 of the General Statutes of North Carolina.

(7) "Motor vehicle insurance" means direct insurance against liability arising out of the ownership, operation, maintenance or use of a motor vehicle as defined in Article 9A of Chapter 20 of the General Statutes of North Carolina for bodily injury including death and property damage and includes medical payments and uninsured motorist coverages.

(8) "Person" means every natural person, firm, partnership, association, corporation or government or agency thereof.

(9) "Plan of operation" means the plan of operation approved pursuant to the provisions of this Article.

(10) "Reinsurance" means that the profit or loss of otherwise unacceptable insurance risks are equitably shared by all companies. (1973, c. 818, s. 1.)

Editor's Note. — Session Laws 1973, c. 818, s. 3, contains a severability clause.

§ 58-248.27. North Carolina Motor Vehicle Reinsurance Facility; creation; membership. — There is created a nonprofit unincorporated legal entity to be known as the North Carolina Reinsurance Facility consisting of all insurers licensed to write and engaged in writing within this State motor vehicle insurance or any component thereof. Every such insurer, as a prerequisite to further engaging in writing such insurance in this State, shall be a member of the Facility and shall be bound by the rules of operation thereof as provided for in this Article and as promulgated by the Board of Governors. No company may withdraw from membership in the Facility unless it ceases to write motor vehicle

insurance in this State or ceases to be licensed to write such insurance. (1973, c. 818, s. 1.)

§ 58-248.28. **Obligations after termination of membership.** — Any company whose membership in the Facility has been terminated by withdrawal shall, nevertheless, with respect to its business prior to midnight of the effective date of such termination continue to be governed by this Article. (1973, c. 818, s. 1.)

§ 58-248.29. **Insolvency.** — Any unsatisfied net liability to the Facility of any insolvent member shall be assumed by and apportioned among the remaining members in the Facility in the same manner in which assessments or gain are apportioned by the Facility. The Facility shall have all rights allowed by law in behalf of the remaining members against the estate or funds of such insolvent for sums due the Facility in accordance with this Article. (1973, c. 818, s. 1.)

§ 58-248.30. **Merger, consolidation or cession.** — When a member has been merged or consolidated into another insurer, or has ceded its entire motor vehicle liability insurance business in the State to another insurer, such company or its successor in interest shall remain liable for all obligations hereunder and such company and its successor in interest and the other insurers with which it has been merged or consolidated shall continue to participate in the Facility according to the rules of operation. (1973, c. 818, s. 1.)

§ 58-248.31. **General obligations of insurers.** — Except as otherwise provided in this Article all insurers as a prerequisite to the further engaging in this State in the writing of motor vehicle insurance or any component thereof shall accept and insure any otherwise unacceptable applicant therefor who is an eligible risk if cession of the particular coverage and coverage limits applied for are permitted in the Facility. All such insurers shall equitably share the results of such otherwise unacceptable business through the Facility and shall be bound by the acts of their agents in accordance with the provisions of this Article. No insurer shall impose upon any of its agents, solely on account of ceded business received from such agents, any quota or matching requirement for any other insurance as a condition for further acceptance of ceded business from such agents. (1973, c. 818, s. 1.)

§ 58-248.32. **General obligations of agents.** — Except as otherwise provided in this Article, no licensed agent of an insurer authorized to solicit and accept premiums for motor vehicle insurance or any component thereof by the company he represents shall refuse on behalf of said company to accept any application from an eligible risk for such insurance and to immediately bind the coverage applied for and for a period of not less than six months if cession of the particular coverage and coverage limits applied for are permitted in the Facility, provided the application is submitted during the agent's normal business hours, at his customary place of business and in accordance with the agent's customary practices and procedures. The commission paid on the insurance coverages provided in this Article shall not be less than the commission on insurance coverage written through the North Carolina Insurance Plan on May 1, 1973. The same commission shall apply uniformly statewide. (1973, c. 818, s. 1.)

§ 58-248.33. **The Facility; functions; administration.** — (a) The operation of the Facility shall assure the availability of motor vehicle insurance to any eligible risk by means of reinsurance and the Facility shall accept for transfer to the account of all members, the profit or loss of the business ceded in accordance with this Article, the plan of operation adopted pursuant thereto, and any amendments to either.

(b) The Facility shall reinsure for each coverage available therein to the standard percentage of one hundred percent (100%) or lesser equitable percentage established in the plan of operation as follows:

(1) For the following coverages of motor vehicle insurance and in at least the following amounts of insurance:

a. Bodily injury liability: twenty-five thousand dollars ($25,000) each person, fifty thousand dollars ($50,000) each accident;

b. Property damage liability: ten thousand dollars ($10,000) each accident;

c. Medical payments: one thousand dollars ($1,000) each person; except that this coverage shall not be available for motorcycles;

d. Uninsured motorist: twenty-five thousand dollars ($25,000) each person; fifty thousand dollars ($50,000) each accident for bodily injury; five thousand dollars ($5,000) each accident property damage (one hundred dollars ($100.00) deductible);

(2) Additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors if there is a substantial public demand for a coverage or coverage limit of any component of motor vehicle insurance up to the following:

Bodily injury liability: one hundred thousand dollars ($100,000) each person, three hundred thousand dollars ($300,000) each accident

Property damage liability: fifty thousand dollars ($50,000) each accident

Medical payments: two thousand dollars ($2,000) each person

Uninsured motorist: one hundred thousand dollars ($100,000) each person and each accident for bodily injury and five thousand dollars ($5,000) for property damage (one hundred dollars ($100.00) deductible).

Any other motor vehicle insurance required by law: in twice the amount of coverage limits required by law.

(c) The Facility shall require each member to adjust losses for ceded business fairly and efficiently in the same manner as voluntary business losses are adjusted and to effect settlement where settlement is appropriate.

(d) The Facility shall be administered by a Board of Governors. The Board of Governors shall consist of nine members having one vote each from the classifications hereinafter enumerated plus the Commissioner who shall serve ex officio without vote. Each Facility insurance company member serving on the Board shall be represented by a senior officer of the company. Not more than one company in a group under the same ownership or management shall be represented on the Board at the same time. Five members of the Board shall be selected by the member insurers, which members shall be fairly representative of the industry. To insure representative member insurers, one each shall be selected from the following groups: the American Insurance Association (or its successors), the American Mutual Insurance Alliance (or its successors), the National Association of Independent Insurers (or its successors), all other stock insurers not affiliated with the above groups, and all other nonstock insurers not affiliated with the above groups. The Commissioner of Insurance shall appoint four members of the Board who shall be fire and casualty insurance agents licensed in this State and actively engaged in writing motor vehicle insurance in this State. The Commissioner shall select one agent from among a list of two nominees submitted by the Independent Insurance Agents of North Carolina, Inc., and one agent from among a list of two nominees submitted by the Carolinas Association of Mutual Insurance Agents, North Carolina Division. The initial term of office of said Board members shall be two years. Following completion of initial terms, successors to the members of the original Board of Governors shall be selected to serve three years. All members of the Board of Governors shall serve until their successors are selected and qualified and the Commissioner may fill any vacancy

on the Board from any of the aforementioned classifications until such vacancies are filled in accordance with the provisions of this Article.

(e) The Commissioner and member companies shall provide for a Board of Governors within 30 days after May 24, 1973. If any member seat on the initial Board of Governors is not filled in accordance with this Article within such time, then, in that event the Commissioner shall appoint natural persons from any of the classifications specified in subsection (d) of this section to serve the initial term on the Board of Governors. As soon as possible after its selection, the Commissioner shall call for the initial meeting of the Board. After the Board of Governors have been selected it shall then elect from its membership a chairman and shall then meet thereafter as often as the chairman shall require or at the request of three members of the Board of Governors. The chairman shall retain the right to vote on all issues. Five members of the Board of Governors shall constitute a quorum. The same member may not serve as chairman for more than two consecutive years.

(f) The Board of Governors shall have full power and administrative responsibility for the operation of the Facility. Such administrative responsibility shall include but not be limited to:

(1) Proper establishment and implementation of the Facility.

(2) Employment of a manager who shall be responsible for the continuous operation of the Facility and such other employees, officers and committees as it deems necessary.

(3) Provision for appropriate housing and equipment to assure the efficient operation of the Facility.

(4) Promulgation of reasonable rules and regulations for the administration and operation of the Facility and delegation to the manager of such authority as it deems necessary to insure the proper administration and operation thereof.

(g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:

(1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.

(2) To receive and record reinsurance cessions from member companies.

(3) To assess members on the basis of participation ratios established in the plan of operation to cover anticipated or incurred costs of operation and administration of the Facility at such intervals as are established in the plan of operation.

(4) To contract for goods and services from others to assure the efficient operation of the Facility.

(5) To hear and determine complaints of any company, agent or other interested party concerning the operation of the Facility.

(6) To review the market for motor vehicle insurance throughout North Carolina to make certain that eligible risks can readily obtain such insurance and to provide in the plan of operation a reasonable means for achieving this objective. The Facility is authorized to require all companies in a fair and equitable manner who are writers of motor vehicle insurance in this State to appoint and license any fire and casualty agent duly licensed to write insurance in North Carolina, in such places where a market need has been demonstrated, to be their agent to write motor vehicle insurance. The companies and agents may enter into such agency contract as may be agreeable to both parties. If a company ceases to be a member of the Facility after appointing and licensing agents pursuant to this provision, then the Facility shall

promptly require another company or companies to appoint and license such agents in these places. Notwithstanding the provisions of this subdivision, the Commissioner may review the market for motor vehicle insurance or any component thereof. After notice to and consultation with the Board of Governors, if the Commissioner finds that reasonable facilities are not being provided to make motor vehicle insurance or any component thereof available in a particular county, then in that event, he may require the Board to provide adequate facilities in such county. If the Board fails to comply with the requirements of the Commissioner, then the Commissioner may exercise all the powers of the Facility to provide such adequate facilities. Additionally, the Commissioner may require the company or companies selected to service a particular county to pay or provide for reasonable compensation for the services of the agent appointed to represent said company or companies, and, if necessary, the Commissioner may appoint such agent.

(7) To maintain all loss, expense, and premium data relative to all risks reinsured in the Facility, and to require each member to furnish such statistics relative to insurance reinsured by the Facility at such times and in such form and detail as may be required.

(8) To establish fair and reasonable procedures for the sharing among the members of profit and loss on Facility business and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. Such shares may be based on the member's premiums for voluntary business for the appropriate category of motor vehicle insurance or by any other fair and reasonable method.

(9) To receive or distribute all sums required by the operation of the Facility.

(10) To accept all risks submitted from the companies in accordance with this Article.

(11) To establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently.

(12) To adopt and enforce all rules and to do anything else where the Board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Facility and is not in conflict with the other provisions of this Article.

(h) Each member company shall authorize the Facility to audit that part of the company's business which is written subject to the Facility in a manner and time prescribed by the Board of Governors.

(i) The Board of Governors shall fix a date for an annual meeting and shall annually meet on that date. Twenty days' notice of such meeting shall be given in writing to all members of the Board of Governors.

(j) There shall be furnished to each member an annual report of the operation of the Facility in such form and detail as may be determined by the Board of Governors.

(k) Each member shall furnish statistics in connection with insurance subject to the Facility as may be required by the Facility. Such statistics shall be furnished at such time and in such form and detail as may be required but at least will include premiums charged, expenses and losses. (1973, c. 818, s. 1.)

§ 58-248.34. Plan of operation. — (a) Within 60 days after the initial organizational meeting, the Facility shall submit to the Commissioner, for his approval, a proposed plan of operation, consistent with the provisions of this Article, which shall provide for economical, fair and nondiscriminating administration and for the prompt and efficient provision of motor vehicle insurance to eligible risks. Should no plan be submitted within the aforesaid

60-day period, then the Commissioner of Insurance shall formulate and place into effect a plan consistent with the provisions of this Article.

(b) The plan of operation, unless sooner approved in writing, shall be deemed to meet the requirements of the Article if it is not disapproved by order of the Commissioner within 30 days from the date of filing. Prior to the disapproval of all or any part of the proposed plan of operation the Commissioner shall notify the Facility in what respect the plan of operation fails to meet the specific requirements of this Article. The Facility shall, within 30 days thereafter, submit for his approval a revised plan of operation which meets the specific requirements of this Article. In the event the Facility fails to submit a revised plan of operation which meets the specific requirements of this Article within the aforesaid 30-day period, the Commissioner of Insurance shall enter an order accordingly and shall immediately thereafter formulate and place into effect a plan consistent with the provisions of this Article.

(c) Any revision of the proposed plan of operation or any subsequent amendments to an approved plan of operation shall be subject to approval or disapproval by the Commissioner in the manner herein provided in subsection (b) with respect to the initial plan of operation.

(d) Any order of the Commissioner with respect to the plan of operation or any revision of [or] amendment thereof shall be subject to court review as provided in G.S. 58-9.3.

(e) Upon approval of the Commissioner of the plan so submitted or the promulgation of a plan deemed approved by the Commissioner, all insurance companies licensed to write motor vehicle insurance in this State or any component thereof as a prerequisite to further engaging in writing such insurance shall formally subscribe to and participate in the plan so approved.

The plan of operation shall provide for, among other matters, the establishment of necessary facilities, the management of the Facility, the preliminary assessment of all members for initial expenses necessary to commence operations, the assessment of members to defray losses and expenses, the distribution of gains, the standard amount (one hundred percent (100%) or any equitable lesser amount) of coverage afforded on eligible risks which a member company may cede to the Facility, and the procedure by which reinsurance shall be accepted by the Facility; and shall further provide that:

(1) Members of the Board of Governors shall receive reimbursement from the Facility for their actual and necessary expenses incurred on Facility business, en route to perform Facility business, and while returning from Facility business plus a per diem allowance of twenty-five dollars ($25.00) a day which may be waived.

(2) In order to obtain a transfer of business to the Facility effective when the binder or policy or renewal thereof first becomes effective, the company must within 30 days of the binding or policy effective date notify the Facility of the identification of the insured, the coverage and limits afforded, classification data, and premium. The Facility shall accept risks at other times on receipt of necessary information, but such acceptance shall not be retroactive. The Facility shall accept renewal business after the member on underwriting review elects to again cede the business. (1973, c. 818, s. 1.)

§ 58-248.35. Limit on cessions. — Upon receipt by the company of a risk which it does not elect to retain, the company shall follow such procedures for ceding the risk as are established by the plan of operation; provided, however, that no company can cede to the Facility more than fifty percent (50%) of all its motor vehicle insurance business in North Carolina without specific approval of the Board of Governors. (1973, c. 818, s. 1.)

§ 58-248.36. Termination of insurance. — No member may terminate insurance to the extent that cession of a particular type of coverage and limits is available under the provisions of this Article except for the following reasons:

(1) Nonpayment of premium when due to the insurer or producing agent.
(2) The named insured has become a nonresident of this State and would not otherwise be entitled to insurance on submission of new application under this Article.
(3) A member company has terminated an agency contract for reasons other than the quality of the agent's insureds or the agent has terminated the contract and such agent represented the company in taking the original application for insurance.
(4) When the insurance contract has been cancelled pursuant to a power of attorney given a company licensed pursuant to the provisions of G.S. 58-56. (1973, c. 818, s. 1.)

§ 58-248.37. Exemption from requirements of this Article of companies and their agents. — By reason of the limit on cessions provided in this Article, the Board of Governors may exempt a company and its agents from the requirements of this Article, insofar as new business is concerned. The Board may further exempt a company and its agents from the requirements of this Article regarding the selling and servicing a particular category of business, if the company is not qualified to service the business. (1973, c. 818, s. 1.)

§ 58-248.38. Physical damage insurance availability. — No physical damage insurer shall refuse to make physical damage coverage available to any applicant for the reason that such applicant has, or may acquire, auto liability insurance through the Facility plan as provided herein; further that no such insurer may levy a surcharge or increased rate for such physical damage coverage on the basis that such applicant has, or may acquire, auto liability insurance through the Facility plan as provided herein.

Any such insurer or representative thereof failing to comply with, or otherwise violating the provisions of this section, shall be punished as prescribed in G.S. 58-248.4 and 58-248.5. (1973, c. 818, s. 1.)

§ 58-248.39. Hearings; review. — (a) Any applicant for a policy from any carrier, any person insured under such a policy, any member of the Facility and any agent duly licensed to write motor vehicle insurance, may request a formal hearing and ruling by the Board of Governors of the Facility on any alleged violation of or failure to comply with the plan of operation or the provisions of this Article or any alleged improper act or ruling of the Facility directly affecting him as to coverage or premium or in the case of a member directly affecting its assessment, and in the case of an agent, any matter affecting his appointment to a carrier or his account therewith. The request for hearing must be made within 15 days after the date of the alleged violation or improper act or ruling. The hearing shall be held within 15 days after the receipt of the request. The hearing may be held by any panel of the Board of Governors consisting of not less than three members thereof, and the ruling of a majority of the panel shall be deemed to be the formal ruling of the Board, unless the full Board on its own motion shall modify or rescind the action of the panel.

(b) Any formal ruling by the Board of Governors may be appealed to the Commissioner by filing notice of appeal with the Facility and Commissioner within 30 days after issuance of the ruling.

(c) The Commissioner shall issue an order approving the action or decision, disapproving the action or decision, or directing the Board of Governors to reconsider the ruling.

(d) Any aggrieved person or organization, any member of the Facility or the Facility may request a public hearing and ruling by the Commissioner on the provisions of the plan of operation, rules, regulations or policy forms approved

by the Commissioner. The request for hearing shall specify the matter or matters to be considered. The hearing shall be held within 30 days after receipt of the request. The Commissioner shall give public notice of the hearing and the matter or matters to be considered not less than 15 days in advance of the hearing date.

(e) In any hearing held pursuant to this section by the Board of Governors or the Commissioner, the Board or the Commissioner as the case may be, shall issue a ruling or order within 30 days after the close of the hearing.

(f) All rulings or orders of the Commissioner under this section shall be subject to judicial review as approved in G.S. 58-9.3. (1973, c. 818, s. 1.)

§ 58-248.40. Termination of North Carolina Automobile Insurance Plan. — The Commissioner of Insurance is authorized and directed to terminate the North Carolina Automobile Insurance Plan established pursuant to G.S. 20-279.34 when it appears to his satisfaction that the Facility herein established is fully operational and when the policies issued under the prior plan have expired. (1973, c. 818, s. 2.)

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 26.

Nature of Policies.

§ 58-249. Form, classification and rates to be approved by Commissioner of Insurance. — No policy of insurance against loss or damage from the sickness or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this State until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with, and the forms approved by, the Commissioner of Insurance. If the Commissioner shall notify, in writing, the company or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form. The action of the Commissioner in this regard shall be subject to review by any court of competent jurisdiction; but nothing in this Article shall be construed to give jurisdiction to any court not already having jurisdiction. (1911, c. 209, s. 1; 1913, c. 91, s. 1; C. S., s. 6477; 1945, c. 385.)

§ 58-250. Form of policy. — (a) No policy of accident and health insurance shall be delivered or issued for delivery to any person in this State unless:

(1) The entire money and other considerations therefor are expressed therein; and

(2) The time at which the insurance takes effect and terminates is expressed therein; and

(3) It purports to insure only one person, except that a policy may insure, originally or by subsequent amendment, upon the application of an adult member of a family who shall be deemed the policyholder, any two or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed 19 years and any other persons dependent upon the policyholder; and

(4) The style, arrangement and overall appearance of the policy give no undue prominence to any portion of the text, and unless every printed portion of the text of the policy and of any endorsements or attached papers is plainly printed in light-faced type of a style in general use, the size of which shall be uniform and not less than 10 point with a lower-case unspaced alphabet length not less than 120 point (the "text"

shall include all printed matter except the name and address of the insurer, name or title of the policy, the brief description if any, and captions and subcaptions); and

(5) The exceptions and reductions of indemnity are set forth in the policy and, except those which are set forth in G.S. 58-251.1, are printed, at the insurer's option, either included with the benefit provision to which they apply, or under an appropriate caption such as "EXCEPTIONS," or "EXCEPTIONS AND REDUCTIONS," provided that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies; and

(6) Each such form, including riders and endorsements, shall be identified by a form number in the lower left-hand corner of the first page thereof; and

(7) It contains no provision purporting to make any portion of the charter, rules, constitution, or bylaws of the insurer a part of the policy unless such portion is set forth in full in the policy, except in the case of the incorporation of, or reference to, a statement of rates or classification of risks, or short-rate table filed with the Commissioner.

(b) If any policy is issued by an insurer domiciled in this State for delivery to a person residing in another state, and if the official having responsibility for the administration of the insurance laws of such other state shall have advised the Commissioner that any such policy is not subject to approval or disapproval by such official, the Commissioner may by ruling require that such policy meet the standards set forth in subsection (a) of this section and in G.S. 58-251.1. (1913, c. 91, s. 2; C. S., s. 6478; 1945, c. 385; 1953, c. 1095, s. 1.)

Editor's Note. — Session Laws 1953, c. 1095, s. 13, provides: "This act shall be in full force and effect from and after January 1, 1954. A policy, rider or endorsement which could have been lawfully used or delivered or issued for delivery to any person in this State immediately before the effective date of this act may be used or delivered or issued for delivery to any such person during three years after the effective date of this act without being subject to the provisions of sections 58-250, 58-251.1 or 58-258, General Statutes, as rewritten by this act."

§ 58-250.1. Right to return policy and have premium refunded. — Every individual or family hospitalization policy, certificate, contract or plan issued for delivery in the State of North Carolina on and after July 1, 1961, must have printed thereon or attached thereto a notice stating substantially: "YOUR POLICY MAY NOT BE IN FORCE WHEN YOU HAVE A CLAIM! PLEASE READ! Your policy was issued based on the information entered in your application, a copy of which is attached to the policy. If, to the best of your knowledge and belief, there is any misstatement in your application or if any information concerning the medical history of any insured person has been omitted, you should advise the Company immediately regarding the incorrect or omitted information; otherwise, your policy may not be a valid contract. RIGHT TO RETURN POLICY WITHIN 10 DAYS. If for any reason you are not satisfied with your policy, you may return it to the Company within 10 days of the date you received it and the premium you paid will be promptly refunded." If a policyholder or certificate holder or purchaser of a contract or plan returns same pursuant to such notice, coverage under such policy, certificate, contract or plan shall become void immediately upon the mailing or delivery of the contract, certificate, policy or plan to the insurance company at its home or branch office or to the agent through whom it was purchased. Coverage shall exist under such policy, certificate, contract or plan within said 10-day period until said mailing or delivery of the contract. (1955, c. 850, s. 10; 1961, c. 962.)

Editor's Note. — Section 12 of the act which inserted this section made it applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

§ 58-251: Repealed by Session Laws 1953, c. 1095, s. 2.

Editor's Note. — See note to § 58-250.

§ 58-251.1. Accident and health policy provisions. — (a) Required Provisions.—Except as provided in subsection (c) of this section each such policy delivered or issued for delivery to any person in this State shall contain the provisions specified in this subsection in the words in which the same appear in this section; provided, however, that the insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the Commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Such provisions shall be preceded individually by the caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision as follows:

ENTIRE CONTRACT; CHANGES: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or waive any of its provisions.

(2) A provision as follows:

TIME LIMIT ON CERTAIN DEFENSES:

a. After two years from the date of issue or reinstatement of this policy no misstatements except fraudulent misstatements made by the applicant in the application for such policy shall be used to void the policy or deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.

The foregoing policy provisions may be used in its entirety only in major or catastrophe hospitalization policies and major medical policies each affording benefits of five thousand dollars ($5,000) or more for any one sickness or injury. Disability income policies affording benefits of one hundred dollars ($100.00) or more per month for not less than 12 months and franchise policies. Other policies to which this section applies must delete the words "except fraudulent misstatements."

(The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial two-year period, nor to limit the application of G.S. 58-251.1(b), (1), (2), (3), (4) and (5) in the event of misstatement with respect to age or occupation or other insurance.)

(A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium:

1. Until at least age 50 or,
2. In the case of a policy issued after age 44, for at least five years from its date of issue, may contain in lieu of the foregoing the following provisions (from which the clause in parentheses

may be omitted at the insurer's option) under the caption "INCONTESTABLE."

After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.)

b. No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

(3) A provision as follows:

GRACE PERIOD: A grace period of . . . . . (insert a number not less than "7" for weekly premium policies, "10" for monthly premium policies and "31" for all other policies) days will be granted for the payment of each premium falling due after the first premium, during which grace period the policy shall continue in force.

(A policy which contains a cancellation provision may add, at the end of the above provision, subject to the right of the insurer to cancel in accordance with the cancellation provision hereof.

A policy in which the insurer reserves the right to refuse any renewal shall have, at the beginning of the above provision,

Unless not less than five days prior to the premium due date the insurer has delivered to the insured or has mailed to his last address as shown by the record of the insurer written notice of its intention not to renew this policy beyond the period for which the premium has been accepted.)

(4) A provision as follows:

REINSTATEMENT: If any renewal premium be not paid within the time granted the insured for payment, a subsequent acceptance of premium by the insurer or by any agent duly authorized by the insurer to accept such premium, without requiring in connection therewith an application for reinstatement, shall reinstate the policy; provided, however, that if the insurer or such agent requires an application for reinstatement and issues a conditional receipt for the premium tendered, the policy will be reinstated upon approval of such application by the insurer, or, lacking such approval, upon the forty-fifth day following the date of such conditional receipt unless the insurer has previously notified the insured in writing of its disapproval of such application. The reinstated policy shall cover only loss resulting from such accidental injury as may be sustained after the date of reinstatement and loss due to such sickness as may begin more than 10 days after such date. In all other respects the insured and insurer shall have the same rights thereunder as they had under the policy immediately before the due date of the defaulted premium, subject to any provisions endorsed hereon or attached hereto in connection with the reinstatement. Any premium accepted in connection with a reinstatement shall be applied to a period for which premium has not been previously paid, but not to any period more than 60 days prior to the date of reinstatement.

(The last sentence of the above provision may be omitted from any policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.)

(5) A provision as follows:

NOTICE OF CLAIM: Written notice of claim must be given to the insurer within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the insured or the beneficiary to the insurer at . . . . . (insert the location of such office as the insurer may designate for the purpose), or to any authorized agent of the insurer, with information sufficient to identify the insured, shall be deemed notice to the insurer.

(In a policy providing a loss-of-time benefit which may be payable for at least two years, an insurer may at its option insert the following between the first and second sentences of the above provision:

Subject to the qualifications set forth below, if the insured suffers loss of time on account of disability for which indemnity may be payable for at least two years, he shall, at least once in every six months after having given notice of claim, give to the insurer notice of continuance of said disability, except in the event of legal incapacity. The period of six months following any filing of proof by the insured or any payment by the insurer on account of such claim or any denial of liability in whole or in part by the insurer shall be excluded in applying this provision. Delay in the giving of such notice shall not impair the insured's right to any indemnity which would otherwise have accrued during the period of six months preceding the date on which such notice is actually given.)

(6) A provision as follows:

CLAIM FORMS: The insurer, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within 15 days after the giving of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, the character and the extent of the loss for which claim is made.

(7) A provision as follows:

PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 90 days after the termination of the period for which the insurer is liable and in case of claim for any other loss within 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

(8) A provision as follows:

TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss other than loss for which this policy provides any period payment will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid . . . . . (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.

(9) A provision as follows:

PAYMENT OF CLAIMS: Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the insured. Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the insured.

(The following provisions, or either of them, may be included with the foregoing provision at the option of the insurer:

If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is a minor or otherwise not competent to give a valid release, the insurer may pay such indemnity, up to an amount not exceeding $..... (insert an amount which shall not exceed one thousand dollars ($1,000)), to any relative by blood or connection by marriage of the insured or beneficiary who is deemed by the insurer to be equitably entitled thereto. Any payment made by the insurer in good faith pursuant to this provision shall fully discharge the insurer to the extent of such payment.

Subject to any written direction of the insured in the application or otherwise all or a portion of any indemnities provided by this policy on account of hospital, nursing, medical, or surgical services, may at the insurer's option and unless the insured requests otherwise in writing not later than the time of filing proofs of such loss, be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person.)

(10) A provision as follows:

PHYSICAL EXAMINATIONS AND AUTOPSY: The insurer at its own expense shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law.

(11) A provision as follows:

LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

(12) A provision as follows:

CHANGE OF BENEFICIARY: Unless the insured makes an irrevocable designation of beneficiary, the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

(The first clause of this provision, relating to the irrevocable designation of beneficiary, may be omitted at the insurer's option.)

(b) Other Provisions.—Except as provided in subsection (c) of this section, no such policy delivered or issued for delivery to any person in this State shall contain provisions respecting the matters set forth below unless such provisions are in the words in which the same appear in this section; provided, however, that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording, approved by the Commissioner which is not less favorable in any respect to the insured or the beneficiary. Any such provision contained in the policy shall be preceded individually by the

appropriate caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision as follows:

CHANGE OF OCCUPATION: If the insured be injured or contract sickness after having changed his occupation to one classified by the insurer as more hazardous than that stated in this policy or while doing for compensation anything pertaining to an occupation so classified, the insurer will pay only such portion of the indemnities provided in this policy as the premium paid would have purchased at the rates and within the limits fixed by the insurer for such more hazardous occupation. If the insured changes his occupation to one classified by the insurer as less hazardous than that stated in this policy, the insurer, upon receipt of proof of such change of occupation, will reduce the premium rate accordingly, and will return the excess pro rata unearned premium from the date of change of occupation or from the policy anniversary date immediately preceding receipt of such proof, whichever is the more recent. In applying this provision, the classification of occupational risk and the premium rates shall be such as have been last filed by the insurer prior to the occurrence of the loss for which the insurer is liable or prior to date of proof of change in occupation with the state official having supervision of insurance in the state where the insured resided at the time this policy was issued; but if such filing was not required, then the classification of occupational risk and the premium rates shall be those last made effective by the insurer in such state prior to the occurrence of the loss or prior to the date of proof of change in occupation.

(2) A provision as follows:

MISSTATEMENT OF AGE: If the age of the insured has been misstated, all amounts payable under this policy shall be such as the premium paid would have purchased at the correct age.

(3) A provision as follows:

OTHER INSURANCE IN THIS INSURER: If an accident or health or accident and health policy or policies previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for . . . . . (insert type of coverage or coverages) in excess of $. . . . . (insert maximum limit of indemnity or indemnities) the excess insurance shall be void and all premiums paid for such excess shall be returned to the insured or to his estate.

Or, in lieu thereof:

Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies.

(4) A provision as follows:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion

for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the "like amount" of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage.

(If the foregoing policy provision is included in a policy which also contains the next following policy provision there shall be added to the caption of the foregoing provision the phrase ". . . EXPENSE INCURRED BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and by hospital or medical service organizations, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, automobile medical payments insurance, or coverage provided by hospital or medical service organizations or by union welfare plans or employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provisions no third-party liability coverage shall be included as "other valid coverage.")

(5) A provision as follows:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for such benefits under this policy shall be for such proportion of the indemnities otherwise provided hereunder for such loss as the like indemnities of which the insurer had notice (including the indemnities under this policy) bear to the total amount of all like indemnities for such loss, and for the return of such portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined.

(If the foregoing policy provision is included in a policy which also contains the next preceding policy provision there shall be added to the caption of the foregoing provision the phrase ". . . OTHER BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be

deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third-party liability coverage shall be included as "other valid coverage.")

(6) A provision as follows:

RELATION OF EARNINGS TO INSURANCE: If the total monthly amount of loss of time benefits promised for the same loss under all valid loss of time coverage upon the insured, whether payable on a weekly or monthly basis, shall exceed the monthly earnings of the insured at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability for which claim is made, whichever is the greater, the insurer will be liable only for such proportionate amount of such benefits under this policy as the amount of such monthly earnings or such average monthly earnings of the insured bears to the total amount of monthly benefits for the same loss under all such coverage upon the insured at the time such disability commences and for the return of such part of the premiums paid during such two years as shall exceed the pro rata amount of the premiums for the benefits actually paid hereunder; but this shall not operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of two hundred dollars ($200.00) or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time.

(The foregoing policy provision may be inserted only in a policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.

The insurer may, at its option, include in this provision a definition of "valid loss of time coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by governmental agencies or by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, or to any other coverage the inclusion of which may be approved by the Commissioner or any combination of such coverages. In the absence of such definition such term shall not include any coverage provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute), or benefits provided by union welfare plans or by employer or employee benefit organizations.)

(7) A provision as follows:

UNPAID PREMIUM: Upon the payment of a claim under this policy, any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

(8) Repealed by Session Laws 1955, c. 886, s. 1.

(9) A provision as follows:

CONFORMITY WITH STATE STATUTES: Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

(10) A provision as follows:

ILLEGAL OCCUPATION: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or

attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation.

(11) A provision as follows:

INTOXICANTS AND NARCOTICS: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician.

(c) Inapplicable or Inconsistent Provisions.—If any provision of this section is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy the insurer, with the approval of the Commissioner, shall omit from such policy any inapplicable provision or part of a provision, and shall modify any inconsistent provision or part of the provision in such manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.

(d) Order of Certain Policy Provisions.—The provisions which are the subject of subsections (a) and (b) of this section, or any corresponding provisions which are used in lieu thereof in accordance with such subsections, shall be printed in the consecutive order of the provisions in such subsections or, at the option of the insurer, any such provision may appear as a unit in any part of the policy, with other provisions to which it may be logically related, provided the resulting policy shall not be in whole or in part unintelligible, uncertain, ambiguous, abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued.

(e) Third-Party Ownership.—The word "insured," as used in this Subchapter shall not be construed as preventing a person other than the insured with a proper insurable interest from making application for and owning a policy covering the insured or from being entitled under such a policy to any indemnities, benefits and rights provided therein.

(f) Requirements of Other Jurisdictions.

(1) Any policy of a foreign or alien insurer, when delivered or issued for delivery to any person in this State, may contain any provision which is not less favorable to the insured or the beneficiary than the provisions of this Subchapter and which is prescribed or required by the law of the state under which the insurer is organized.

(2) Any policy of a domestic insurer may, when issued for delivery in any other state or country, contain any provision permitted or required by the laws of such other state or country.

(g) Filing Procedure.—The Commissioner may make such reasonable rules and regulations concerning the procedure for the filing or submission of policies subject to this Subchapter as are necessary, proper or advisable to the administration of this Subchapter. This provision shall not abridge any other authority granted the Commissioner by law. (1953, c. 1095, s. 2; 1955, c. 850, s. 8; c. 886, s. 1; 1961, c. 432.)

Editor's Note. — For comment on the 1955 amendments, see 33 N.C.L. Rev. 555 (1955).

As to clause excluding from coverage death caused by intentional act of any person, see Patrick v. Pilot Life Ins. Co., 241 N.C. 614, 86 S.E.2d 201 (1955), citing repealed § 58-253(6).

§ 58-251.2. Renewability of individual and blanket hospitalization and accident and health insurance policies. — (a) Every individual or blanket family hospitalization policy and accident and health policy, other than noncancellable or nonrenewable policies but including group, blanket and franchise policies, as defined in this Chapter, covering less than 10 persons, issued in North Carolina after January 1, 1956, shall include the following provision:

Renewability: This policy is renewable at the option of the policyholder unless sufficient notice of nonrenewal is given the policyholder in writing by the insurer.

Sufficient notice shall be, during the first year of any policy, or during the first year following any lapse and reinstatement, a period of 30 days prior to the premium due date. After one continuous year of coverage and acceptance of premium for any portion of the second or subsequent year sufficient notice shall be a number of full months most nearly equivalent to one fourth the number of months of continuous coverage from the first anniversary of the date of issue or reinstatement, to the date of mailing of such notice: Provided no period of required notice shall exceed two years.

The insurer upon a showing of inadequacy of the rates chargeable on such policies upon which notice of nonrenewal has been given, and a finding as to the same by the Commissioner of Insurance, may increase such rates with the approval of the Commissioner. Thereafter, such rates shall be applicable to all policies of the same type, the holders of which receive notice of nonrenewal. The policyholder thereafter must pay the increased rate in order to continue the policy in force. The requirements of this provision shall not apply to refusal of renewal because of change of occupation of the insured to one classified by the company as uninsurable nor to increase in rate due to change of occupation of the insured to a more hazardous occupation.

(b) No insurance company issuing individual or blanket family hospitalization or accident and health policies of insurance shall have the right to unilaterally restrict coverage, reduce benefits or increase rates upon any contract of hospitalization or accident and health insurance which is subject to the provisions of this section except as provided herein.

(c) Any hospitalization or accident and health policy reissued or renewed in the name of the insured during the grace period shall be construed to be a continuation of the policy first issued. (1955, c. 886, s. 2; 1957, c. 1085, s. 2.)

§ 58-251.3. Policy coverage to continue as to mentally retarded or physically handicapped children. — An individual or group accident and health insurance policy, hospital service policy, or medical service plan policy, delivered or issued for delivery in this State after July 1, 1969, which provides that coverage of a dependent child shall terminate upon attainment of the limiting age for dependent children specified in the policy or contract, shall also provide in substance that attainment of such limiting age shall not operate or terminate the coverage of such child while the child is and continues to be (i) incapable of self-sustaining employment by reason of mental retardation or physical handicap; and (ii) chiefly dependent upon the policyholder or subscriber for support and maintenance: Provided, proof of such incapacity and dependency is furnished to the insurer, hospital service plan corporation, or medical service plan corporation by the policyholder or subscriber within 31 days of the child's attainment of the limiting age and subsequently as may be required by the insurer or corporation, but not more frequently than annually after the child's attainment of the limiting age. (1969, c. 745, s. 1; 1971, c. 1126, s. 1.)

Editor's Note. — Session Laws 1969, c. 745, s. 2, and Session Laws 1971, c. 1126, s. 2, provide: "This act shall apply to medical service plan policies and hospital service plan policies issued under the provisions of Chapter 57 as fully as the same applies to accident and health policies issued under Chapter 58 of the General Statutes."

§ 58-251.4. Policies to cover newborn infants. — Every policy of insurance and every hospital service or medical service plan as defined in Chapter 57 of the General Statutes (regardless of whether any of such policies or plans shall be defined as individual, family, group, blanket, franchise, industrial or

otherwise) which provides benefits on account of any sickness, illness, or disability of any minor child or which provides benefits on account of any medical treatment or service authorized or permitted to be furnished by a hospital under the laws of this State to any minor child shall provide such benefits for such occurrences beginning with the moment of birth of such child if such birth occurs while said policy or subscriber contract with such a plan is in force.

Benefits in such insurance policies or plans shall be the same for congenital defects or anomalies as are provided for most sicknesses or illnesses suffered by minor children which are covered by said policies or plans.

No policy or plan subscriber contract shall be approved by the Commissioner of Insurance pursuant to the provisions of this Article or the provisions of Chapter 57 of the General Statutes that does not comply with the provisions of this section.

The provisions of this section shall apply both to insurers governed by the provisions of Chapter 58 of the General Statutes and to corporations governed by the provisions of Chapter 57 of the General Statutes. (1973, c. 345, ss. 1, 2.)

Editor's Note. — Session Laws 1973, c. 345, s. 3, provides: "This act shall become effective upon ratification but shall only apply to policies of insurance, and hospital service and medical service plan subscriber contracts delivered, issued for delivery, reissued or renewed in this State on and after July 1, 1973."

§ 58-251.5. Insurers and others to afford coverage to mentally retarded and physically handicapped children. — (a) No insurance company licensed in this State pursuant to the provisions of this Chapter and no corporation governed by the provisions of Chapter 57 of the General Statutes of North Carolina shall refuse to issue or deliver any individual or group accident and health insurance policy of hospital or medical service plan policy in this State which it is currently issuing for delivery in this State and which affords benefits or coverage for minor children of the applicant, by reason of the physical handicap or mental retardation of any minor children of the applicant; nor shall any such policy issued and delivered in this State carry a higher premium rate or charge or restrict or exclude coverage or benefits by reason of said mental retardation or physical handicap. Provided, however, such policy may exclude benefits, otherwise payable for disability, hospitalization, or medical or other therapeutic expense directly and solely attributable to such mental retardation or such physical handicap.

(b) The Commissioner of Insurance shall revoke the license of any insurer or any corporation governed by the provisions of Chapter 57 of the General Statutes of North Carolina if it fails to comply with the provisions of this section.

(c) The provisions of this section shall apply to corporations governed by the provisions of Chapter 57 of the General Statutes of North Carolina. (1973, c. 754, ss. 1, 2.)

§ 58-252. Meaning of term "preexisting conditions" in certain policies. — At the time of issuing any new policy of individual or family hospitalization insurance or individual accident and health insurance to insureds over age 65, the term "preexisting conditions," or its equivalent in said policy shall include only conditions specifically eliminated by rider. (1955, c. 850, s. 5.)

Editor's Note. — Former § 58-252 was repealed by Session Laws 1953, c. 1095, § 3. The above section was designated § 58-252 by the 1955 act which inserted it. Section 12 of the 1955 act made this section applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

§§ 58-253, 58-254: Repealed by Session Laws 1953, c. 1095, s. 3.

Editor's Note. — See note to § 58-250.

§ 58-254.1. Industrial sick benefit insurance defined. — Industrial sick benefit insurance is hereby defined as that form of insurance for which premiums are payable weekly and which provides for the payment of a weekly indemnity on account of sickness or accident in addition to a benefit in case of death. Such death benefit shall not exceed one hundred and fifty dollars ($150.00). There shall be a provision for the payment of weekly premium, eighty percent (80%) of which shall be allocated for the purchase of sick and accident coverages and twenty percent (20%) thereof for the purchase of death benefits. (1945, c. 385.)

§ 58-254.2. Industrial sick benefit insurance; provisions. — Policies issued under the industrial sick benefit plan shall contain the provisions contained in G.S. 58-251.1 and in addition shall contain the following:

(1) A provision for grace for the payment of the additional premium or assessment or proportion thereof for such death benefits of not less than four weeks during which period the death benefit shall continue in force;

(2) A provision for incontestability of the death benefit coverage after not more than two years except for

a. Nonpayment of premiums, and

b. Misstatement of age;

(3) A provision that the death benefit is noncancellable by the company except for nonpayment of premium.

The Commissioner may approve any form of certificate to be issued under the industrial sick benefit plan which omits or modifies any of the provisions hereinbefore required, if he deems such omission or modification suitable for the character of such insurance and not unjust to the persons insured thereunder. (1945, c. 385; 1953, c. 1095, s. 4.)

§ 58-254.3. Blanket accident and health insurance defined. — (a) Any policy or contract of insurance against death or injury resulting from accident or from accidental means which insures a group of persons conforming to the requirements of one of the following subdivisions (1) to (7), inclusive, shall be deemed a blanket accident policy. Any policy or contract which insures a group of persons conforming to the requirements of one of the following subdivisions (3), (5), (6) or (7) against total or partial disability, excluding such disability from accident or from accidental means, shall be deemed a blanket health insurance policy. Any policy or contract of insurance which combines the coverage of blanket accident insurance and of blanket health insurance on such a group of persons shall be deemed a blanket accident and health insurance policy:

(1) Under a policy or contract issued to any railroad, steamship, motorbus or airplane carrier of passengers, which shall be deemed the policyholder, a group defined as all persons who may become such passengers may be insured against death or bodily injury either while, or as a result of, being such passengers.

(2) Under a policy or contract issued to an employer, or the trustee of a fund established by the employer, who shall be deemed the policyholder, covering any group of employees defined by reference to exceptional hazards incident to such employment, insuring such employee against death or bodily injury resulting while, or from, being exposed to such exceptional hazard.

(3) Under a policy or contract issued to a college, school or other institution of learning or to the head or principal thereof, who or which shall be deemed the policyholder.

(4) Under a policy or contract issued in the name of any volunteer fire department, which shall be deemed the policyholder, covering all of the members of such department.

(5) Under a policy or contract issued to and in the name of an incorporated or unincorporated association of persons having a common interest or calling, which association shall be deemed the policyholder, having not less than 25 members, and formed for purposes other than obtaining insurance, covering all of the members of such association.

(6) Under a policy or contract issued to the head of a family, who shall be deemed the policyholder, whereunder the benefits thereof shall provide for the payment by the insurer of amounts for expenses incurred by the policyholder on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children, or other persons chiefly dependent on him for support and maintenance.

(7) Under a policy or contract issued in the name of any municipal or county recreation commission or department which shall be deemed the policyholder.

(b) All benefits under any blanket accident, blanket health or blanket accident and health insurance policy shall be payable to the person insured, or to his designated beneficiary or beneficiaries, or to his estate, except that if the person insured be a minor, such benefits may be made payable to his parent, guardian, or other person actually supporting him, or to a person or persons chiefly dependent upon him for support and maintenance.

(c) Nothing contained in this section shall be deemed to affect the legal liability of policyholders for the death of or injury to, any such member of such group. (1945, c. 385; 1947, c. 721; 1953, c. 1095, s. 5; 1961, c. 603.)

Editor's Note. — For comment on the 1947 amendment, see 25 N.C.L. Rev. 437.

§ 58-254.4. Group accident and health insurance defined. — (a) Any policy or contract of insurance against death or injury resulting from accident or from accidental means which covers more than one person except blanket accident policies as defined in G.S. 58-254.3, shall be deemed a group accident insurance policy. Any policy or contract which insures against disablement, disease or sickness of the insured (excluding disablement which results from accident or from accidental means) and which covers more than one person, except blanket health insurance policies as defined in G.S. 58-254.3, shall be deemed a group health insurance policy or contract. Any policy or contract of insurance which combines the coverage of group accident insurance and of group health insurance shall be deemed a group accident and health insurance policy. No policy or contract of group accident, group health or group accident and health insurance, and no certificates thereunder, shall be delivered or issued for delivery in this State unless it conforms to the requirements of subsection (b).

(b) No policy or contract of group accident, group health or group accident and health insurance shall be delivered or issued for delivery in this State unless the group of persons thereby insured conforms to the requirements of the following paragraph:

Under a policy issued to an employer, principal, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, or by a principal or two or more principals in the same industry of kind of business, which employer, principal, or trustee shall be deemed the policyholder, covering, except as hereinafter provided, only employees, or

agents, of any class or classes thereof determined by conditions pertaining to employment, or agency, for amounts of insurance based upon some plan which will preclude individual selection. The premium may be paid by the employer, by the employer and the employees jointly, or by the employee; and where the relationship of principal and agent exists, the premium may be paid by the principal, by the principal and agents, jointly, or by the agents. If the premium is paid by the employer and the employees jointly, or by the principal and agents jointly, or by the employees, or by the agents, the group shall comprise not less than seventy-five percent (75%) of all persons eligible of any class or classes of employees, or agents, determined by conditions pertaining to the employment or agency.

(c) The term "employees" as used in this section shall be deemed to include, for the purposes of insurance hereunder, employees of a single employer, the officers, managers, and employees of the employer and of subsidiary or affiliated corporations of a corporation employer, and the individual proprietors, partners, and employees of individuals and firms of which the business is controlled by the insured employer through stock ownership, contract or otherwise. The term "employer" as used herein may be deemed to include the State of North Carolina, any county, municipality or corporation, or the proper officers, as such, of any unincorporated municipality or any department or subdivision of the State, county, such corporation, or municipality determined by conditions pertaining to the employment.

(d) The term "agents" as used in this section shall be deemed to include, for the purposes of insurance hereunder, agents of a single principal who are under contract to devote all, or substantially all, of their time in rendering personal services for such principal, for a commission or other fixed or ascertainable compensation.

(e) The benefits payable under any policy or contract of group accident, group health and group accident and health insurance shall be payable to the employees, or agents, or to some beneficiary or beneficiaries designated by the employee or agent, other than the employer or principal, but if there is no designated beneficiary as to all or any part of the insurance at the death of the employee or agent, then the amount of insurance payable for which there is no designated beneficiary shall be payable to the estate of the employee or agent, except that the insurer may in such case, at its option, pay such insurance to any one or more of the following surviving relatives of the employee or agent: wife, husband, mother, father, child, or children, brothers or sisters; and except that payment of benefits for expenses incurred on account of hospitalization or medical or surgical aid, as provided in subsection (f), may be made by the insurer to the hospital or other person or persons furnishing such aid. Payment so made shall discharge the insurer's obligation with respect to the amount of insurance so paid.

(f) Any policy or contract of group accident, group health or group accident and health insurance may include provisions for the payment by the insurer of benefits to the employee or agent of the insured group, on account of hospitalization or medical or surgical aid for himself, his spouse, his child or children, or other persons chiefly dependent upon him for support and maintenance.

(g) Any policy or contract or group accident, group health or group accident and health insurance may provide for readjustment of the rate of premium based on the experience thereunder at the end of the first year, or of any subsequent year of insurance thereunder, and such readjustment may be made retroactive only for such policy year. Any refund under any plan for readjustment of the rate of premium based on the experience under group policies and any dividend paid under such policies may be used to reduce the employer's or principal's contribution to group insurance for the employees of the employer, or the agents

of the principal, and the excess over such contribution by the employer, or principal, shall be applied by the employer, or principal, for the sole benefit of the employees or agents.

(h) Nothing contained in this section shall be deemed applicable to any contract issued by any corporation defined in Chapter 57 of the General Statutes of North Carolina. (1945, c. 385; 1947, c. 721; 1951, c. 282; 1953, c. 1095, ss. 6, 7.)

Editor's Note. — For comment on 1947 amendment, see 25 N.C.L. Rev. 437.

§ 58-254.5. Group or blanket accident and health insurance; approval of forms and filing of rates. — No policy or group or blanket accident, health or accident and health insurance shall be delivered or issued for delivery in this State unless the form of the policy contracts including the master policy contract, the individual certificates thereunder, the applications for the contract, and a schedule of the premium rates pertaining to such form or forms, have been filed with and the forms approved by the Commissioner. (1945, c. 385.)

§ 58-254.6. Definition of franchise accident and health insurance. — Accident and health insurance on a franchise plan is hereby declared to be that form of accident and health insurance issued to five or more employees of any corporation, copartnership or individual employer or any governmental corporation, agency or department thereof, or 10 or more members of any trade or professional association or of a labor union or of any other association where such association or union has a constitution or bylaws and is formed in good faith for purposes other than that of obtaining insurance, where such persons, with or without their dependents, are issued the same form of an individual policy varying only as to amounts and kinds of coverage applied for by such persons, under an arrangement whereby the premiums on such policies may be paid to the insurer periodically by the employer, with or without payroll deductions, or by the association for its members, or by some designated person acting on behalf of such employer or association. The provisions of this section shall not be construed so as to repeal G.S. 58-254.3 and 58-254.4 or any parts thereof. (1947, c. 721; 1961, c. 646.)

Editor's Note. — For brief comment on this section, see 25 N.C.L. Rev. 438.

§ 58-254.7. Approval by Commissioner of forms, classification and rates; hearing; exceptions. — No policy of insurance against loss or expense from the sickness, or from the bodily injury or death by accident of the insured shall be issued or delivered to any person in this State nor shall any application, rider or endorsement be used in connection therewith until a copy of the form thereof and of the classification of risks and the premium rates, or, in the case of cooperatives or assessment companies the estimated cost pertaining thereto, have been filed with the Commissioner of Insurance.

No such policy shall be issued, nor shall any application, rider or endorsement be used in connection therewith, until the expiration of 30 days after it has been so filed unless the Commissioner shall sooner give his written approval thereto.

The Commissioner may within 30 days after the filing of any such form, disapprove such form

(1) If the benefits provided therein are unreasonable in relation to the premium charged, or

(2) If it contains a provision or provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such policy.

If the Commissioner shall notify the insurer which has filed any such form that it does not comply with the provisions of this section or sections, it shall be unlawful thereafter for such insurer to issue such form or use it in connection with any policy. In such notice the Commissioner shall specify the reasons for his disapproval and state that a hearing will be granted within 20 days after request in writing by the insurer.

The Commissioner may at any time, after a hearing of which not less than 20 days' written notice shall have been given to the insurer, withdraw his approval of any such form on any of the grounds stated in this section. It shall be unlawful for the insurer to issue such form or use it in connection with any policy after the effective date of such withdrawal of approval. The notice of any hearing called under this paragraph shall specify the matters to be considered at such hearing and any decision affirming disapproval or directing withdrawal of approval under this section shall be in writing and shall specify the reasons therefor: Provided, that the provisions of this section shall not apply to workmen's compensation insurance, accidental death or disability benefits issued supplementary to life insurance or annuity contracts, medical expense benefits under liability policies or to group accident and health insurance. (1951, c. 784.)

Editor's Note. — For brief comment on this section, see 29 N.C.L. Rev. 398.

§ 58-254.8. Credit accident and health insurance. — Credit accident and health insurance is declared to be insurance against death or personal injury by accident or by any specified kind or kinds of accident, and insurance against sickness, ailment, or bodily injury of a debtor who may be indebted to any person, firm, or corporation extending credit to such debtor. The amount of credit accident and health insurance written shall not exceed the installment payment. (1953, c. 1096, s. 2; 1961, c. 1071.)

§ 58-254.9. Hospitalization insurance defined. — Hospitalization insurance is declared to be any form of accident and health insurance which provides indemnity or payment for expenses incurred due to or in connection with hospitalization of the insured, or his dependents. (1953, c. 1096, s. 3.)

ARTICLE 26A.

Joint Action to Insure Elderly.

§ 58-254.10. Definitions. — Wherever used in this Article, the following terms shall have the respective meanings hereinafter set forth or indicated, unless the context otherwise requires:

(1) "Association" means a voluntary unincorporated association formed for the sole purpose of enabling joint and cooperative action to provide accident and health insurance in accordance with this Article in this or any other State having legislation enabling the issuance of insurance of the type provided in this Article.

(2) "Insurer" means any insurance company which is authorized under this Chapter to transact accident and health insurance business in this State. (1963, c. 1125.)

Editor's Note. — In the 1963 act inserting this Article, the sections were numbered 58-255.1 to 58-255.6.

§ 58-254.11. Joint action to insure persons 65 years of age or over and their spouses permitted; associations of insurers; individual and group policies. — Notwithstanding any other provisions of this Chapter or any other law which may be inconsistent herewith, any insurer may join with one or more other insurers to plan, develop, underwrite, offer, sell and provide to or for any resident person of this State, or of another state if permitted by the laws of such other state, who is 65 years of age or over and to the spouse of such person, insurance against financial loss from accident or sickness, or both. Such insurance may also cover an employer's nonresident employees and nonresident retired employees 65 years of age or older and their spouses, provided such employees are regularly employed within this State or were so employed at the time of their retirement. Such insurance may be offered, issued and administered through an association of two or more insurers which association is formed for the purpose of offering, selling, issuing and administering such insurance, and may be in the form of a policy insuring a resident who is 65 years of age or older, and the spouse of such resident, if any, or in the form of a group policy insuring residents 65 years of age or older and the spouses of such residents, or in both forms. On such insurance each insurer shall be severally liable for a percentage of the risks determined under the articles of association of the association. The insurer members of such association may agree with respect to premium rates, policy provisions, commission rates and other matters within the scope of this Article. Notwithstanding the provisions of G.S. 58-44, any policy providing such insurance may be executed on behalf of the insurers or the association, as the case may be, by a duly authorized person and need not be countersigned by a resident agent. (1963, c. 1125; 1965, c. 677.)

§ 58-254.12. Regional plans authorized. — If "over 65" accident and health insurance plans exist or hereafter come into existence in other states pursuant to legislative authority similar to that herein given, North Carolina insurers may jointly participate with insurers of such other states in forming a regional plan to carry out the purposes of this Article. Any association formed for the operation of a regional plan shall be exempt from the provisions of G.S. 58-36 and may engage in business in North Carolina through its insurer members only, without being separately licensed. (1963, c. 1125.)

§ 58-254.13. Forms and rate manuals subject to § 58-249; disapproval of rates. — The forms of the policies, applications, certificates or other evidence of insurance coverage and the rate manual showing rates, rules and classification of risks applicable thereto shall be subject to the applicable provisions of G.S. 58-249. The Commissioner may disapprove the premium rates for such insurance, or any class thereof, if he finds that such rates are by reasonable assumptions excessive in relation to the benefits provided. In determining whether such rates by reasonable assumptions are excessive in relation to the benefits provided, the Commissioner shall give due consideration to past and prospective claim experience on such insurance, or other comparable insurance, within and outside this State, and to fluctuations in such claim experience, to a reasonable risk charge, to contribution to surplus and contingency funds, to past and prospective expenses, both within and outside this State, and to all other relevant factors within and outside this State, including any differing operating methods of the insurers joining in the issue of such insurance. In the event of any such disapproval, the decision of the Commissioner shall be subject to review under G.S. 58-9.3. In exercising the powers conferred by this section, the Commissioner shall not be bound by any

other requirements of this Chapter with respect to standard provisions required to be included in the forms of the policies, applications, certificates or other evidence of insurance coverage filed with the Commissioner. (1963, c. 1125.)

§ 58-254.14. Organization of associations of insurers; powers; annual statements; mutual insurers may participate. — An association formed for the purposes of this Article shall adopt articles of association for the organization, administration and regulation of its affairs, which articles of association and any amendments thereto shall be filed within 30 days of adoption of same with the Commissioner of Insurance. Such association may establish requirements for membership of insurers, hold title to property, incur expenses for advertising, soliciting and administering such insurance, including payment of salary or compensation to persons employed by it, enter into contracts, limit the liability of and among its members, and shall be subject to the provisions of G.S. 1-69.1.

Such association shall file annually with the Commissioner of Insurance, on such date and in such form as the Commissioner may prescribe, a statement with respect to its operations.

For the purpose of implementing joint action of insurers in furnishing accident and health insurance coverage to persons 65 years of age and older and their spouses, in accordance with the intent of this Article as expressed herein, insurers operating on a mutual plan, or on any other membership basis, may participate in such a plan, and the persons insured through the plan shall not be entitled to membership in any such insurer nor shall they be entitled to any dividend rights, voting rights, or any other rights peculiar to mutual insurance policyholders and participants in membership insurance plans. (1963, c. 1125.)

§ 58-254.15. No additional licensing required. — Accident and health insurance authorized by this Article and offered by or through an association formed for the purpose of this Article may be solicited and offered directly by such association, any insurer member of such association, and by or through any person authorized by the North Carolina Insurance Department to sell accident and health insurance in this State, without any additional license being required. (1963, c. 1125.)

ARTICLE 27.

General Regulations.

§ 58-255: Repealed by Session Laws 1953, c. 1095, s. 8.

§ 58-256. Waiver by insurer. — The acknowledgment by any insurer of the receipt of notice given under any policy covered by this Subchapter, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of any claim thereunder, shall not operate as a waiver of any of the rights of the insurer in defense of any claim arising under such policy. (1913, c. 91, s. 7; C. S., s. 6484.)

§ 58-257. Application. — (a) On and after January 1, 1956, each individual or family accident, health, hospitalization policy, certificate or service plan of hospitalization and medical and/or dental service corporations shall be issued only on application in writing signed by the insured or the head of the household or guardian. Each application shall also contain the certificate of the agent that he has truly and accurately recorded on the application the information supplied by the insured. Every policy subject to the provisions of this section shall contain as a part of such policy the original or a reproduction of the application required by this section. This section shall not apply to travel or dread disease policies or to policies issued pursuant to a group insurance conversion privilege. If any such policy delivered or issued for delivery to any person in this State shall be

reinstated or renewed, and the insured or the beneficiary or assignee of such policy shall make written request to the insurer for a copy of the application, if any, for such reinstatement or renewal, the insurer shall within 15 days after the receipt of such request at his home office or any branch office of the insurer, deliver or mail to the person making such request, a copy of such application. If such copy shall not be so delivered or mailed, the insurer shall be precluded from introducing such application as evidence in any action or proceeding based upon or involving such policy or its reinstatement or renewal.

(b) No alteration of any written application for any such policy shall be made by any person other than the applicant without his written consent, except that insertions may be made by the insurer, for administrative purposes only, in such manner as to indicate clearly that such insertions are not to be ascribed to the applicant.

(c) The falsity of any statement in the application for any policy covered by this Subchapter may not bar the right to recover thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer. (1913, c. 91, s. 8; C. S., s. 6485; 1953, c. 1095, s. 9; 1955, c. 850, s. 6; 1961, c. 1149.)

Editor's Note. — Section 12 of the 1955 amendatory act made it applicable to hospital and medical service corporations under Chapter 57 to the same extent as to insurers under this Chapter.

§ 58-257.1. Claim forms. — All forms used by policyholders, beneficiaries, hospitals and physicians to report information relative to the nature and extent of loss or disability for which claim is being made under any type of accident or health policy must conform to certain standard language approved by the Commissioner of Insurance. (1955, c. 850, s. 9.)

Editor's Note. — Section 12 of the act inserting this section, as amended by Session Laws 1955, c. 1261, made this section applicable to hospital and medical service corporations under Chapter 57 to the same extent as it applies to insurers under this Chapter.

§ 58-258. Conforming to statute. — (a) Other Policy Provisions. — No policy provision which is not subject to G.S. 58-251.1 shall make a policy, or any portion thereof, less favorable in any respect to the insured or the beneficiary than the provisions thereof which are subject to this Subchapter.

(b) Policy Conflicting with Subchapter. — A policy delivered or issued for delivery to any person in this State in violation of this Subchapter shall be held valid but shall be construed as provided in this Subchapter. When any provision in a policy subject to this Subchapter is in conflict with any provision of this Subchapter, the rights, duties and obligations of the insurer, the insured and the beneficiary shall be governed by the provisions of this Subchapter. (1913, c. 91, s. 9; C. S., s. 6486; 1953, c. 1095, s. 10.)

§ 58-259: Repealed by Session Laws 1953, c. 1095, s. 11.

§ 58-259.1. Age limit. — If any such policy contains a provision establishing, as an age limit or otherwise, a date after which the coverage provided by the policy will not be effective, and if such date falls within a period for which premium is accepted by the insurer or if the insurer accepts a premium after such date, the coverage provided by the policy will continue in force subject to any right of cancellation until the end of the period for which premium has been accepted. In the event the age of the insured has been misstated and if, according to the correct age of the insured, the coverage provided by the policy would not have become effective, or would have ceased prior to the acceptance of such

premium or premiums, then the liability of the insurer shall be limited to the refund, upon request, of all premiums paid for the period not covered by the policy. (1953, c. 1095, s. 11.)

Misrepresentation as to Age. — Where a policy provides that in the event of misrepresentation as to age, the contract will be adjusted so as to pay the amount actually due under the insured's correct age, it is generally held that this provision relates not to the efficacy of the contract, but to the benefits due, and is not affected by an incontestable clause. Wall v. Diamond State Life Ins. Co., 9 N.C. App. 231, 175 S.E.2d 602 (1970).

§ 58-259.2. Nurses' services. — No agency, institution or physician providing a service for which payment or reimbursement is required to be made under a policy governed by this Chapter shall be denied such payment or reimbursement on account of the fact that such services were rendered through a registered nurse acting under authority of rules and regulations adopted by the Board of Medical Examiners and the Board of Nursing pursuant to G.S. 90-6 and 90-162.

Nothing herein shall be construed to authorize contracting with or making payments directly to any nurse not otherwise permitted. (1973, c. 437.)

§ 58-260. Discrimination forbidden; right to choose services of optometrist, podiatrist, dentist or chiropractor. — Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this Subchapter, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or in any other manner whatsoever, is prohibited.

Whenever any policy of insurance governed by this Chapter provides for payment of or reimbursement for any service which is within the scope of practice of a duly licensed optometrist, or duly licensed podiatrist, or a duly licensed dentist, or duly licensed chiropractor, the insured or other persons entitled to benefits under such policy shall be entitled to payment of or reimbursement for such services, whether such services be performed by a duly licensed physician or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist or a duly licensed chiropractor, notwithstanding any provision contained in such policy. Whenever any policy of insurance governed by this Chapter provides for certification of disability which is within the scope of practice of a duly licensed physician, or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist, or a duly licensed chiropractor, the insured or other persons entitled to benefits under such policy shall be entitled to payment of or reimbursement for such disability whether such disability be certified by a duly licensed physician, or a duly licensed optometrist, or a duly licensed podiatrist, or a duly licensed dentist, or a duly licensed chiropractor, notwithstanding any provisions contained in such policy. The policyholder, insured, or beneficiary shall have the right to choose the provider of such services notwithstanding any provision to the contrary in any other statute. (1913, c. 91, s. 11; C. S., s. 6488; 1965, c. 396, s. 2; c. 1169, s. 2; 1967, c. 690, s. 2; 1969, c. 679; 1973, c. 610.)

Editor's Note. — The 1973 amendment added the second sentence of the second paragraph.

Session Laws 1965, c. 396, s. 4, provides that it shall not be construed to equate optometrists with physicians except to the extent that each must be duly licensed.

Session Laws 1965, c. 1169, s. 2, provides that the right to payment or reimbursement notwithstanding any provision to the contrary contained in any plan or policy shall be applicable only to those plans and policies entered into, issued, or renewed after the effective date of the act, there being no legislative intent to impair or enlarge obligations under any existing contracts.

Session Laws 1967, c. 690, s. 4, provides: "Nothing in this act shall be construed to equate podiatrists with physicians except to the extent that each must be duly licensed."

§ 58-260.1. Notice of nonpayment of premium required before forfeiture. — No insurance company doing business in this State and issuing health and/or accident insurance policies, other than contracts of group insurance or disability and/or accidental death benefits in connection with policies of life insurance, the premium for which is to be collected in weekly, monthly, or other periodical installments by authority of a payroll deduction order executed by the assured and delivered to such insurance company or the assured's employer authorizing the deduction of such premium installments from the assured's salary or wages, shall, during the period for which such policy is issued, declare forfeited or lapsed any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least 15 days before said policy is canceled or lapsed. (1909, c. 884; C. S., s. 6465; 1929, c. 308, s. 1; 1931, c. 317; 1945, c. 379.)

Editor's Note. — Prior to the 1945 amendment this section was a part of § 58-207.

§ 58-260.2. Premium rates on credit accident and health insurance. — The maximum premium rates that may be charged on credit accident and health insurance as defined in G.S. 58-254.8 shall be established from time to time by the Commissioner of Insurance on the basis of experience of companies writing this type of credit insurance after due notice and hearing and with full rights of appeal as provided in G.S. 58-9.2 and 58-9.3. (1955, c. 1341, s. 1½.)

§ 58-261. Certain policies of insurance not affected. — (a) Nothing in this Subchapter shall apply to or affect any policy of liability or workmen's compensation insurance.

(b) Nothing in this Subchapter shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as operate to safeguard such insurance against lapse or to provide special benefits therefor in the event that the insured shall be totally, or totally and permanently disabled by reason of accidental bodily injury or by sickness, nor to contracts issued as supplements to life insurance contracts or contracts of endowment insurance, and intended to increase the amount insured by such life or endowment contracts in the event that the death or disability of the insured shall result from accidental bodily injuries: Provided, that no such supplemental contracts shall be issued or delivered to any person in this State unless and until a copy of the form thereof has been submitted to and approved by the Commissioner of Insurance under such reasonable rules and regulations as he shall make concerning the provisions in such contracts, and their submission to and approval by him.

(c) Nothing in this Subchapter shall apply to or in any way affect fraternal benefit societies.

(d) The provisions of this Subchapter contained in subdivision (5) of G.S. 58-250, and clauses (2), (3), (8), and (12) of G.S. 58-251 may be omitted from railroad ticket policies sold only at railroad stations or at railroad ticket offices by railroad employees. (1911, c. 209, s. 5; 1913, c. 91, s. 12; C. S., s. 6489; 1921, c. 136, s. 5; 1945, c. 385; 1947, c. 721.)

Editor's Note. — Section 58-251, referred to in subsection (d), was repealed by Session Laws 1953, c. 1095, s. 2.

§ 58-262. Punishment for violation. — Any company, association, society, or other insurer or any officer or agent thereof, which or who issues or delivers to any person in this State any policy in wilful violation of the provisions of this Subchapter, shall be punished by a fine of not more than five hundred dollars ($500.00) for each offense, and the Commissioner of Insurance may revoke the license of any company, corporation, association, society, or other insurer of another state or country, or of the agent thereof, which or who willfully violates any provision of this Subchapter. (1911, c. 209, s. 6; 1913, c. 91, s. 13; C. S., s. 6490.)

Rules of Evidence Applicable Only to Hearings Which Might Result in Loss of Legal Right. — Former § 143-317(3) showed that former § 143-318 was intended to apply only to hearings which might result in a loss by a specific party of some legal right, duty or privilege, such as hearings relating to the revocation of the license of a specified insurance agent or of a specified insurance company or to the imposition of a fine or penalty upon an insurance agent or insurance company for violation of the "Insurance Law." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

Such hearings involve the essential elements of a court trial, and in such cases the Attorney General, as legal advisor to the Commissioner, can provide counsel as to whether proffered evidence complies with "the rules of evidence as applied in the superior and district divisions of the General Court of Justice." In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971).

ARTICLE 27A.

Health Insurance Advisory Board.

§ 58-262.1. Creation of Board. — There is hereby created the North Carolina Health Insurance Advisory Board. (1961, c. 1044, s. 1.)

State Government Reorganization. — The Health Insurance Advisory Board was transferred to the Department of Insurance by § 143A-77, enacted by Session Laws 1971, c. 864.

§ 58-262.2. Membership of Board; appointment; terms; Commissioner of Insurance ex officio member. — The membership of said Board shall consist of nine members to be appointed as follows:

(1) Five members of the Board shall be appointed from the public at large by the Governor of North Carolina, and four members of the Board shall be appointed from the insurance industry by the Governor of North Carolina upon the recommendation of the Commissioner of Insurance of North Carolina. All of the members of the Board so appointed shall be citizens and residents of the State of North Carolina.

(2) The term of office of the members of said Board shall be as follows: Three public members and two industry members shall be appointed for original two-year terms commencing September 15, 1967. Two public members and two industry members shall be appointed for original four-year terms commencing September 15, 1967; thereafter, all appointments shall be for terms of four years: Provided, however, each member may continue in office into the new term until his successor is appointed. No member shall by appointment or by continuance in office serve more than two consecutive four-year terms.

(3) The Commissioner of Insurance of the State of North Carolina shall be an ex officio member of said Board. (1961, c. 1044, s. 2; 1967, c. 634, s. 1.)

§ 58-262.3. Organization and other meetings; election of officers; adoption of rules; expenses and per diem paid from Department of Insurance appropriations. — (a) The Commissioner of Insurance shall call the initial

meeting of the Board on or before October 1, 1961, for the purpose of organization of the Board. The Board at its initial meeting shall elect from its membership a chairman and such other officers as it may deem necessary.

(b) The Board shall adopt such rules as it may deem necessary for the discharge of its duties, not inconsistent with law.

(c) The Board may meet at such times and places as the Board may determine; provided, that the Board shall meet at least quarterly during each calendar year.

(d) The expenses and per diem of the Board shall be paid from the appropriation made to the North Carolina Department of Insurance and where funds are insufficient for this purpose, the Commissioner of Insurance shall request additional appropriations for this purpose from the Contingency and Emergency Fund. (1961, c. 1044, s. 3.)

§ 58-262.4. Review of analysis of complaints; calling company before Board to examine its operation and procedure; reprimanding, placing on probation or suspending license; study of health insurance industry and making recommendations. — The Board shall review in analysis of complaints prepared by the Department of Insurance relating to the health insurance industry at least quarterly during each calendar year.

The Board may call upon any company selling health insurance in the State of North Carolina to appear before the Board when in the opinion of the Board and the Commissioner of Insurance such company is not operating in the public interest, to the end that the Board and the Commissioner may examine their operations and procedures.

If in the opinion of the Board and the Commissioner of Insurance, any company is not operating in the public interest such company may be reprimanded, or placed on probation, or have its license suspended.

The Board shall also make such study of the health insurance industry as it deems necessary to insure better service to the public, and may recommend to the industry such procedures and changes resulting from each study, and the Board may recommend to the Governor of North Carolina for transmission to the General Assembly any legislation that the Board shall deem necessary. (1961, c. 1044, s. 4.)

§ 58-262.5. Immunity of Board and Commissioner of Insurance from civil suit or criminal prosecution. — The Board and the Commissioner of Insurance shall be immune from civil suit or criminal prosecution as a result of any findings, recommendations or action taken while performing their duties under this Article; provided, that any order or decision made by the Board and the Commissioner of Insurance shall be subject to the provisions of G.S. 58-9.3, and the Board shall be subject to said Article wherever said section shall refer to the Commissioner of Insurance as fully as if the said Board were referred to in said statute. (1961, c. 1044, s. 5.)

§ 58-262.6. Board may subpoena persons and records, administer oaths and take testimony. — The Board shall have the power to subpoena persons and records necessary to carry out its duties, and shall have the power to administer oaths and take testimony in the performance of its duties. (1961, c. 1044, s. 6.)

§ 58-262.7. Per diem and travel allowances of members. — The members of the Board shall receive as compensation the same per diem allowance given to members of other State commissions and boards while in the actual performance of their duties, and shall receive travel allowance upon the same basis as that given to employees of the State of North Carolina when travelling in the performance of their official duties. (1961, c. 1044, s. 7.)

SUBCHAPTER VII. FRATERNAL ORDERS AND SOCIETIES.

ARTICLE 28.

Fraternal Orders.

§ 58-263. General insurance law not applicable. — Nothing in the general insurance laws, except such as apply to fraternal orders or fraternal societies, shall be construed to extend to benevolent associations, incorporated under the laws of this State that only levy an assessment on the members to create a fund to pay the family of a deceased member and make no profit therefrom, and do not solicit business through agents. Such benevolent associations providing death benefits in excess of three hundred dollars ($300.00) to any one person, or disability benefits not exceeding three hundred dollars ($300.00) in any one year to any one person, or both, shall be known as "fraternal benefit societies"; and those providing benefits of three hundred dollars ($300.00) or less shall be known as "fraternal orders." (1899, c. 54, s. 87; 1901, c. 706, s. 2; Rev., s. 4794; 1913, c. 46; C. S., s. 6491.)

Cross Reference. — As to other assessment insurance, see § 58-105 et seq.

Editor's Note. — See 12 N.C.L. Rev. 374.

Williams v. Supreme Conclave, Improved Order of Heptasophs, 172 N.C. 787, 90 S.E. 888 (1916), and Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917), were decided in regard to policies issued before the enactment of this statute, which makes it clear that fraternal and assessment orders shall be governed by their own rules and regulations as are authorzied by the state of their origin. Hollingsworth v. Supreme Council of Royal Arcanum, 175 N.C. 615, 96 S.E. 81 (1918), discussing the application of the statute and altering the rule as applied in former cases.

Fraternal Benefit Associations and Orders. — This section groups benevolent associations incorporated under the laws of this State into "fraternal benefit associations" and "fraternal orders." Gay v. Woodmen of the World, 179 N.C. 210, 102 S.E. 195 (1920).

Representations in Application for Policy. — Section 58-30, providing that statements in an application for a policy of insurance shall be deemed representations which will not prevent a recovery on the policy unless material or fraudulent, is not applicable to a fraternal order as defined in § 58-264, but does apply to a fraternal benefit association incorporated under the laws of another state. Gay v. Woodmen of the World, 179 N.C. 210, 102 S.E. 195 (1920).

§ 58-264. Fraternal orders defined. — Every incorporated association, order, or society doing business in this State on the lodge system, with ritualistic form of work and representative form of government, for the purpose of making provision for the payment of benefits of three hundred dollars ($300.00) or less in case of death, sickness, temporary or permanent physical disability, either as the result of disease, accident, or old age, formed and organized for the sole benefit of its members and their beneficiaries, and not for profit, is hereby declared to be a "fraternal order." Societies and orders which do not make insurance contracts or collect dues or assessments therefor, but simply pay burial or other benefits out of the treasury of their orders, and use their funds for the purpose of building homes or asylums for the purpose of caring for and educating orphan children and aged and infirm people in this State, shall not be considered as "fraternal orders" or "fraternal benefit societies" under this Subchapter; and such order or association paying death or disability benefits may also create, maintain, apply, or disburse among its membership a reserve or emergency fund as may be provided in its constitution or bylaws; but no profit or gain may be added to the payments made by a member. (1899, c. 54, s. 88; 1901, c. 706, s. 3; Rev., s. 4795; 1907, c. 936; 1913, c. 46; C. S., s. 6492.)

Cross Reference. — See § 58-263 and note.

Cited in Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

§ 58-265. Funds derived from assessments and dues. — The fund from which the payment of benefits, as provided for in G.S. 58-264, shall be made, and the fund from which the expenses of such association, order or society shall be defrayed, shall be derived from assessments or dues collected from its members. Such societies or associations shall be governed by the laws of the state governing fraternal orders or societies, and are exempt from the provisions of all general insurance laws of this State, and no law hereafter passed shall apply to such societies unless fraternal orders or societies are designated therein. (1899, c. 54, s. 89; 1901, c. 706, s. 2; Rev., s. 4796; 1913, c. 46; C. S., s. 6493.)

Assessments Governed by Charter and Bylaws. — A fraternal society or association is governed by its own charter and bylaws and an assessment in accordance with its own laws is valid. Hollingsworth v. Supreme Council of Royal Arcanum, 175 N.C. 615, 96 S.E. 81 (1918).

The funds received from assessment are trust funds for orphans and widows and are not subject to use for any other purpose, therefore attachment will not lie. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

Where the constitution of a foreign fraternal insurance society provided for the creation of a fund to be raised from assessments upon its members for the benefit of widows and orphans of deceased members, any money paid to such fund is impressed with the qualities of a trust for the special purposes expressed, and such fund in the hands of a local collector, which he was bound to pay over to the society's treasurer, is not subject to an attachment by a creditor of the society. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

§ 58-266. Appointment of member as receiver or collector; appointee as agent for order or society; rights of members. — Assessments and dues referred to in G.S. 58-264 and 58-265 may be collected, receipted, and remitted by a member or officer of any local or subordinate lodge of any fraternal order or society when so appointed or designated by any grand, district, or subordinate lodge or officer, deputy, or representative of the same, there being no regular licensed agent or deputy of said grand lodge charged with said duties; but any person so collecting said dues or assessments shall be the agent or representative of such fraternal order or society, or any department thereof, and shall bind them by their acts in collecting and remitting said amounts so collected. Under no circumstances, regardless of any agreement, bylaws, contract, or notice, shall said officer or collector be the agent or representative of the individual member from whom any such collection is made; nor shall said member be responsible for the failure of such officer or collector to safely keep, handle, or remit said dues or assessments so collected, in accordance with the rules, regulations, or bylaws of said society; nor shall said member, regardless of any rules, regulations, or bylaws to the contrary, forfeit any rights under his certificate of membership in said fraternal benefit society by reason of any default or misconduct of any said officer or member so acting. (1921, c. 139; C. S., s. 6493(a).)

Waiver of Provisions of Certificate and Bylaws. — Where plaintiff's evidence showed that it had been the custom of defendant mutual benefit association's collecting agents to collect dues within 30 days after the due date, that defendant's home office knew of this custom, and that insured made payment of the dues for the preceding month within 30 days of the due date and died prior to the customary time for the election of dues for the following month, it was held that the evidence was sufficient to be submitted to the jury on the question of defendant's waiver of the provisions of its certificate and bylaws, requiring certificate of good health before reinstating a policy upon payment of premium after the due date, and upon the verdict

of the jury plaintiff was entitled to judgment for the amount of the policy, less the dues for the month not paid. Shackelford v. Sovereign Camp of Woodmen of the World, 209 N.C. 633, 184 S.E. 691 (1936).

§ 58-267. Meetings of governing body; principal office. — Any such society or order incorporated and organized under the laws of this State may provide for the meeting of its supreme legislative or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this State; but the principal business office of such society shall always be kept in this State. (1899, c. 54, s. 91; Rev., s. 4797; 1913, c. 46; C. S., s. 6494; 1969, c. 1279.)

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

§ 58-268. Conditions precedent to doing business. — Any such fraternal, beneficiary order, society, or association as defined by this Chapter, chartered and organized in this State or organized and doing business under the laws of any other state, district, province, or territory, having the qualifications required of domestic societies of like character, upon satisfying the Commissioner of Insurance that its business is proper and legitimate and so conducted, may be admitted to transact business in this State upon the same conditions as are prescribed by this Chapter for admitting and authorizing foreign insurance companies to do business in this State, except that such fraternal orders shall not be required to have the capital required of such insurance companies. Organizers or agents shall be licensed without requiring an examination. (1899, c. 54, s. 92; 1901, c. 706, s. 2; 1903, c. 438, s. 9; Rev., s. 4798; 1913, c. 46; C. S., s. 6495; 1959, c. 1190.)

Cited in Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906); State v. Arlington, 157 N.C. 640, 73 S.E. 122 (1911).

§ 58-269. Certain lodge systems exempt. — The following beneficial orders or societies shall be exempt from the requirements of this Chapter, and shall not be required to pay any license tax or fees nor make any report to the Commissioner of Insurance, unless the assessments collected for death benefits by the supreme lodge amount to at least three hundred dollars ($300.00) in one year: beneficial fraternal orders, or societies incorporated under the laws of this State, which are conducted under the lodge system which have the supreme lodge or governing body located in this State, and which are so organized that the membership consists of members of subordinate lodges; that the subordinate lodges accept for membership only residents of the county in which such subordinate lodge is located; that each subordinate lodge issues certificates, makes assessments, and collects a fund to pay benefits to the widows and orphans of its own deceased members and their families, each lodge independently of the others, for itself and independently of the supreme lodge; that each lodge controls the fund for this purpose; that in addition to the benefits paid by each subordinate lodge to its own members, the supreme lodge provides for an additional benefit for such of the members of the subordinate lodges as are qualified, at the option of the subordinate lodge members; that such organization is not conducted for profit, has no capital stock, and has been in operation for 10 years in this State.

The Commissioner of Insurance may require the chief or presiding officer, or the secretary, to file annually an affidavit that such organization is entitled to this exemption. (1911, c. 199; C. S., s. 6496.)

§ 58-270. Fraternal benefit society defined. — Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which makes provision for the payment of benefits as hereafter prescribed in this Article, is declared to be a fraternal benefit society. (1913, c. 89, s. 1; C. S., s. 6497.)

Applied in Equitable Trust Co. v. Widows' Fund of Oasis & Omar Temples, 207 N.C. 534, 177 S.E. 799 (1935).

§ 58-271. Lodge system defined. — A society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name known, into which members are elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches are required by the laws of such society to hold regular or stated meetings at least once in each month, is deemed to be operating on the lodge system. (1913, c. 89, s. 2; C. S., s. 6498.)

§ 58-272. Representative form of government defined. — A society is deemed to have a representative form of government when it provides in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: Provided that the elective members constitute a majority in number and have not less than two thirds of the votes, nor less than the votes required to amend its constitution and laws; and provided further, that the meetings of the supreme or governing body, and the election of officers, representatives, or delegates, are held as often as once in four years. The members, officers, representatives, or delegates of a fraternal benefit society shall not vote by proxy. (1913, c. 89, s. 3; C. S., s. 6499.)

§ 58-273. Organization. — (a) Application. — Ten or more persons, citizens of the United States, and a majority of whom are citizens of this State, who desire to form a fraternal benefit society, as defined by this Article, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgement of deeds, articles of incorporation in which shall be stated:

(1) The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this State as to mislead the public or lead to confusion.

(2) The purpose for which it is formed — which shall not include more liberal powers than are granted by this Article: Provided, that any lawful social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society — and the mode in which its corporate powers are to be exercised.

(3) The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall

be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

(b) Papers and Bond Filed. — Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of five thousand dollars ($5,000), with sureties approved by the Commissioner of Insurance, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the Commissioner of Insurance, who may require such further information as he deems necessary.

(c) Preliminary License. — If the purposes of the society conform to the requirements of this Article, and all provisions of law have been complied with, the Commissioner of Insurance shall so certify to the Secretary of State and upon his issuing the articles of incorporation shall furnish the incorporators a preliminary license authorizing the society to solicit members as hereinafter provided.

(d) Completion of Organization. — Upon receipt of such license from the Commissioner of Insurance the society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least 500 lives for at least one thousand dollars ($1,000) each, or the largest amount written on any one person, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established 10 subordinate lodges or branches into which said 500 applicants have been initiated; nor until there has been submitted to the Commissioner of Insurance under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four percent (4%) per annum; nor until it shall be shown to the Commissioner of Insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least 500 applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars ($1,000) of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars ($2,500). Such advanced payments shall be credited to the mortuary or disability fund on account of such applicants, and no part thereof may be used for expenses, but such payments shall be held in trust and returned to the applicants if the organization is not completed within one year as hereinafter provided.

(e) License Issued. — The Commissioner of Insurance may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate or license to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate.

(f) One-Year Limit. — No preliminary certificate or license granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the Commissioner of Insurance, upon cause shown unless the 500 applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate, or at the expiration of such extended period, unless the society shall have completed its organization and commenced business as herein provided.

(g) Discontinuance. — When any domestic society shall have discontinued business for the period of one year, or has less than 400 members, its charter shall become null and void. (1913, c. 89, s. 11; C. S., s. 6500.)

§ 58-274. Constitution and bylaws. — Each society shall have power to make a constitution and bylaws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; it shall have the power to change or amend such constitution and bylaws, and it shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. (1913, c. 89, s. 11; C. S., s. 6501.)

§ 58-275. Amendments to constitution and bylaws. — Every society transacting business under this Article shall file with the Commissioner of Insurance a duly certified copy of all amendments of or additions to its constitution and laws within 90 days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (1913, c. 89, s. 19; C. S., s. 6502.)

Failure to File Copy of Amendments. — As to suspension of member where copy of amendments not filed, see Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917).

§ 58-276. Waiver of the provisions of the laws. — The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof, and on all beneficiaries of members. (1913, c. 89, s. 17; C. S., s. 6503.)

Editor's Note. — See Shackelford v. Sovereign Camp of Woodmen of the World, 209 N.C. 633, 184 S.E. 691 (1936), where a distinction is made between waiver by local agents, prohibited by this section, and a custom of dealing established over a period of years to the knowledge of the home office.

§ 58-277. Place of meeting; location of office. — Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all

respects as if such meetings were held in this State; but its principal office shall be located in this State. (1913, c. 89, s. 15; C. S., s. 6504.)

§ 58-278. No personal liability for benefits. — Officers and members of the supreme, grand, or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. (1913, c. 89, s. 16; C. S., s. 6505.)

§ 58-279. Qualifications for membership. — Any society may admit to beneficial membership any person not less than 16 and not more than 60 years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society: Provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (1913, c. 89, s. 6; C. S., s. 6506.)

Construction of Word "Year". — The word "year" in this section should be construed as a calendar year, as set forth in § 12-3(3). The word "year" in a funeral benefit association bylaw relative to membership in the association should be likewise construed. Green v. Patriotic Order of Sons of America, Inc., 242 N.C. 78, 87 S.E.2d 14 (1955).

§ 58-280. Benefits. — (a) Every society transacting business under this Article shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident, or old age, and for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits: Provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under 70 years. Such society shall have the power to give a member, when permanently disabled or on attaining the age of 70, all or such portion of the face value of his certificate as the laws of the society may provide; but nothing contained in this Article shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life, which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four percent (4%) per annum; but this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment.

(b) Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American Experience Table and four percent (4%) interest, may grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; but such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (1913, c. 89, s. 4; C. S., s. 6507.)

§ 58-281. Beneficiaries. — The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member, or,

with the consent of the society, any charitable institution maintained by the society; and if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member. Any society may, by its laws, limit the scope of beneficiaries within the above classes.

Provided, however, that any member or insured named in any contract or certificate of insurance issued by any beneficial fraternal order, lodge, society, or other insurance association, who has neither lawful spouse nor offspring, shall have the right, without regard to the amount payable thereunder, to have the death benefit provided for in any such contract or certificate of insurance made payable, or to have the named beneficiary changed, to the estate of such member or insured, or to his or her executors or administrators, and to make a testamentary disposition of the proceeds thereof, or to have such death benefit made payable, or to have the named beneficiary changed, to a trustee to be named by such member or insured, and to impress the proceeds in the hands of such trustee with a trust, the terms and provisions of the charter, rules, bylaws and regulations of any such beneficial fraternal order, lodge, society, or other insurance association, to the contrary notwithstanding: Provided further, that in case a husband or wife is designated as beneficiary and subsequently becomes absolutely divorced from the member or insured, such divorce shall automatically annul the designation. (1913, c. 89, s. 5; C. S., s. 6508; 1931, c. 161; 1937, c. 178.)

Editor's Note. — See 13 N.C.L. Rev. 95.

For comment on the effects of the 1937 amendment adding the second paragraph, see 15 N.C.L. Rev. 357.

This section expressly grants to the insurer the right to circumscribe the statutory permissive class. Having the right to circumscribe, the insurer of course has the right to make its limitation absolute or it can fix a permissive class of beneficiaries. Widows Fund of Sudan Temple v. Umphlett, 246 N.C. 555, 99 S.E.2d 791 (1957).

Legal dependent means something more than one who is deriving support from another. It imports one who has the right to invoke the aid of the law to require support. And the status of a wife living with her husband as being his legal dependent, entitled in law to his support, is recognized by our statutes. National Council, Junior Order United Am. Mechanics v. Tate, 212 N.C. 305, 193 S.E. 397, 113 A.L.R. 1514 (1937).

Payment of Dues Does Not Create Lien against Certificate. — Where insured's wife was named beneficiary, and after her death insured's brother, who became the beneficiary under the terms of the certificate as insured's nearest blood relation, kept the certificate in force until the death of the insured a short time thereafter, it was held that under the terms of the certificate the insured's brother was entitled to the proceeds thereof, to the exclusion of the wife's nephew who claimed under the will of the wife, the payment of dues or premiums alone being insufficient to create a lien against the certificate, or the proceeds thereof, and the wife at no time having any vested interest as the named beneficiary which she could bequeath by will. Sorrell v. Sovereign Camp, Woodmen of the World, 209 N.C. 226, 183 S.E. 400 (1936).

A contract in the form of a life insurance policy with a mutual benefit society, which contract stipulates that insured agrees that the society is a fraternal benefit society as defined by § 58-270, is a fraternal benefit contract, not an insurance policy, and governed by this section. Equitable Trust Co. v. Widows' Fund of Oasis & Omar Temples, 207 N.C. 534, 177 S.E. 799 (1935).

Right to Change Beneficiary. — Within the restrictions of this section, the beneficiary may be changed by the mere will of the member and without the beneficiary's consent. In such case the right of the beneficiary is not property, but a mere expectancy, dependent on the will of the member to whom the certificate is issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy containing no provision for the designation of a new beneficiary. Pollock v. Household of Hardy, 150 N.C. 211, 63 S.E. 940 (1909).

The right of the insured to change the beneficiary is declared and guaranteed by this section. Hence anyone named as beneficiary has, during the life of the insured, no vested right in the certificate. It is a mere expectancy. Widows Fund of Sudan Temple v. Umphlett, 246 N.C. 555, 99 S.E.2d 791 (1957).

Same — One Disqualified to Take. — Where the assured has named his wife as beneficiary and afterwards substitutes the name of another, disqualified to take under the statute, such attempted change is not a revocation of the provisions of the policy first issued and leaves it in force. Andrews v. Most Worshipful Grand Lodge Free & Accepted Order of Masons, 189 N.C. 697, 128 S.E. 4 (1925).

This section defines the class who may be beneficiaries in a certificate issued by a fraternal benefit society. An attempt to name a beneficiary outside of the class therein limited confers no right on the person so designated. Widows Fund of Sudan Temple v. Umphlett, 246 N.C. 555, 99 S.E.2d 791 (1957).

Effect of Absolute Divorce. — Although the legislature has provided in this section that absolute divorce automatically annuls the designation of a husband or wife as beneficiary in a policy issued by a fraternal order or society, policies of that type are sui generis. There is no similar provision applicable to insurance policies generally. DeVane v. Travelers Ins. Co., 8 N.C. App. 247, 174 S.E.2d 146 (1970).

Bigamous Wife's Right to Recover. — A fraternal assessment benefit association having a representative form of government may, by its contract and constitution, confine the beneficiaries to certain blood relatives, wife, affianced wife, persons dependent upon the member, etc., in conformity with the laws of the state wherein it has its head organization; and where such beneficiary sues upon a policy, claiming as the wife of the deceased member, and it appears that in fact the marriage was bigamous, she may not recover, though the certificate states she was his wife. Applebaum v. Order of United Com. Travelers of America, 171 N.C. 435, 88 S.E. 722 (1916).

Trustee as Beneficiary. — Prior to the 1937 amendment, an incorporated trust company, authorized by a trust agreement to collect the proceeds of life insurance policies on the life of the trustor upon his death, could not be named beneficiary in a fraternal benefit contract on the trustor's life. Equitable Trust Co. v. Widows' Fund of Oasis & Omar Temples, 207 N.C. 534, 177 S.E. 799 (1935).

§ 58-282. Benefit certificates. — Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter, or articles of incorporation or, if a voluntary association, the articles of association, the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member; and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof. Any changes, additions, or amendments to the charter or articles of incorporation, or articles of association if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership. (1913, c. 89, s. 7; C. S., s. 6509.)

Cross Reference. — See note to § 58-263.

Alteration of Constitution or Bylaws Impairing Vested Rights. — A general consent of a policyholder in an assessment fraternal benefit society that the society may thereafter alter or amend its constitution or bylaws does not authorize the society to make such changes therein as will impair the vested right of its members and policyholders arising under their contract of insurance with the society. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917).

Same — Recovery on Canceled Policy. — Where a fraternal benefit society has issued a policy to a member, and has changed its plan of business so as to impair the vested rights of the insured under his contract, and refuses to accept the proper premium, and declares the policy void, the insured may maintain his action to recover of the insurer the principal sum of money he has paid on his policy, and simple interest thereon. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917).

Suspension of Members Where Changes in Bylaws Not Filed. — Where a fraternal benefit insurance society is required to file a certified copy of changes made in its constitution and bylaws with the Insurance Commissioner within 90 days (see § 58-275) and fails to do so, it may

not, while thus in default, suspend a member for noncompliance therewith. Wilson v. Supreme Conclave, Improved Order of Heptasophs, 174 N.C. 628, 94 S.E. 443 (1917).

Proof of Forfeiture of Benefits. — A stipulation in an endowment policy in a fraternal order requiring the member to be in good standing at the time of his death must be construed in reference to provisions in the charter and bylaws of the order, that the member can only be suspended for failure to pay his dues for six months of which notice shall be given him; and an order of suspension made in his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and bylaws. Lyons v. Grand Lodge of Knights of Pythias, 172 N.C. 408, 90 S.E. 423 (1916), distinguishing Wilkie v. National Council United American Mechanics, 151 N.C. 527, 66 S.E. 579 (1909).

False Representations of Insured. — Where an insurance policy in a fraternal order is issued in violation of certain restrictions contained in its constitution and bylaws, and there is evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the order is not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that its agent also knew that the applicant's statements were false. Robinson v. Brotherhood of Locomotive Firemen, 170 N.C. 545, 87 S.E. 537 (1916).

Nonpayment of Dues. — In an action upon a life insurance certificate in a fraternal order the burden of proof is upon the defendant to show nonpayment of dues or other matters to avoid the certificate, when the certificate has been put in evidence and the death has been shown. Wilkie v. National Council, J.O.U.A.M., 147 N.C. 637, 61 S.E. 580 (1908); Harris v. National Council, J.O.U.A.M., 168 N.C. 357, 84 S.E. 405 (1915).

Waiver of Defects in Policy. — A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and bylaws, unless the defect has been waived by the order or it is in some way estopped from insisting on the forfeiture. Robinson v. Brotherhood of Locomotive Firemen, 170 N.C. 545, 87 S.E. 537 (1916).

§ 58-283. Benefits not subject to debts. — No money or other benefit, charity or relief or aid to be paid provided, or rendered by any such society or association for the relief of employees including railroad and other relief associations shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. (1913, c. 89, s. 18; C. S., s. 6510; 1925, c. 83.)

Editor's Note. — See 3 N.C.L. Rev. 130.

§ 58-284. Certificates of insurance to members. — Any fraternal benefit society authorized to do business in this State which shall accumulate and maintain the reserves, on all certificates hereafter issued, required by the American Experience Table of Mortality, with Craig's or Buttolph's Extension thereof, or the Standard Industrial Table of Mortality, with an interest assumption of not more than three and one-half per centum (3½%) per annum, or the American Men Ultimate Table of Mortality, with Bowerman's Extension thereof, with an interest assumption of not more than three and one-half per centum (3½%) per annum, or some higher standard, may accept members in such manner and upon such showing of eligibility, and issue to its members such forms of certificates in such amounts and payable to such beneficiaries as may be authorized by the society; and such society may issue benefit certificates of insurance to any such members in an amount or amounts not exceeding five thousand dollars ($5,000) on the aggregate without medical examination, upon health and character information satisfactory to the society. The provisions of this section shall apply to children under 16 years of age of members of such society.

This section shall not affect or apply to any organization or society which limit their membership to persons engaged in one or more hazardous occupations in the same or similar lines of business, or in any way affect or repeal any law that now applies to such organizations or societies. (1941, c. 74.)

Editor's Note. — For comment on this section, see 19 N.C.L. Rev. 491.

§ 58-285. Funds provided. — (a) Any society may create, maintain, invest, disburse, and apply an emergency, surplus, or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in subsection (b) of G.S. 58-280. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds. But no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this State which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, with interest assumption not more than four percent (4%) per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four percent (4%) per annum.

(b) Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (1913, c. 89, s. 8; C. S., s. 6511.)

§ 58-286. Investment of funds. — Every society shall invest its funds only in securities permitted by the laws of this State for the investment of the assets of life insurance companies: Provided, that any foreign society permitted or seeking to do business in this State, which invests its funds in accordance with the laws of the state in which it is incorporated where it has such laws, shall be held to meet the requirements of this Article for the investment of funds. (1913, c. 89, s. 9; C. S., s. 6512.)

Cross References. — As to investment in bonds guaranteed by the United States, see § 53-44. As to investment in bonds or notes secured by mortgages insured by the Secretary of Housing and Urban Development, see § 53-45. See also § 53-60 as to investments in federal farm loan bonds, and § 142-29 as to investment in refunding bonds of North Carolina.

§ 58-287. Application of funds. — Every provision of the laws of the society for payment by its members, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses. (1913, c. 89, s. 10; C. S., s. 6513.)

§ 58-288. Powers of existing societies retained; reincorporation. — Any society now engaged in transacting business in this State may exercise all of the rights conferred by this Article, and all the rights, powers, and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this Article, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided by law. (1913, c. 89, s. 12; C. S., s. 6514.)

§ 58-289. Mergers and transfers. — No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and is filed with the Commissioner of Insurance of this State, together with a sworn statement of the financial condition of each of the societies, by its president and secretary or corresponding officers, and a certificate duly verified under oath of said officers of each of the contracting societies that such merger or transfer has been approved by a vote of two thirds of the members of the supreme legislative or governing body of each of the societies.

Upon the submission of such contract, financial statements, and certificates, the Commissioner of Insurance shall examine the same, and if he shall find such financial statements to be correct and the contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of the societies, he shall approve the merger or transfer, issue his certificate to that effect, and thereupon the contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the Commissioner of Insurance. (1913, c. 89, s. 13; C. S., s. 6515.)

As to partial repeal of section, see note under § 58-303.

§ 58-290. Accident societies may be licensed. — Any fraternal benefit society heretofore organized and incorporated, and operating within the definition set forth in this Article, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this Article, and shall have all the privileges and be subject to all the provisions and regulations of this Article, except the provisions requiring medical examinations, valuations of benefit certificates, and that the certificate shall specify the amount of benefits. (1913, c. 89, s. 27; C. S., s. 6517.)

§ 58-291. Certain societies not included. — Nothing contained in this Article shall be construed to affect or apply to societies which limit their membership to any one hazardous occupation, nor to an association of local lodges of a society now doing business in this State which provides death benefits not exceeding five hundred dollars ($500.00) to any one person, provided, that the Commissioner of Insurance, upon investigation, may, in his discretion, authorize the payment of death benefits not exceeding fifteen hundred dollars ($1,500) to any one person, or disability benefits not exceeding three hundred dollars ($300.00) in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this State, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which

do not provide for a death benefit of more than one hundred dollars ($100.00), or for disability benefits of more than one hundred and fifty dollars ($150.00) to any one person in any one year. The Commissioner of Insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this Article. (1913, c. 89, s. 26; C. S., s. 6518; 1925, c. 70, s. 2; 1967, c. 977.)

Service on Resident Secretary Valid. — Personal service on resident secretary of fraternal insurance association allowed to do business in the State without a license under this section and § 58-15 and former § 58-251 held valid service on the association in action on policy. Winchester v. Grand Lodge of Bhd. of R.R. Trainmen, 203 N.C. 735, 167 S.E. 49 (1932).

§ 58-292. Reports to Commissioner of Insurance. — (a) Annual Report. — Every society transacting business in this State shall annually, on or before the first day of March, file with the Commissioner of Insurance, in such form as he may require, a statement, under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the Commissioner may deem necessary to a proper exhibit of its business and plan of working. The Commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

(b) Valuation of Certificates. — In addition to the annual report herein required, each society shall annually report to the Commissioner a valuation of its certificates in force on December 31, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and the net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

(c) Valuation Ascertained. — Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the Commissioner within 90 days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or, at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least 20 years and covering not less than 100,000 lives with interest assumption not more than four per centum (4%) per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: Provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required.

(d) Test of Solvency. — The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

(e) Report Mailed to Members. — A report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June 1 of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. (1913, c. 89, s. 20; C. S., s. 6519.)

§ 58-293. Additional or increased rates. — The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased, or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five percent (5%) per annum. (1913, c. 89, s. 20; C. S., s. 6520.)

§ 58-294. Provisions to insure future security. — If the valuation of the certificates, as hereinbefore provided, on December 31, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of efficiency as shown in the valuation as of December 31, 1917. If at any succeeding triennial valuation such society does not show at least the same condition, the Commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the Commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of this Article, or in the case of a foreign society, its license may be canceled in the manner provided in this Article.

Any such society, shown by any triennial valuation, subsequent to December 31, 1917, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members admitted, to be subject, so far as stated rates of contributions are concerned, to the provisions of this Article, applicable in the organization of new societies: Provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. (1913, c. 89, s. 20(a); C. S., s. 6521.)

§ 58-295. Valuation on accumulation basis; tabular basis. — In lieu of the requirements of the two preceding sections [G.S. 58-293 and 58-294], any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated "accumulation basis," by crediting each member with the net amount contributed for each year, and with interest at approximately the net rate earned and by charging him with his shares of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this State, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death, less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member of any past share of losses

exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contribution especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this State shall be valued on such basis, herein designated the "Tabular Basis": Provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis.

Whenever, in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions or by an increase in the number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws.

If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this State and adopted by the society shall be filed by the society with each annual report, and also be furnished to each member before July 1 of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis.

For this purpose individual bookkeeping accounts for each member shall not be required, and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in the manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. (1913, c. 89, s. 20(b); C. S., s. 6522.)

§ 58-296. Examination of domestic societies. — The Commissioner of Insurance, or any person he may appoint, shall have power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as a witness under oath and examine its officers, agents, and employees or other persons in relation to the affairs, transactions, and condition of the society.

The expense of such examination shall be paid by the society examined upon statement furnished by the Commissioner of Insurance, and the examination shall be made at least once in three years. (1913, c. 89, s. 21; C. S., s. 6523.)

§ 58-297. Proceedings for dissolution. — When after examination the Commissioner of Insurance is satisfied that any domestic society has failed to comply with any provision of this Article, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than 400 (or shall determine to discontinue business), the Commissioner of Insurance may present the facts relating thereto to the Attorney General who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, it shall be enjoined from carrying on any further business, and a receiver shall be appointed to take possession of its books, papers, moneys, and other assets and immediately, under the direction of the court, proceed to close its affairs and distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the Attorney General against any such society until after notice has been duly served on its chief executive officers and a reasonable opportunity given to it, on a date to be named in the notice, to show cause why such proceedings should not be commenced. (1913, c. 89, s. 21; C. S., s. 6524.)

§ 58-298. Proceedings only by Attorney General. — No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this State unless the same is made by the Attorney General. (1913, c. 89, s. 22; C. S., s. 6525.)

§ 58-299. Examination of foreign societies. — The Commissioner of Insurance or any person whom he may appoint may examine any foreign society transacting or applying for admission to transact business in this State. The Commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees and other persons in relation to the affairs, transactions, and condition of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the Commissioner of Insurance.

If any such society or its officers refuse to submit to such examination or to comply with the provisions of the section relative thereto, its authority to write new business in this State shall be suspended or license refused until satisfactory evidence is furnished the Commissioner relating to its condition and affairs, and during such suspension the society shall not write new business in this State. (1913, c. 89, s. 23; C. S., s. 6526.)

§ 58-300. No adverse publications. — Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the Commissioner of Insurance shall make public no financial statement, report, or finding, nor shall he knowingly permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society, until a copy thereof has been served upon the society, at its home office, nor until the society has been afforded a reasonable opportunity to answer any such

financial statement, report, or finding, and to make such showing in connection therewith as it may desire. (1913, c. 89, s. 24; C. S., s. 6527.)

§ 58-301. Revocation of license. — When the Commissioner of Insurance on investigation is satisfied that any foreign society transacting business under this Article has exceeded its powers, or has failed to comply with any provisions of this Article, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require the society, on a date named, to show cause why its license should not be revoked. If on the date named in the notice such objections have not been removed to the satisfaction of the Commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this State should not at that time be revoked, he may revoke the authority to continue business in this State. All decisions and findings of the Commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in this Article. (1913, c. 89, s. 25; C. S., s. 6528.)

§ 58-302. Criminal offenses. — Any person, officer, member, or examining physician of any society authorized to do business under this Article who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this Article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or imprisoned in the county jail for not less than 30 days nor more than one year, or both, in the discretion of the court.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this State, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided to do business as herein defined in this State, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty ($50.00) nor more than two hundred dollars ($200.00).

Any society, or any officer, agent, or employee thereof, neglecting or refusing to comply with, or violating, any of the provisions of this Article, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding two hundred dollars ($200.00) upon conviction thereof. (1913, c. 89, s. 28; C. S., s. 6529.)

Cross Reference. — As to penalties for using funds of insurance companies for political purposes, see § 163-270.

§ 58-303. Merger, consolidation or reinsurance of fraternal risks with licensed life insurance companies or with other fraternal orders or benefit societies. — No fraternal order or society organized under the laws of this State to do the business of life, accident, or health insurance shall consolidate or merge with any other fraternal order or society, or with a life insurance company, or reinsure its risks, or any part thereof with any other fraternal order or society, or with a life insurance company, or assume or reinsure the whole or any portion of the risks of any other fraternal order or society, except with a fraternal order or society, or a life insurance company, licensed to transact business in North Carolina and subject to the provisions of G.S. 58-304. (1921, c. 60, s. 1; C. S., s. 6529(a); 1949, c. 1080, s. 1.)

Editor's Note. — Session Laws 1949, c. 1080, s. 4, provides: "All laws and clauses of laws, and in particular the provisions of G.S. 58-289, in conflict with this act are repealed to the extent of such conflict."

§ 58-304. Contracts approved by boards of directors or governing bodies of parties to same; approval by Commissioner of Insurance. — When any fraternal order or society shall propose to consolidate or merge its business or to enter into a contract of reinsurance with any other fraternal order or society or with a life insurance company, or to assume or reinsure the whole or any portion of the risks of any other fraternal order or society, the proposed contract in writing setting forth the terms and conditions of the proposed consolidation, merger, or reinsurance shall be submitted to the boards of directors or to the governing bodies of each of said parties to said contract at a meeting called for that purpose by notice given in writing 10 days prior thereto, and if approved by a majority vote of the said boards of directors, or governing bodies, said contract as so approved shall be submitted to the Commissioner of Insurance of this State for his approval, and the parties to said contract shall at the same time submit a sworn statement showing their financial condition as of the thirty-first day of December next preceding the date of such contract. Provided, that the Commissioner of Insurance may, within his discretion, require such financial statement to be submitted as of the last day of the month next preceding the date of such contract. The Commissioner of Insurance shall thereupon consider such contract of consolidation, merger, or reinsurance, and if satisfied that the interests of the certificate and policyholders of each of the parties are properly protected and that the contract will be in the public interest, and that such contract is just and equitable to the certificate and policyholders of each of the parties, and that no reasonable objection exists thereto, he shall approve said contract as submitted. In case the parties corporate to such contract shall have been incorporated in separate states, or territories, such contract shall be submitted as herein provided to the commissioner of insurance of each of such incorporating states, or territories, to be considered and approved separately by each of said commissioners of insurance. If the Commissioner of Insurance approves such contract of consolidation, merger, or reinsurance, he shall issue a certificate to that effect, and thereupon the said contract of consolidation, merger, or reinsurance shall be in full force and effect. In case such contract is not approved it shall be inoperative, and the fact of the submission and its contents shall not be disclosed by the Commissioner of Insurance. (1921, c. 60, s. 2; C. S., s. 6529(b); 1949, c. 1080, s. 2.)

§ 58-304.1. Application of §§ 58-155.1 to 58-155.35, inclusive. — The provisions of G.S. 58-155.1 to 58-155.35, inclusive, shall apply, where pertinent, to all fraternal orders and societies doing business in this State. (1949, c. 1080, s. 3.)

§ 58-305. Expenses; compensation to officers or employees of contracting parties and State employees. — All necessary and actual expenses and compensation incident to the proceedings provided in this law shall be paid as provided by such contract of consolidation, merger, or reinsurance: Provided, however, that no brokerage or commission shall be included in such expenses and compensation or shall be paid to any person by either of the parties to any such contract in connection with the negotiation therefor or execution thereof, nor shall any compensation be paid to any officer or employee of either of the parties to such contract for directly or indirectly aiding in effecting such contract of consolidation, merger, or reinsurance. An itemized statement of all such expenses shall be filed with the Commissioner of Insurance, subject to approval, and when approved the same shall be binding on the parties thereto. Except as fully expressed in the contract of consolidation, merger or reinsurance, or

itemized statement of expenses, as approved by the Commissioner of Insurance, or commissioners, as the case may be, no compensation shall be paid to any person or persons, and no officer or employee of the State shall receive any compensation, directly or indirectly, for in any manner aiding, promoting, or assisting any such consolidation, merger, or reinsurance. (1921, c. 60, s. 3; C. S., s. 6529(c).)

§ 58-306. Violation of law a felony. — Any person violating the provisions of G.S. 58-303, 38-304, 58-305 shall be guilty of a felony, and upon conviction shall be liable to a fine of not more than five thousand dollars ($5,000), or to imprisonment for not more than five years, or to both fine and imprisonment. (1921, c. 60, s. 4; C. S., s. 6529(d).)

§ 58-307. Appointment of Commissioner of Insurance as process agent. — Every foreign fraternal benefit society except labor organizations which limit their admission to membership to persons engaged in one or more hazardous occupations in the same or similar lines of business now transacting business in this State shall, within 30 days after the passage of this section, and every such society hereafter applying for admission shall, before being licensed, appoint in writing the Commissioner of Insurance and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this State. Copies of such appointment, certified by said Commissioner of Insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall be made in duplicate upon the Commissioner of Insurance, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon said society. When legal service against any such society is served upon said Commissioner of Insurance he shall forthwith forward by registered mail one of the duplicate copies, prepaid and directed to its secretary or corresponding officer. No such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than 30 days from the date of mailing the copy of such service to such society. Legal process shall not be served upon any such society except in the manner provided therein. As a condition precedent to a valid service of process and to the duty of the Commissioner in the premises, the plaintiff shall pay to the Commissioner of Insurance at the time of service the sum of one dollar ($1.00), which the plaintiff shall recover as taxable costs if he prevails in his action. (1939, c. 130.)

Cross Reference. — As to other ways in which a foreign insurance company may be served with a copy of process, see §§ 55-143, 55-144 and 55-146.

ARTICLE 29.

Whole Family Protection.

§ 58-308. Insurance on children. — Any fraternal order or fraternal benefit society authorized to do business in this State and operating on the lodge plan may provide in its constitution and bylaws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of one and 16 years at next birthday, for whose support and maintenance a member of such society is responsible. The society may at its option organize and operate branches for such children and membership in local lodges, and initiation therein shall not be required of such

children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively, as follows: one year, twenty dollars ($20.00); two years, fifty dollars ($50.00); three years, seventy-five dollars ($75.00); four years, one hundred dollars ($100.00); five years, one hundred twenty-five dollars ($125.00); six years, one hundred fifty dollars ($150.00); seven years, two hundred dollars ($200.00); eight years, two hundred fifty dollars ($250.00); nine years, three hundred dollars ($300.00); 10 years, four hundred dollars ($400.00); 11 years, five hundred dollars ($500.00); 12 years, six hundred dollars ($600.00); 13 years, seven hundred dollars ($700.00); 14 years, eight hundred dollars ($800.00); 15 years, nine hundred dollars ($900.00); 16 years, one thousand dollars ($1,000).

Provided, any fraternal benefit society which shall accumulate and maintain the reserves required by a table of mortality not lower than the American Experience Table of Mortality, with an interest assumption of not more than four percent (4%), may accept members at such ages, and children under 16 years of age, in such manner and upon such showing of eligibility, and issue to its members, and children under 16 years of age, such forms of certificates, payable to such beneficiaries, and for such amounts, as its constitution and laws may provide. Children under 16 years of age shall have no voice or vote. (1917, c. 239, s. 1; C. S., s. 6530; 1931, c. 38; 1937, c. 208.)

§ 58-309. Medical examination; certificates and contributions. — No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least 500 such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by such certificate falls below 500. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Mortality Table" or the "English Life Table Number Six," and a rate of interest not greater than four percent (4%) per annum, or upon a higher standard; but contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the bylaws; and extra contributions shall be made if the reserves hereafter provided for become impaired. (1917, c. 239, s. 2; C. S., s. 6531.)

§ 58-310. Reserve fund; exchange of certificates. — Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in G.S. 58-309, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized. A society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society: Provided, that such surrender will not reduce the number of lives insured in the branch below 500; and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. (1917, c. 239, s. 3; C. S., s. 6532.)

§ 58-311. Separation of funds. — An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the Commissioner of Insurance by any society availing itself of the provisions hereof. The separation of assets, funds, and liabilities required hereby shall not be terminated, rescinded, or modified, nor shall the funds be diverted for any use other than as specified in the preceding section [G.S. 58-310], as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition or the status of the society. (1917, c. 239, s. 4; C. S., s. 6533.)

§ 58-312. Payments to expense or general fund. — Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society, as its constitution and bylaws may provide. (1917, c. 239, s. 5; C. S., s. 6534.)

§ 58-313. Continuation of certificates. — In the event of the termination of membership in the society by the person responsible for the support of any child on whose account a certificate may have been issued as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child who shall assume the payment of the required contributions. (1917, c. 239, s. 6; C. S., s. 6535.)

ARTICLE 30.

General Provisions for Societies.

§ 58-314. Appointment of trustees to hold property. — The lodges of Masons, Odd Fellows, Knights of Pythias, camps of Woodmen of the World, councils of the Junior Order of United American Mechanics, orders of the Elks, Young Men's Christian Associations, Young Women's Christian Associations, societies for the care of orphans and indigent children, societies for the rescue of fallen women, and any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies or societies, in such manner as they deem proper, which trustees, and their successors, shall have power to receive, purchase, take, and hold property, real and personal, in trust for such society or body. The trustees shall have power, when instructed so to do by resolution adopted by the society or body which they represent, to mortgage or sell and convey in fee simple any real or personal property owned by the society or body; and the conveyances so made by the trustees shall be effective to pass the property in fee simple to the purchaser or to the mortgagee or trustee for the purposes in such conveyance or mortgage expressed. If there shall be no trustee, then any real or personal property which could be held by such trustees shall vest in and be held by such charitable, benevolent, religious, or fraternal orders and societies, respectively, according to such intent. (1907, c. 22; 1915, cc. 149, 186; C. S., s. 6536; 1923, c. 257.)

Wrongfully Suspended Members Enjoining Sale of Lodge Property. — Where a local lodge existed under the constitution and bylaws of the supreme lodge requiring written notice to be given to its members before suspension, and certain members were suspended without such notice being given, a resolution passed at a subsequent meeting of the local lodge authorizing a sale of its property by trustees was invalid, and the sale was enjoined at the suit of such wrongfully suspended members. Tyler v. Howell, 192 N.C. 433, 135 S.E. 133 (1926).

§ 58-315. Unauthorized wearing of badges, etc. — Any person who fraudulently and willfully wears the badge or button of any secret or fraternal organization or society, either in the identical form or in such near resemblance thereto as to be colorable imitation thereof, or who fraudulently and willfully uses the name of any such order or organization, the titles of its officers, or its insignia, ritual, or ceremonies, unless entitled to wear or use the same under the constitution and bylaws, rules and regulations of such secret or fraternal organization or society, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of fifty dollars ($50.00) or imprisonment for 30 days, in the discretion of the court. (1907, c. 968; 1911, c. 37; 1915, c. 252; C. S., s. 6537.)

ARTICLE 31.

Nonprofit Life Benefit Association.

§§ 58-316 to 58-340: Repealed by Session Laws 1945, c. 379.

Chapter 59.
Partnership.

Article 1.
Uniform Limited Partnership Act.

Sec.
59-1. Limited partnership defined.
59-2. Formation.
59-3. Business which may be carried on.
59-4. Character of limited partner's contribution.
59-5. A name not to contain surname of limited partner; exceptions.
59-6. Liability for false statements in certificate.
59-7. Limited partner not liable to creditors.
59-8. Admission of additional limited partners.
59-9. Rights, powers and liabilities of a general partner.
59-10. Rights of a limited partner.
59-11. Status of person erroneously believing himself a limited partner.
59-12. One person both general and limited partner.
59-13. Loans and other business transactions with limited partner.
59-14. Relation of limited partners inter se.
59-15. Compensation of limited partner.
59-16. Withdrawal or reduction of limited partner's contribution.
59-17. Liability of limited partner to partnership.
59-18. Nature of limited partner's interest in the partnership.
59-19. Assignment of limited partner's interest.
59-20. Effect of retirement, death or insanity of a general partner.
59-21. Death of limited partner.
59-22. Rights of creditors of limited partner.
59-23. Distribution of assets.
59-24. When certificate shall be canceled or amended.
59-25. Requirements for amendment and for cancellation of certificate.
59-26. Parties to actions.
59-27. Name of Article.
59-28. Rules of construction.
59-29. Rules for cases not provided for in this Article.
59-30. Provisions for existing limited partnerships.

Article 2.
Uniform Partnership Act.

Part 1. Preliminary Provisions.

59-31. Name of Article.
59-32. Definition of terms.
59-33. Interpretation of knowledge and notice.
59-34. Rules of construction.
Sec.
59-35. Rules for cases not provided for in this Article.

Part 2. Nature of a Partnership.

59-36. Partnership defined.
59-37. Rules for determining the existence of a partnership.
59-38. Partnership property.

Part 3. Relations of Partners to Persons Dealing with the Partnership.

59-39. Partner agent of partnership as to partnership business.
59-39.1. Act, admission or acknowledgment by partner.
59-40. Conveyance of real property of the partnership.
59-41. Partnership bound by admission of partner.
59-42. Partnership charged with knowledge of or notice to partner.
59-43. Partnership bound by partner's wrongful act.
59-44. Partnership bound by partner's breach of trust.
59-45. Nature of partner's liability.
59-46. Partner by estoppel.
59-47. Liability of incoming partner.

Part 4. Relations of Partners to One Another.

59-48. Rules determining rights and duties of partners.
59-49. Partnership books.
59-50. Duty of partners to render information.
59-51. Partner accountable as a fiduciary.
59-52. Right to an account.
59-53. Continuation of partnership beyond fixed term.

Part 5. Property Rights of a Partner.

59-54. Extent of property rights of a partner.
59-55. Nature of a partner's right in specific partnership property.
59-56. Nature of partner's interest in the partnership.
59-57. Assignment of partner's interest.
59-58. Partner's interest subject to charging order.

Part 6. Dissolution and Winding Up.

59-59. Dissolution defined.
59-60. Partnership not terminated by dissolution.
59-61. Causes of dissolution.
59-62. Dissolution by decree of court.
59-63. General effect of dissolution on authority of partner.

Sec.
59-64. Right of partner to contribution from co-partners after dissolution.
59-65. Power of partner to bind partnership to third persons after dissolution; publication of notice of dissolution.
59-66. Effect of dissolution on partner's existing liability.
59-67. Right to wind up.
59-68. Rights of partners to application of partnership property.
59-69. Rights where partnership is dissolved for fraud or misrepresentation.
59-70. Rules for distribution.
59-71. Liability of persons continuing the business in certain cases.
59-72. Rights of retiring partner or estate of deceased partner when the business is continued.
59-73. Accrual of actions.

Article 3.

Surviving Partners.

59-74. Surviving partner to give bond.
59-75. Effect of failure to give bond.
59-76. Surviving partner and personal representative to make inventory.
59-77. When personal representative may take inventory; receiver.
59-78. Notice to creditors.
59-79. Debts paid pro rata; liens.
59-80. Effect of failure to present claim in six months.
59-81. Procedure for purchase by surviving partner.
59-82. Surviving partner to account and settle.
59-83. Accounting compelled.
59-84. Settlement otherwise provided for.
59-84.1. Partnership to comply with "assumed name" statute.

Article 4.

Business under Assumed Name Regulated.

59-85 to 59-89. [Transferred.]

ARTICLE 1.

Uniform Limited Partnership Act.

§ 59-1. Limited partnership defined. — A limited partnership is a partnership formed by two or more persons under the provisions of G.S. 59-2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. (1941, c. 251, s. 1.)

Editor's Note. — For comment on this article, see 19 N.C.L. Rev. 503.

§ 59-2. Formation. — (a) Two or more persons desiring to form a limited partnership shall

(1) Sign and swear to a certificate, which shall state

a. The name of the partnership,

b. The character of the business,

c. The location of the principal place of business,

d. The name and place of residence of each member; general and limited partners being respectively designated,

e. The term for which the partnership is to exist,

f. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

g. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

h. The time, if agreed upon, when the contribution of each limited partner is to be returned,

i. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

j. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

k. The right, if given, of the partners to admit additional limited partners,

l. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

m. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

n. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(2) File for record the certificate in the office of the register of deeds of the county where the principal place of business is located according to the statement in such certificate.

(b) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of subsection (a). (1941, c. 251, s. 2; 1953, c. 1190, s. 4; 1967, c. 823, s. 26.)

Cross Reference. — See Editor's note to § 53-5.

Editor's Note. — For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 429 (1953).

Partnership General unless Section Complied with. — Where in an action to recover a partnership debt the evidence failed to show either actual or substantial compliance by defendants with the provisions of this section, pertaining to formation of a limited partnership which would relieve them of liability as general partners in the partnership in question, the trial court was correct in giving the jury peremptory instructions in favor of the plaintiff on the issues of general partnership. Atlanta Stove Works, Inc. v. Keel, 255 N.C. 421, 121 S.E.2d 607 (1961).

§ 59-3. Business which may be carried on. — A limited partnership may carry on any business which a partnership without limited partners may carry on. (1941, c. 251, s. 3.)

§ 59-4. Character of limited partner's contribution. — The contributions of a limited partner may be cash or other property, but not services. (1941, c. 251, s. 4.)

§ 59-5. A name not to contain surname of limited partner; exceptions. — (a) The surname of a limited partner shall not appear in the partnership name, unless

(1) It is also the surname of a general partner, or

(2) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(b) A limited partner whose name appears in a partnership name contrary to the provisions of subsection (a) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. (1941, c. 251, s. 5.)

§ 59-6. Liability for false statements in certificate. — If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false

(1) At the time he signed the certificate, or

(2) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in G.S. 59-25, subsection (c). (1941, c. 251, s. 6.)

§ 59-7. Limited partner not liable to creditors. — A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. (1941, c. 251, s. 7.)

Cross Reference. — As to nature of liability of general partner, see § 59-45.

§ 59-8. Admission of additional limited partners. — After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of G.S. 59-25. (1941, c. 251, s. 8.)

§ 59-9. Rights, powers and liabilities of a general partner. — A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(1) Do any act in contravention of the certificate,
(2) Do any act which would make it impossible to carry on the ordinary business of the partnership,
(3) Confess a judgment against the partnership,
(4) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,
(5) Admit a person as a general partner,
(6) Admit a person as a limited partner, unless the right so to do is given in the certificate,
(7) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate. (1941, c. 251, s. 9.)

§ 59-10. Rights of a limited partner. — (a) A limited partner shall have the same rights as a general partner to

(1) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,
(2) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and
(3) Have dissolution and winding up by decree of court.

(b) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in G.S. 59-15 and 59-16. (1941, c. 251, s. 10.)

§ 59-11. Status of person erroneously believing himself a limited partner. — A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. (1941, c. 251, s. 11.)

§ 59-12. One person both general and limited partner. — (a) A person may be a general partner and a limited partner in the same partnership at the same time.

(b) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all restrictions of a general partner; except that, in respect to his contribution, he shall have the rights

against the other members which he would have had if he were not also a general partner. (1941, c. 251, s. 12.)

§ 59-13. Loans and other business transactions with limited partner. — (a) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim

(1) Receive or hold as collateral security any partnership property, or

(2) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(b) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of subsection (a) is a fraud on the creditors of the partnership. (1941, c. 251, s. 13.)

§ 59-14. Relation of limited partners inter se. — Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing. (1941, c. 251, s. 14.)

§ 59-15. Compensation of limited partner. — A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (1941, c. 251, s. 15.)

§ 59-16. Withdrawal or reduction of limited partner's contribution. — (a) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(1) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(2) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of subsection (b), and

(3) The certificate is canceled or so amended as to set forth the withdrawal or reduction.

(b) Subject to the provisions of subsection (a) a limited partner may rightfully demand the return of his contribution

(1) On the dissolution of a partnership, or

(2) When the date specified in the certificate for its return has arrived, or

(3) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(c) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(d) A limited partner may have the partnership dissolved and its affairs wound up when

(1) He rightfully but unsuccessfully demands the return of his contribution, or

(2) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by subdivision (a)(1) and the limited partner would otherwise be entitled to the return of his contribution. (1941, c. 251, s. 16.)

§ 59-17. Liability of limited partner to partnership. — (a) A limited partner is liable to the partnership

(1) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(2) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the condition stated in the certificate.

(b) A limited partner holds as trustee for the partnership

(1) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(2) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(c) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(d) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return. (1941, c. 251, s. 17.)

§ 59-18. Nature of limited partner's interest in the partnership. — A limited partner's interest in the partnership is personal property. (1941, c. 251, s. 18.)

§ 59-19. Assignment of limited partner's interest. — (a) A limited partner's interest is assignable.

(b) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(c) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(d) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(e) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with G.S. 59-25.

(f) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(g) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under G.S. 59-6 and 59-17. (1941, c. 251, s. 19; 1971, c. 1093, s. 10.)

Cross Reference. — As to assignment of general partner's interest, see § 59-57.

§ 59-20. Effect of retirement, death or insanity of a general partner. — The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(1) Under a right so to do stated in the certificate, or

(2) With the consent of all members. (1941, c. 251, s. 20.)

§ 59-21. Death of limited partner. — (a) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(b) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner. (1941, c. 251, s. 21.)

§ 59-22. Rights of creditors of limited partner. — (a) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(b) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(c) The remedies conferred by subsection (a) shall not be deemed exclusive of others which may exist.

(d) Nothing in this Article shall be held to deprive a limited partner of his statutory exemption. (1941, c. 251, s. 22.)

§ 59-23. Distribution of assets. — (a) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(1) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(2) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(3) Those to limited partners in respect to the capital of their contributions,

(4) Those to general partners other than for capital and profits,

(5) Those to general partners in respect to profits,

(6) Those to general partners in respect to capital.

(b) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims. (1941, c. 251, s. 23.)

§ 59-24. When certificate shall be canceled or amended. — (a) The certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such.

(b) A certificate shall be amended when

(1) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(2) A person is substituted as a limited partner,

(3) An additional limited partner is admitted,

(4) A person is admitted as a general partner,

(5) A general partner retires, dies or becomes insane, and the business is continued under G.S. 59-20,

(6) There is a change in the character of the business of the partnership,

(7) There is a false or erroneous statement in the certificate,

(8) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(9) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(10) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them. (1941, c. 251, s. 24.)

§ 59-25. Requirements for amendment and for cancellation of certificate. — (a) The writing to amend a certificate shall

(1) Conform to the requirements of G.S. 59-2, subdivision (a)(1) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(2) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(b) The writing to cancel a certificate shall be signed by all members.

(c) A person desiring the cancellation or amendment of a certificate, if any person designated in subsections (a) and (b) as a person who must execute the writing refuses to do so, may petition the superior court to direct a cancellation or amendment thereof.

(d) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the register of deeds in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(e) A certificate is amended or canceled when there is filed for record in the office of the register of deeds where the certificate is recorded

(1) A writing in accordance with the provisions of subsection (a) or (b) or

(2) A certified copy of the order of court in accordance with the provisions of subsection (d).

(f) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all puposes the certificate provided for by this Article. (1941, c. 251, s. 25; 1967, c. 823, s. 27.)

Cross Reference. — See Editor's note to § 53-5.

§ 59-26. Parties to actions. — A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. (1941, c. 251, s. 26.)

Applied in C.P. Robinson Constr. Co. v. National Corp. for Housing Partnerships, 375 F. Supp. 446 (M.D.N.C. 1974).

§ 59-27. Name of Article. — This Article may be cited as the Uniform Limited Partnership Act. (1941, c. 251, s. 27.)

§ 59-28. Rules of construction. — (a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Article.

(b) This Article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(c) This Article shall not be so construed as to impair the obligations of any contract existing when the Article goes into effect, nor to affect any action on proceedings begun or right accrued before this Article takes effect. (1941, c. 251, s. 28.)

§ 59-29. Rules for cases not provided for in this Article. — In any case not provided for in this Article the rules of law and equity, including the law merchant, shall govern. (1941, c. 251, s. 29.)

§ 59-30. Provisions for existing limited partnerships. — (a) A limited partnership formed under any statute of this State prior to March 15, 1941, may become a limited partnership under this Article by complying with the provisions of G.S. 59-2; provided the certificate sets forth

(1) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(2) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(b) A limited partnership formed under any statute of this State prior to the adoption of this Article, until or unless it becomes a limited partnership under this Article, shall continue to be governed by the provisions of existing law, except that such partnership shall not be renewed unless so provided in the original agreement. (1941, c. 251, s. 30.)

Editor's Note. — Section 31 of the act from which this Article was codified repealed §§ 3258-3276 of the Consolidated Statutes, as amended, except insofar as said sections affected limited partnerships existing on March 15, 1941, when the act became effective.

ARTICLE 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. Name of Article. — This Article may be cited as Uniform Partnership Act. (1941, c. 374, s. 1.)

Editor's Note. — For comment on the enactment, see 19 N.C.L. Rev. 499. For note on partnerships in bankruptcy, see 31 N.C.L. Rev. 457 (1953).

§ 59-32. Definition of terms. — In this Article:

(1) "Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent act.

(2) "Business" includes every trade, occupation, or profession.

(3) "Conveyance" includes every assignment, lease, mortgage, or encumbrance.

(4) "Court" includes every court and judge having jurisdiction in the case.

(5) "Person" includes individuals, partnerships, corporations, and other associations.

(6) "Real property" includes land and any interest or estate in land. (1941, c. 374, s. 2.)

§ 59-33. Interpretation of knowledge and notice. — (a) A person has "knowledge" of a fact within the meaning of this Article not only when he has

actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

(b) A person has "notice" of a fact within the meaning of this Article when the person who claims the benefit of the notice:

(1) States the fact to such person, or

(2) Delivers through the mail, or by other means of communication a written statement of the fact to such person or to a proper person at his place of business or residence. (1941, c. 374, s. 3.)

§ 59-34. Rules of construction. — (a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Article.

(b) The law of estoppel shall apply under this Article.

(c) The law of agency shall apply under this Article.

(d) This Article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(e) This Article shall not be construed so as to impair the obligations of any contract existing when the Article goes into effect, nor to affect any action or proceedings begun or right accrued before this Article takes effect. (1941, c. 374, s. 4.)

§ 59-35. Rules for cases not provided for in this Article. — In any case not provided for in this Article the rules of law and equity, including the law merchant, shall govern. (1941, c. 374, s. 5.)

Part 2. Nature of a Partnership.

§ 59-36. Partnership defined. — (a) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(b) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this Article, unless such association would have been a partnership in this State prior to the adoption of this Article; but this Article shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith. (1941, c. 374, s. 6.)

Cross Reference. — As to limited partnerships, see §§ 59-1 to 59-30.

To make a partnership, two or more persons should combine their property, effects, labor, or skill in a common business or venture, and under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

A partnership is a contractual relation and may be informally created, and its existence may be proved by acts and declarations of the parties. Whiteside v. Rooks, 197 F. Supp. 313 (W.D.N.C. 1961).

Co-ownership of the business is an indispensable requisite for a partnership, under this section, and where this element is lacking there can be no partnership. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

A partnership may be formed by an oral agreement. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

A partnership is a partnership at will unless some agreement to the contrary can be proved. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

Quoted in Peirson v. American Hdwe. Mut. Ins. Co., 248 N.C. 215, 102 S.E.2d 800 (1958).

Cited in Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949).

§ 59-37. Rules for determining the existence of a partnership. — In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by G.S. 59-46 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

a. As a debt by installments or otherwise,

b. As wages of an employee or rent to a landlord,

c. As an annuity to a widow or representative of a deceased partner,

d. As interest on a loan, though the amount of payment vary with the profits of the business,

e. As the consideration for the sale of a goodwill of a business or other property by installments or otherwise. (1941, c. 374, s. 7.)

Cross Reference. — For provisions that a lessor and lessee are not partners, see §§ 42-1 and 74-1.

Agreement to Share Profits Does Not Create Partnership. — While an agreement to share profits, as such, is one of the tests of a partnership, an agreement to receive part of the profits for his services and attention, as a means only of ascertaining the compensation, does not create a partnership. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Sale or Lease of Property to Partnership. — Where a tractor was either sold by an individual to a partnership for "ten hundred dollars," payable one hundred dollars per week, or was leased to the partnership on a rental basis of one hundred dollars per week, even though it appears that the money paid for the tractor was money received from the partnership business, no inference arises therefrom that the individual was a partner in the business. Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Applied in Eggleston v. Eggleston, 228 N.C. 668, 47 S.E.2d 243 (1948); McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

§ 59-38. Partnership property. — (a) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(b) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(c) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(d) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears. (1941, c. 374, s. 8.)

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business. — (a) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(b) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(c) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(1) Assign the partnership property in trust for creditors, or on the assignee's promise to pay the debts of the partnership,

(2) Dispose of the goodwill of the business,

(3) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(4) Confess a judgment,

(5) Submit a partnership claim or liability to arbitration or reference.

(d) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction. (1941, c. 374, s. 9.)

Liability on Contract Signed for Partnership by Unauthorized Partner. — Where a contract apparently made for the purpose of carrying on partnership business, is executed in the partnership name by a partner, the partnership is liable for a breach of the contract, even though the partner was not authorized to so contract unless the other parties to the contract had notice of the lack of authority. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Service of Summons on One Partner. — Under the Uniform Partnership Act it is not necessary that all members of an alleged partnership should be served with summons. A partnership is represented by the partner who is served, and as to him a judgment in the action in which he is served would be binding on him individually, and as to the partnership property. But as to a partner not served with summons, the judgment would not be binding on him individually. Nevertheless even after judgment such partner could be brought in and made a party. The court may, before or after judgment, direct the bringing in of new parties to the end that substantial justice may be done. See § 1A-1, Rules 19 and 22. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949).

Attempt by Partner to Relieve Himself of Liability by Notice to Third Person. — Where there is a general partnership of two persons, without restrictions on the authority of either partner to act within the scope of the partnership business, one of the partners cannot, by notice to a third person that he would not be personally liable for goods thereafter sold the partnership in the ordinary course of the partnership business, relieve himself of liability for such goods thereafter ordered by the other partner while the partnership is a going concern under this section and §§ 59-45 and 59-48 of the Uniform Partnership Act. National Biscuit Co. v. Stroud, 249 N.C. 467, 106 S.E.2d 692 (1959).

Stated in Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Cited in Pappas v. Crist, 223 N.C. 265, 25 S.E.2d 850 (1943).

§ 59-39.1. Act, admission or acknowledgment by partner. — After a cause of action has accrued on any obligation of a partnership, any act, admission or acknowledgment by any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners which removes the bar of the statute of limitations or causes the statutes to begin running anew with respect to the partner doing such act or making such admission or acknowledgment has a like effect with respect to all of the partners and with respect to partnership liability, but when any partner is not so acting and does not have the authority of his copartners, any act, admission or acknowledgment by such partner which removes the bar of the statute of limitations or causes the statute to begin running anew has such effect only as to the partner doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against any partner who has not authorized or ratified the same nor against the partnership. (1953, c. 1076, s. 2.)

Editor's Note. — For brief comment on this section, see 31 N.C.L. Rev. 397 (1953).

§ 59-40. Conveyance of real property of the partnership. — (a) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of subsection (a) of G.S. 59-39, or unless such property has been conveyed by the grantee or a person claiming through such grantee to holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(b) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of subsection (a) of G.S. 59-39.

(c) Where title to real property is in the name of one or more, but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of subsection (a) of G.S. 59-39, unless the purchaser or his assignee, is a holder for value, without knowledge.

(d) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of subsection (a) of G.S. 59-39.

(e) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. (1941, c. 374, s. 10; 1959, c. 1161, s. 3.)

§ 59-41. Partnership bound by admission of partner. — An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Article is evidence against the partnership. (1941, c. 374, s. 11.)

Cross Reference. — As to admission after the statute of limitations has run, see §§ 1-27 and 59-39.1.

§ 59-42. Partnership charged with knowledge of or notice to partner. — Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. (1941, c. 374, s. 12.)

§ 59-43. Partnership bound by partner's wrongful act. — Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (1941, c. 374, s. 13.)

Action against Individual Partners. — In an action by the federal government to recover from individual partners for alleged violation of the False Claims Act, this section did not impose liability upon one of the partners for a false claim filed by the other, since the action was against the individual partners and not against the partnership. United States v. Toepleman, 141 F. Supp. 677 (E.D.N.C. 1956).

Where one partner is sued individually for a tort committed by him in the course of the partnership business, a judgment would be binding upon him individually, and as to the partnership property, but not as against the other partner individually, though the court even after judgment may direct that such other partner be brought in and made a party. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949). See § 59-45 and note.

Malicious prosecution is not within the ordinary course of business of a law partnership. Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974).

Advising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, but taking such action maliciously and without probable cause is quite a different matter. A partner who gave such advice was either conducting himself lawfully and ethically in his relationship with his client, in which event neither he nor any of his partners would have any liability, or he was conducting himself maliciously and unlawfully and would not be acting in the ordinary course of the partnership business. Whatever may be the eventual determination of the conduct, it is evident that his partners, who did not authorize, participate in, or even know about such conduct, would not be held responsible for any injury the conduct may have caused. Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974).

Stated in Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Cited in Keith v. Wilder, 241 N.C. 672, 86 S.E.2d 444 (1955).

§ 59-44. Partnership bound by partner's breach of trust. — The partnership is bound to make good the loss:

(1) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(2) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. (1941, c. 374, s. 14.)

§ 59-45. Nature of partner's liability. — All partners are jointly and severally liable for the acts and obligations of the partnership. (1941, c. 374, s. 15; 1953, c. 881.)

Cross References. — See note to § 59-39. As to liability of limited partner, see §§ 59-6 and 59-7. As to procedure in action against partners, see §§ 1-72 and 1-113.

Section States Common Law. — The common-law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in the Uniform Partnership Act, embraced in this Article. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952).

Each partner is jointly and severally liable for a tort committed by one partner in the course of the partnership business, and the injured person may sue all members of the partnership or any one of them at his election. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952). See note to § 59-43.

Quoted in Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

§ 59-46. Partner by estoppel. — (a) When a person, by words spoken or written or by contract, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(1) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(b) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. (1941, c. 374, s. 16.)

§ 59-47. Liability of incoming partner. — A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. (1941, c. 374, s. 17.)

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners. — The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(3) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(4) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(5) All partners have equal rights in the management and conduct of the partnership business.

(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(7) No person can become a member of a partnership without the consent of all the partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. (1941, c. 374, s. 18.)

Cross References. — See note to § 59-39. As to rights and liabilities of limited partners, see §§ 59-10 to 59-17.

§ 59-49. Partnership books. — The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the

partnership, and every partner shall at all times have access to and may inspect and copy any of them. (1941, c. 374, s. 19.)

§ 59-50. Duty of partners to render information. — Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. (1941, c. 374, s. 20.)

§ 59-51. Partner accountable as a fiduciary. — (a) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

(b) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. (1941, c. 374, s. 21.)

Cross Reference. — As to criminal liability for appropriation of partnership funds by partner, see §§ 14-97 and 14-98.

When one partner wrongfully takes partnership funds and uses them to buy or improve property, his copartners may charge the property with a constructive trust in favor of the partnership to the extent of the partnership funds used in its purchase or improvement. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).

§ 59-52. Right to an account. — Any partner shall have the right to a formal account as to partnership affairs:

(1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
(2) If the right exists under the terms of any agreement,
(3) As provided by G.S. 59-51,
(4) Whenever other circumstances render it just and reasonable. (1941, c. 374, s. 22.)

Equitable jurisdiction is practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm's affairs between the copartners themselves. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954).

Pleading. — Allegations of a partner that the other partner had usurped complete control and exclusive possession of the books, records and entire assets of the partnership and was squandering its earnings and assets, and had refused, after demand, to account to plaintiff for any share of the profits or earnings of the business, were held to state a cause of action for an accounting between the partners. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1954).

Cited in Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

§ 59-53. Continuation of partnership beyond fixed term. — (a) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(b) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. (1941, c. 374, s. 23.)

Part 5. Property Rights of a Partner.

§ 59-54. Extent of property rights of a partner. — The property rights of a partner are:

(1) His right in specific partnership property,

(2) His interest in the partnership, and
(3) His right to participate in the management. (1941, c. 374, s. 24.)

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-55. Nature of a partner's right in specific partnership property. — (a) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(b) The incidents of this tenancy are such that:

(1) A partner, subject to the provisions of this Article and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(2) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(3) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(4) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner, or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(5) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. (1941, c. 374, s. 25.)

Cross Reference. — As to survivor in joint tenancy for partnership purposes, see § 41-2.

Editor's Note. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

The assignment by one partner of all his rights in the partnership to a stranger does not affect the rights of the other partner who is not a party to such assignment, and such assignment cannot transfer title to partnership property. Smithfield Oil Co. v. Furlonge, 257 N.C. 388, 126 S.E.2d 167 (1962).

Applied in Prentzas v. Prentzas, 260 N.C. 101, 113 S.E.2d 678 (1963).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-56. Nature of partner's interest in the partnership. — A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. (1941, c. 374, s. 26.)

The interest of partners in the partnership is personal property, even though part of the partnership assets is real estate. Hence upon the death of the partners, their respective personal representatives were properly made parties to prosecute and defend an action for an accounting and proper application of partnership property on behalf of their intestates. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-57. Assignment of partner's interest. — (a) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor,

as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(b) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. (1941, c. 374, s. 27.)

Cross Reference. — As to assignment of a limited partner's interest, see § 59-19.

§ 59-58. Partner's interest subject to charging order. — (a) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(b) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(1) With separate property, by any one or more of the partners, or

(2) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(c) Nothing in this Article shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (1941, c. 374, s. 28.)

Cross Reference. — As to right of creditors of limited partner, see § 59-22.

Part 6. Dissolution and Winding Up.

§ 59-59. Dissolution defined. — The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. (1941, c. 374, s. 29.)

§ 59-60. Partnership not terminated by dissolution. — On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. (1941, c. 374, s. 30.)

Stated in Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

§ 59-61. Causes of dissolution. — Dissolution is caused:

(1) Without violation of the agreement between the partners,

a. By the termination of the definite term or particular undertaking specified in the agreement,

b. By the express will of any partner when no definite term or particular undertaking is specified,

c. By the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,

d. By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner, unless the partnership agreement provides otherwise;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under G.S. 59-62. (1941, c. 374, s. 31; 1943, c. 384.)

The significance of a partnership being one at will, i.e., without any definite term or undertaking to be accomplished, is that the termination by the election of a partner is not a breach of contract. Having the legal right to terminate, it would seem that there is no liability for its exercise whatever the motive, and whatever may be the injurious consequences to copartners who have neglected to protect themselves by an agreement to continue for a definite term. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

Death of Partner. — Even prior to the statute it was held that the death of a partner worked a dissolution of the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904); Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

The death of a partner ordinarily dissolves the partnership as of that date. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950); Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

In the absence of an express agreement to the contrary, every partnership is dissolved by the death of one of the partners. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Distinction between Partnership for Indefinite Period and One for Specified Term as Concerns Dissolution. — According to the majority view, the only difference, so far as concerns the rights of dissolution by one partner, between a partnership for an indefinite period and one for a specified term is that in the case of a partnership for a definite term a dissolution before the expiration of the stipulated time is a breach of agreement which subjects such partner to a claim for damages for breach of contract if the dissolution is not justified, whereas the dissolution of a partnership at will affords the other partner no ground for complaint; in either case the action of one partner actually dissolves the partnership. Campbell v. Miller, 274 N.C. 143, 161 S.E.2d 546 (1968).

Applied in Langdon v. Hurdle, 17 N.C. App. 530, 195 S.E.2d 72 (1973).

§ 59-62. Dissolution by decree of court. — (a) On application by or for a partner the court shall decree a dissolution whenever:

(1) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(2) A partner becomes in any other way incapable of performing his part of the partnership contract,

(3) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(4) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(5) The business of the partnership can only be carried on at a loss,

(6) Other circumstances render a dissolution equitable.

(b) On the application of the purchaser of a partner's interest under G.S. 59-57 and 59-58:

(1) After the termination of the specified term or particular undertaking,
(2) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued. (1941, c. 374, s. 32.)

Allegations Held Sufficient Predicate for Dissolution. — Where a complaint alleges the existence of a partnership, a conspiracy to deprive plaintiff partner of possession and control of the partnership assets pursuant to which defendant partner transferred all the partnership property to defendant transferee, and seeks a settlement and an accounting of the partnership affairs, the allegations are sufficient predicate for the dissolution of the partnership entitling plaintiff to an accounting and proper application of all the partnership property. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

§ 59-63. General effect of dissolution on authority of partner. — Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,
   a. When the dissolution is not by the act, bankruptcy or death of a partner; or
   b. When the dissolution is by such act, bankruptcy or death of a partner, in cases where G.S. 59-64 so requires,
(2) With respect to persons not partners, as declared in G.S. 59-65. (1941, c. 374, s. 33.)

§ 59-64. Right of partner to contribution from copartners after dissolution. — Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(1) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or
(2) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. (1941, c. 374, s. 34.)

§ 59-65. Power of partner to bind partnership to third persons after dissolution; publication of notice of dissolution. — (a) After dissolution a partner can bind the partnership except as provided in subsection (c)

(1) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;
(2) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction
   a. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or
   b. Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been published at least once a week for four successive weeks in some newspaper qualified for legal advertising in each county in which the partnership business was regularly carried on, or if no such newspaper is published in the county, posted for 30 days at the courthouse and three other public places in the county.

(b) The liability of a partner under subdivision (a)(2) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(1) Unknown as a partner to the person with whom the contract is made; and

(2) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(c) The partnership is in no case bound by any act of a partner after dissolution

(1) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(2) Where the partner has become bankrupt; or

(3) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

a. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

b. Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in subdivision (a)(2)b.

(d) Nothing in this section shall affect the liability under G.S. 59-46 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (1941, c. 374, s. 35; 1951, c. 381, s. 1.)

Editor's Note. — For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 409.

§ 59-66. Effect of dissolution on partner's existing liability. — (a) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(b) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(c) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(d) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts. (1941, c. 374, s. 36.)

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-67. Right to wind up. — Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. (1941, c. 374, s. 37.)

§ 59-68. Rights of partners to application of partnership property. — (a) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless

otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under G.S. 59-66, subsection (b), he shall receive in cash only the net amount due him from the partnership.

(b) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(1) Each partner who has not caused dissolution wrongfully shall have:
   a. All the rights specified in subsection (a) of this section, and
   b. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(2) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (b)(1)b of this section, and in like manner indemnify him against all present or future partnership liabilities.

(3) A partner who has caused the dissolution wrongfully shall have:
   a. If the business is not continued under the provisions of subdivision (b)(2) all the rights of a partner under subsection (a), subject to clause (b)(1)b, of this section,
   b. If the business is continued under subdivision (b)(2) of this section, the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the goodwill of the business shall not be considered. (1941, c. 374, s. 38.)

Under the principle of marshaling of assets each partner has the right to have the partnership property applied to the payment or security of partnership debts in order to relieve him from personal liability. Casey v. Grantham, 239 N.C. 121, 79 S.E.2d 735 (1945).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-69. Rights where partnership is dissolved for fraud or misrepresentation. — Where partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(1) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(2) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(3) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (1941, c. 374, s. 39.)

§ 59-70. Rules for distribution. — In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(1) The assets of the partnership are
   a. The partnership property,
   b. The contributions of the partners necessary for the payment of all the liabilities specified in subdivision (2) of this section.

(2) The liabilities of the partnership shall rank in order of payment, as follows:
   a. Those owing to creditors other than partners,
   b. Those owing to partners other than for capital and profits,
   c. Those owing to partners in respect of capital,
   d. Those owing to partners in respect of profits.

(3) The assets shall be applied in the order of their declaration in subdivision (1) of this section to the satisfaction of the liabilities.

(4) The partners shall contribute, as provided by G.S. 59-48, subdivision (1) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(5) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in subdivision (4) of this section.

(6) Any partner or his legal representative shall have the right to enforce the contributions specified in subdivision (4) of this section, to the extent of the amount which he has paid in excess of his share of the liability.

(7) The individual property of a deceased partner shall be liable for the contributions specified in subdivision (4) of this section.

(8) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(9) Where a partner has become bankrupt or his estate is insolvent the claims against the separate property shall rank in the following order:
   a. Those owing to separate creditors,
   b. Those owing to partnership creditors,
   c. Those owing to partners by way of contribution. (1941, c. 374, s. 40.)

Cross Reference. — As to distribution of assets of limited partnership, see § 59-23.

Editor's Note. — For note on marshaling of assets, see 36 N.C.L. Rev. 229 (1958).

Determination of Liabilities Is Contemplated in Receivership Proceedings. — When a partner seeks a dissolution of a partnership and, with the consent of the other partners, a receiver is appointed to take possession of partnership assets for distribution to the parties entitled thereto, the law contemplates a judicial determination of the liabilities of the partnership. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

No Distribution to Partners Until Such Determination Made. — Until the liabilities of the partnership have been determined, there can be no distribution to the partners. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

When Judgment Recoverable against Individual Partners. — Where the partnership assets are insufficient to discharge the partnership obligations, claimant may, in the proceedings in which a receiver was appointed, have judgment against the individual partners for the balance of his claim. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Applied in Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-71. Liability of persons continuing the business in certain cases. — (a) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(b) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(c) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in subsections (a) and (b) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(d) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(e) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of G.S. 59-68, subdivision (b)(2), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(f) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(g) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of the partnership property only.

(h) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(i) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(j) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership. (1941, c. 374, s. 41.)

§ 59-72. Rights of retiring partner or estate of deceased partner when the business is continued. — When any partner retires or dies, and the business

is continued under any of the conditions set forth in G.S. 59-71, subsections (a), (b), (c), (e), (f), or G.S. 59-68, subdivision (b)(2), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by G.S. 59-71, subsection (h). (1941, c. 374, s. 42.)

§ 59-73. Accrual of actions. — The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary. (1941, c. 374, s. 43.)

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

ARTICLE 3.

Surviving Partners.

§ 59-74. Surviving partner to give bond. — Upon the death of any member of a partnership, the surviving partner shall, within 30 days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the State of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds. (1915, c. 227, ss. 1, 2, 3; C. S., s. 3277.)

Cross Reference. — As to death of partner working dissolution of partnership, see § 59-61 and note.

The purpose of this section is limited to the protection of those who are interested in the property or estate administered by the surviving partner, who is required to account to them and pay over their interest in case there is a surplus after paying the partnership debts. It is a trust relationship in which only they have a legal interest. Therefore, the objection that the surviving partner has not filed the bond is not available to one who is merely a debtor of the estate. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

The giving of a bond cannot be regarded as a condition precedent to the maintenance of an action by a surviving partner, for § 59-75 provides an alternative remedy upon failure of the surviving partner to give bond. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

Purpose and Scope of Bond. — The bond required by this section of surviving partners is primarily for the protection of those interested in the deceased partner's interest in the surplus after the partnership has been wound up, and such bond has no retroactive effect and does not become liable for any maladministration prior to its filing. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Appeal from Order of Clerk Requiring Filing of Bond and Inventory. — Upon the failure or refusal of surviving partners to file the bond required by this section or the inventory required by § 59-76, the clerk of the superior court may not properly issue an order requiring the filing of bond and inventory, but upon appeal from such orders the superior court acquires jurisdiction of the entire proceeding and the appeal is erroneously dismissed in the superior court on the ground of want of jurisdiction. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Applied in Reel v. Boyd, 198 N.C. 214, 151 S.E. 192 (1930).

Cited in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-75. Effect of failure to give bond. — Upon the failure of the surviving partner to execute the bond provided for in G.S. 59-74, the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person. (1915, c. 227, s. 4; C. S., s. 3278.)

Cross Reference. — As to the law governing an administrator of a deceased person, see Chapter 28.

Quoted in Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948); In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-76. Surviving partner and personal representative to make inventory. — When a member of any partnership dies the surviving partner, within 60 days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner. (1901, c. 640; Rev., s. 2540; C. S., s. 3279.)

Cross References. — As to appeal from order of clerk requiring filing of inventory, see note under § 59-74. As to jurisdiction to appoint receiver for failure to file inventory, see note under § 59-77.

Property Vests in Surviving Partner. — The surviving partner has the closing up of partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and, under Revisal § 1579 (now § 41-2), the title to personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. Sherrod v. Mayo, 156 N.C. 144, 72 S.E. 216 (1911). As to joint tenancy in partnership property, see § 41-2.

Impressed with a Trust. — The death of a partner, in the absence of any stipulation in the articles of partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

After the dissolution of a firm by the death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all persons interested. Calvert v. Miller, 94 N.C. 600 (1886).

Upon the death of a partner, his interest in the partnership property vests in the surviving partner for administration in winding up the partnership, and the surviving partner stands as a trustee charged with the duty of faithful management and accounting to those entitled to the deceased partner's interest after the settlement of the debts of the partnership. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

It is the right and duty of a surviving partner to close up the affairs of the firm. He has the right, therefore, to receive and to collect the debts and assets of the partnership, and apply the same toward the payment of the debts and liabilities of the firm. Weisel v. Cobb, 114 N.C. 22, 18 S.E. 943 (1894); Hodgin v. Peoples' Nat'l Bank, 124 N.C. 540, 32 S.E. 887 (1899); Hodgin v. Bank, 128 N.C. 110, 38 S.E. 294 (1901).

Creation of New Debts. — A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new material and making new debts so far as may be necessary to work up unfinished material and sell the same. Howell, Orr & Co. v. Boyd Mfg. Co., 116 N.C. 806, 22 S.E. 5 (1895).

Power to Renew or Indorse Note. — A surviving partner has no power after dissolution to renew or indorse a firm note in the name of the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

A surviving partner who, more than two years after dissolution of the firm, indorsed a note in the firm name for the renewal of notes outstanding similarly indorsed, was individually liable on such indorsement, though it did not bind the

firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

Injunction When There Is Danger of Misapplication of Funds. — In case of danger of misapplication by the surviving partner of partnership funds, the court would certainly, in behalf of the representatives of a deceased partner interfere and restrain by injunction the surviving partner from such acts, or grant other proper relief; and there is no reason why they should not interfere in behalf of a creditor in such a case. Hodgin v. Bank, 128 N.C. 110, 38 S.E. 294 (1901).

When Surviving Partner Is Agent of Executor. — Where one of the members of a firm was constituted its general managing agent by the articles of partnership, and upon the death of one partner his executor consented to a continuance of the business, it was held that the manager became the agent of the executor as well as of the other surviving member, and a demand and refusal to account are necessary to terminate the agency and put the statute of limitations in operation. Patterson v. Lilly, 90 N.C. 82 (1884).

When Property Held in Common. — An arrangement between distributees and legatees to permit their property with the consent and cooperation of the representatives of the deceased partners to remain in common and to be used for their joint benefit, adopting the name of the old firm, constitutes a partnership. Walker v. Miller, 139 N.C. 448, 52 S.E. 125 (1905).

Personal Property Exemptions. — A surviving partner of an insolvent firm is not entitled to have his personal property exemptions paid out of the partnership assets. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

Competency of Witness. — In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, is not competent as against the executor of the deceased partner or against the firm. Charlotte Oil & Fertilizer Co. v. Rippy, 124 N.C. 643, 32 S.E. 980 (1899); Moore v. Palmer, 132 N.C. 969, 44 S.E. 673 (1903).

A surviving partner, who assigns partnership property of an insolvent firm to pay his own debts pro rata with those of the firm, cannot be allowed to testify that he did not thereby intend to defraud the firm creditors. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

When Representative Not Subject to Suit. — The representative of a deceased partner cannot be sued while there is a surviving partner. Burgwin v. Hostler (2nd Sec.), 1 N.C. 75 (1799).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

Cited in Bank v. Hodgin, 129 N.C. 247, 39 S.E. 959 (1901).

§ 59-77. When personal representative may take inventory; receiver. — If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of G.S. 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (1901, c. 640, s. 2; Rev., s. 2541; C. S., s. 3280.)

Where the surviving partner of a firm is appointed receiver of the firm, he cannot maintain an action against one who, as surety for the accommodation of the deceased partner indorsed the latter's note, which was discounted by the firm, if it appears that the assets of the partnership are sufficient to pay its debts and leave a surplus against the deceased partner's share of which the note can be charged. Patton v. Carr, 117 N.C. 176, 23 S.E. 182 (1895).

Jurisdiction to Appoint Receiver. — While the clerk of the superior court has no jurisdiction to appoint a receiver for a partnership under this section when the surviving partners have failed or refused to file the inventory required by § 59-76, the superior court on appeal from an order of the clerk in the proceeding does acquire jurisdiction to appoint such receiver. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Receiver Appointed When Assignee of Surviving Partner Holds for Indefinite Term. — Where an assignment was made by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver might be appointed to administer the partnership fund among the creditors though the deed of assignment was not set aside. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898). As to fraudulent assignment, see note to § 59-79.

Duty of Assignee to Charge Interest. — Where the surviving partner of a firm conveyed the assets to an assignee to settle the estate, it was the duty of the assignee, notwithstanding a contrary custom existing in the town where the

business has been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of the partnership, and he is liable to the surviving partner for his failure to do so. Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896).

Assignee Liable for Interest. — The assignee of a surviving partner is chargeable with interest on the partnership moneys kept by him after 12 months from the time he assumed the trust until he disbursed it. Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896).

Stated in Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

§ 59-78. Notice to creditors. — Every surviving partner, within 30 days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within six months from the date of first publication of such notice. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the surviving partner the notice shall be published in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. (1901, c. 640, s. 3; Rev., s. 2542; C. S., s. 3281; 1951, c. 381, s. 2; 1973, c. 1410, ss. 1, 2.)

Editor's Note. — The 1973 amendment substituted "six months" for "twelve months" in the first sentence and rewrote the second and third sentences of the section. The amendatory act directed that the section be amended by rewriting lines 5, 6, 7, 8 and 9. The second and third sentences were plainly intended.

Where a dissolution of a firm occurs by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. Bank v. Hollingsworth, 135 N.C. 556, 47 S.E. 618 (1904).

§ 59-79. Debts paid pro rata; liens. — All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership. (1901, c. 640, s. 4; Rev., s. 2543; C. S., s. 3282.)

Debts Created by Surviving Partner. — While a surviving partner cannot enter into contracts, or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and if he contracts debts, bona fide, for the interest of the common property, he may pay them out of the common fund. Calvert v. Miller, 94 N.C. 600 (1886).

Creditors Advancing Funds to Market Product. — Where a surviving partner has purchased materials and contracted new debts to complete unfinished products and placed the finished article on the market, the creditors advancing the necessary funds are entitled to pay out of assets of the partnership. Howell, Orr & Co. v. Boyd Mfg. Co., 116 N.C. 806, 22 S.E. 5 (1895).

Personal Debt as Set-Off. — In an action brought by a surviving partner for a debt, a debt due from him may be pleaded as a set-off. Hogg's Ex'rs v. Ashe, 2 N.C. 471 (1797).

But a defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, being for the board of his partner, should be paid out of the assets of the store in which the plaintiff and the defendant were partners. Norment v. Johnston, 32 N.C. 89 (1849).

Prior Encumbrance of Surviving Partner. — The claims of a surviving partner upon the proceeds of sale of the deceased partner's half of the real estate (here mill property), to reimburse him to the amount of half the expenditures incurred in the conduct of the joint business and improvements put upon the property, constitute a prior encumbrance and must be paid, to the postponement of creditors of the deceased partner. Mendenhall v. Benbow, 84 N.C. 646 (1881).

Assignment Fraudulent as to Creditors. — An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee

to have the right to employ servants and to replenish the stock, and out of the proceeds to pay firm debts, and also the individual debts of the survivor pro rata, is fraudulent as against creditors. Southern Comm'n Co. v. Porter, 122 N.C. 692, 30 S.E. 119 (1898).

When Bank May Not Apply Deposits to Debts. — When a bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the depositor. Hodgin v. People's Nat'l Bank, 125 N.C. 503, 34 S.E. 709 (1899).

Accommodation Indorser of Note for Member of Firm. — A note executed by a member of a partnership to a third party who, as surety for the accommodation of the maker, indorses it and receives no benefit from it, cannot be subject to an action at law against the indorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorsers unless the firm is insolvent. Patton v. Carr, 117 N.C. 176, 23 S.E. 182 (1895).

§ 59-80. Effect of failure to present claim in six months. — In an action brought on a claim which was not presented within six months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner. (1901, c. 640, s. 5; Rev., s. 2544; C. S., s. 3283; 1973, c. 1410, s. 3.)

Editor's Note. — The 1973 amendment substituted "six months" for "twelve months" near the beginning of the section.

§ 59-81. Procedure for purchase by surviving partner. — (a) Appraisal of Property. — The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisement of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

(b) Surviving Partner May Purchase. — The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

(c) Surviving Partner to Give Bond. — In case the surviving partner shall avail himself of the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the payment of the debts and liabilities of the partnership, and for the performance of all contracts for which the partnership is liable.

(d) Sale of Real Estate. — In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until

the sale thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law or devisees of the deceased partner are duly made parties. (1901, c. 640, s. 6; Rev., s. 2545; 1911, c. 12; C. S., s. 3284.)

§ 59-82. Surviving partner to account and settle. — In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within six months from the date of the first publication of notice to creditors, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court. (1901, c. 640, s. 7; Rev., s. 2546; C. S., s. 3285; 1947, c. 781; 1957, c. 783, s. 6; 1973, c. 1410, s. 4.)

Editor's Note. — The 1973 amendment substituted "six months" for "twelve months" near the beginning of the first sentence of the section.

There can be no division of partnership property until all the accounts have been taken and the clear interest of each partner ascertained. Baird v. Baird, 21 N.C. 524 (1837); Mendenhall v. Benbow, 84 N.C. 646 (1881).

Presumption of Equal Interest. — In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business. State ex rel. Worthy v. Brower, 93 N.C. 344 (1885).

If an agreement for a common or special partnership appears to have existed between parties for the purchase of property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the law extends the concern to all the goods purchased by either of the parties; and the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there can be no contract as to the amount of the advances to be made by them respectively. Taylor v. Taylor & Justice, 6 N.C. 70 (1811).

Note Arising Out of Partnership Business. — In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note due the testator of the plaintiff individually, if such note arose from or grew out of the business of the partnership business. Royster v. Johnson, 73 N.C. 474 (1875).

Surviving Partner Is Required to Make Settlement with Personal Representative of Deceased Partner. — The deceased partner's interest being personal property, this section requires the surviving partner to make settlement with the personal representative of the deceased partner; and there is placed upon the personal representative of deceased partner the duty to require that a true accounting be made either by the surviving partner or by a receiver under court supervision in accordance with former § 28-172. Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

And Right to Sue for Accounting Vests Exclusively in Such Personal Representative. — The right to sue for an accounting of the partnership assets and affairs upon the death of one of the partners vests exclusively in the personal representative of the deceased partner. Ewing v. Caldwell, 243 N.C. 18, 89 S.E.2d 774 (1955).

Compensation. — Within the limitation of this section, a surviving partner is entitled to reasonable compensation for his services in settling up the partnership business. Royster v. Johnson, 73 N.C. 474 (1875).

In Weisel v. Cobb, 118 N.C. 11, 24 S.E. 782 (1896), two and one-half percent commissions on receipts and disbursements were allowed under the circumstances of the case.

Liability for Loss. — Where the surviving partner has acted in good faith in a fiduciary character he is not chargeable with loss. Thompson v. Rogers, 69 N.C. 357 (1873).

Cited in Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

§ 59-83. Accounting compelled. — In case any surviving partner fails to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as

provided for by law in the case of executors and administrators. (1901, c. 640, s. 8; Rev., s. 2547; C. S., s. 3286.)

§ 59-84. Settlement otherwise provided for. — When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this Chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will. (1901, c. 640, s. 6; Rev., s. 2545; C. S., s. 3287.)

Applied in Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

§ 59-84.1. Partnership to comply with "assumed name" statute. — Every partnership other than a limited partnership shall comply with, and be subject to, the provisions of Articles 14 and 15 of Chapter 66 of the General Statutes in all cases in which the same are applicable. (1951, c. 381, s. 9.)

ARTICLE 4.

Business under Assumed Name Regulated.

§ 59-85: Transferred to § 66-68 by Session Laws 1951, c. 381, s. 7.

§ 59-86: Transferred to § 66-69 by Session Laws 1951, c. 381, s. 7.

§ 59-87: Transferred to § 66-70 by Session Laws 1951, c. 381, s. 7.

§ 59-88: Transferred to § 66-71 by Session Laws 1951, c. 381, s. 7.

§ 59-89: Transferred to § 66-72 by Session Laws 1951, c. 381, s. 8.

Chapter 60.
Railroads and Other Carriers.

Sec.
60-1 to 60-81. [Repealed.]
60-82 to 60-87. [Transferred.]
Sec.
60-88 to 60-146. [Repealed.]

§§ 60-1 to 60-81: Repealed by Session Laws 1963, c. 1165, s. 1.

Editor's Note. — Session Laws 1963, c. 1165, amended, revised and rewrote Chapters 56, 60 and 62 of the General Statutes and recodified them as a new Chapter 62 and a new Chapter 74A.

§§ 60-82 to 60-87: Transferred to §§ 74A-1 to 74A-6 by Session Laws 1963, c. 1165, s. 2.

§§ 60-88 to 60-146: Repealed by Session Laws 1963, c. 1165, s. 1.

Chapter 61.

Religious Societies.

Sec.
61-1. Trustees may be appointed and removed.
61-2. Trustees may hold property.
61-3. Title to lands vested in trustees, or in societies.
61-4. Trustees may convey property.
61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.
61-6. House on vacant land vests title.

§ 61-1. Trustees may be appointed and removed. — The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the State, as also the religious societies and congregations within the State, may from time to time and at any time appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise. (1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76; R. C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C. S., s. 3568.)

Editor's Note. — Session Laws 1945, c. 90, provides for the appointment of trustees for certain Primitive Baptist churches to dispose of abandoned church property and distribute the proceeds thereof.

This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N.C. 126, 31 S.E. 383 (1898); Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

Hence, upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," it was held that their successors should be appointed under § 45-9 by the clerk of the superior court. Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

That religious bodies must act through and appoint trustees is recognized by this section. Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Society May Remove Trustees at Will. — Under the provisions of this section, a religious society may remove a trustee of church property who proves faithless to his trust, and may fill any vacancy thus created. Nash v. Sutton, 117 N.C. 231, 23 S.E. 178 (1895). Faithlessness is not required, however, and it may remove trustees at will. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Section Not Affected by Church Regulations. — A church has authority to appoint a "suitable number" of its own trustees for the purpose of acquiring and holding church property, and remove them at will; and where the discipline of the denomination with which a church is affiliated has provided a note to be given for the trial of "offenses," this regulation refers to infractions of church discipline and does not apply to the election or removal of trustees. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Trustees May Maintain Action for Removal of Trustees, etc. — A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 109 N.C. 550, 14 S.E. 77 (1891).

And Member May Maintain Action. — In the absence of competent trustee and a governing body authorized to appoint trustees, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest. Nash v. Sutton, 109 N.C. 550, 14 S.E. 77 (1891).

Cited in Bridges v. Pleasants, 39 N.C. 26 (1845); King v. Richardson, 136 F.2d 849 (4th Cir. 1943); Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

§ 61-2. Trustees may hold property. — The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or

congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches, denominations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it. (1796, c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76; R. C., c. 97; Code, ss. 3667, 3668; Rev., ss. 2670, 2671; C. S., s. 3569.)

Cross References. — See note to § 61-3. As to trusts and trustees generally, see § 36-19 et seq.

This section applies only to property held for religious purposes and not to property held in trust for a "Baptist church and for the education of the youths of the colored race." Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

No General Capacity of Acquisition. — Religious societies or their trustees have no general capacity of acquisition; they can only take for the use of the society. And by a conveyance to trustees, for purposes forbidden by the policy of the law, nothing passes. Trustees of Quaker Soc'y of Contentnea v. Dickenson, 12 N.C. 189 (1827).

Church Has Right to Use of Property. — A church of the congregational system having elected certain trustees to supersede several theretofore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

Levy on Communion Service. — A communion service of a church is not liable to seizure and sale under an execution by a pastor for salary due him. Lord v. Hardie, 82 N.C. 241 (1880).

An individual member of a religious society has an equitable interest in the property held by the society. Nash v. Sutton, 117 N.C. 231, 23 S.E. 178 (1895).

Trusts for Special Purposes. — There is nothing in this section which precludes trustees of a certain North Carolina church from accepting trusts for special purposes; and, even if there were, a trust for a special purpose would not fail because they were named as trustees but equity would appoint other trustees to administer it in application of the maxim that a trust will not be allowed to fail for lack of a trustee. King v. Richardson, 136 F.2d 894 (4th Cir. 1943).

Trustees Are Agents. — The trustees of a church are merely agents and have no property interest as against the governing body of the church. North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911).

They May Mortgage Property. — A congregation taking possession of a church cannot contest the validity of a mortgage given by the trustees for the purchase money on the ground that it was ultra vires. Rountree v. Blount, 129 N.C. 25, 39 S.E. 631 (1901).

May Enforce Bequest. — Where a testator provides for building a fence around a certain chapel cemetery, the trustees of the chapel are the proper parties to require the executor to perform this provision. Cabe v. Vanhook, 127 N.C. 424, 37 S.E. 464 (1900).

And May Recover Property. — The title to church property is vested in the trustees individually and they may recover at law, though in the writ and declaration they style themselves "trustees." Walker v. Fawcett, 29 N.C. 44 (1846).

Title Not in Controversy in Contest between Trustees. — In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy. Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

Original Trustees May Sue though Not Legally Appointed. — Where a conveyance is made to three persons for a certain tract of land, as trustees for a church, a suit of trespass may be brought by them against the wrongdoers, though they may not have been appointed trustees according to law. Walker v. Fawcett, 29 N.C. 44 (1846).

It is only when a suit is brought by persons, who claim as "successors," that the question arises, whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property, which is necessary to support an action. Walker v. Fawcett, 29 N.C. 44 (1846).

Trustees Cannot Recover for Physical Suffering of Pastor, etc. — In suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery can be had for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. Taylor v. Seaboard Air Line Ry., 145 N.C. 400, 59 S.E. 129 (1907).

Rights of Trustees as against Majority of Members. — See note to § 61-3.

Liability of Trustees. — The trustees of a church are liable for material ordered by one of their number and used in building the church although the order was not authorized. Tull v. Trustees of M.E. Church S., 75 N.C. 424 (1876). But the building committee of a church is not

liable for injuries received by a workman. Wilson v. Clark, 110 N.C. 364, 14 S.E. 962 (1892).

Member of Quasi Corporation Is Engaged in Joint Enterprise. — One of the material differences between a church or denomination, religious society or congregation (a quasi corporation) in North Carolina and a real corporation organized or existing pursuant to statutory law, is that a member of such a quasi corporation is engaged in a joint enterprise and may not recover from the quasi corporation damages sustained through the tortious conduct of another member thereof. Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

And May Not Recover for Negligence of Agent, Employee or Another Member. — This section does not authorize a member of a church or denomination, religious society or congregation (a quasi corporation) to recover of the quasi corporation for the negligence of an agent, employee or another member thereof. Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

Applied in Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Cited in Bridges v. Pleasants, 39 N.C. 26 (1845).

§ 61-3. Title to lands vested in trustees, or in societies. — All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent. (1776, c. 107; 1796, c. 457, s. 4; R. C., c. 97, s. 1; Code, s. 3665; Rev., s. 2672; C. S., s. 3570.)

Cross Reference. — See note to § 61-2.

This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N.C. 126, 31 S.E. 383 (1898).

Congregational and Connectional Systems. — The rights of an individual member of a congregation under the congregational system is discussed in North Carolina Christian Conference v. Allen, 156 N.C. 524, 72 S.E. 617 (1911); and the connectional system is discussed in Simmons v. Allison, 118 N.C. 763, 24 S.E. 716 (1896); Tilley v. Ellis, 119 N.C. 233, 26 S.E. 29 (1896); State ex rel. Kerr v. Hicks, 154 N.C. 265, 70 S.E. 468 (1911); Gold v. Cozart, 173 N.C. 612, 92 S.E. 600 (1917).

Where a diocese receiving a devise of land was afterwards divided into two dioceses, the land becomes the property of both and not that of the diocese in which the land happens to be and in which the testator resided. Trustees of Diocese of E. Carolina v. Trustees of Diocese of N. Carolina, 102 N.C. 442, 9 S.E. 310 (1889).

Title by Adverse Possession. — A church holding real property for a hundred years, and using it for religious purposes, acquires a fee simple title by adverse possession, independent of the validity of its deed. Gold v. Cozart, 173 N.C. 612, 92 S.E. 600 (1917).

A bequest for a religious charity must be to some definite purpose, and to some body or association of persons having a legal existence and with capacity to take. There is no provision for donations to be employed in any general system of diffusing the knowledge of Christianity throughout the earth. Bridges v. Pleasants, 39 N.C. 26 (1845).

Bequest to Build Church Where Amount Insufficient. — A provision in a will that a church is to be built from certain funds will not fail because there is not a sufficient amount of the funds to build a church as large as directed by the testator. Paine v. Forney, 128 N.C. 237, 38 S.E. 885 (1901).

Specific Trust Must Be Imperative. — A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control the management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative. Hayes v. Franklin, 141 N.C. 599, 54 S.E. 432 (1906).

No Trust Created. — The recital in a deed conveying land to the vestry and wardens of a church that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" by the grantee, creates no trust, and the grantee can convey a perfect title. St. James v. Bagley, 138 N.C. 384, 50 S.E. 841 (1905).

Trustees May Hold Property as against Majority of Members. — Where land is conveyed to the officers and trustees of a nondenominational religious organization for the purposes of the organization, its officers and trustees have title to the property in trust and are entitled to hold it for the use and occupancy of the organization as against members of the organization, even though they are in the large majority, who seek possession of the property for use and occupancy by a denominational church. Wheeless v. Barrett, 229 N.C. 282, 49 S.E.2d 629 (1948).

Rights of Majority of Congregation Withdrawing from Denomination. — A conveyance of land to trustees for the erection of a church to belong to a denomination gives the title in trust for the use of the denomination, and therefore members of the congregation of the church so erected who withdraw affiliation from the denomination, even though they be a majority of the congregation, are not entitled to the control and use of the property as against the denomination, irrespective of whether the particular church is congregational or connectional. Western N. Carolina Conference v. Tally, 229 N.C. 1, 47 S.E.2d 467 (1948).

Applied in Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Cited in YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

§ 61-4. Trustees may convey property. — The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made, shall be effective to pass the land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property. (1855, c. 384; 1889, c. 484; Rev., s. 2673; C. S., s. 3571.)

Sale to Promote Testator's Purpose. — Where a testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," the trustees might sell the property if the purpose declared would be promoted thereby; or the court might order a sale under its general equity power. Grace Church v. Ange, 161 N.C. 314, 77 S.E. 239 (1912).

Lease of Part of Property. — Where land was conveyed to a church for the purpose of maintaining a church for worship, the court will not restrain the officers of the church from leasing a small portion of the lot for erecting a store. Hayes v. Franklin, 141 N.C. 599, 54 S.E. 432 (1906).

Cited in Bond v. Town of Tarboro, 217 N.C. 289, 7 S.E.2d 617, 127 A.L.R. 695 (1940).

§ 61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated. — Whenever the laws, rules, or ecclesiastic polity of any church or religious sect, society or denomination, commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by gift, purchase or otherwise, and to hold, improve, mortgage, sell and convey the property, real or personal, of any such church or religious sect, society or denomination, for the purposes, in the manner and otherwise as authorized and permitted by its laws, rules or ecclesiastic polity; and in the event of the transfer, removal, resignation or death of any such bishop, minister or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon appointment or election, and pending appointment or election of such successor, such title and rights shall be vested in such person or persons as shall be

designated by the laws, rules or ecclesiastic polity of such church or religious sect, society or denomination.

All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 24, 1939, to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who, at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church, religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid; and all transfers of title and rights with respect to property, prior to March 24, 1939, from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church, or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

This section shall not affect vested rights, or repeal any of the provisions of G.S. 61-1 to 61-4, or of G.S. 36-21 to 36-23. (1939, c. 177.)

§ 61-6. House on vacant land vests title. — All houses and edifices erected for public religious worship on vacant lands, or on lands of the State not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established. (1778, c. 132, s. 6; R. C., c. 97, s. 2; Code, s. 3666; Rev., s. 2674; C. S., s. 3572.)

Chapter 62.
Public Utilities.

Article 1.
General Provisions.

Sec.
62-1. Short title.
62-2. Declaration of policy.
62-3. Definitions.
62-4. Applicability of Chapter.
62-5 to 62-9. [Reserved.]

Article 2.
Organization of Utilities Commission.

62-10. Number, appointment and terms of commissioners; chairman; vacancies; compensation; practice of law prohibited.
62-11. Oath of office.
62-12. Organization of Commission; adoption of rules and regulations therefor.
62-13. Chairman to administer and execute internal rules and regulations, and direct staff.
62-14. Economic and statistical studies.
62-15. Authority of Commission to employ technically qualified personnel.
62-16. Special investigators; clerical assistance.
62-17. Annual reports; monthly or quarterly release; publication of procedural orders and decisions.
62-18. Records of receipts and disbursements; payment into treasury.
62-19. Public record of proceedings; chief clerk; seal.
62-20. Assistant attorney general and staff attorneys assigned to Utilities Commission; to represent public; employment of additional attorneys, expert witnesses, office and clerical help.
62-21. Commission attorney.
62-22. Utilities Commission and Department of Revenue to coordinate facilities for rate making and taxation purposes.
62-23. Commission as an administrative board or agency.
62-24 to 62-29. [Reserved.]

Article 3.
Powers and Duties of Utilities Commission.

62-30. General powers of Commission.
62-31. Power to make and enforce rules and regulations for public utilities.
62-32. Supervisory powers; rates and service.
62-33. Commission to keep informed as to utilities.
62-34. To investigate companies under its control; visitation and inspection.
62-35. System of accounts.
62-36. Reports by utilities; canceling certificates for failure to file.
62-37. Investigations.
62-38. Power to regulate public utilities in municipalities.
62-39. To regulate crossings of telephone, telegraph, electric power lines and pipelines and rights-of-way of railroads and other utilities by another utility.
62-40. To hear and determine controversies submitted.
62-41. To investigate accidents involving public utilities; to promote general safety program.
62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.
62-43. Fixing standards, classifications, etc.; testing service.
62-44. Commission may require continuous telephone lines.
62-45. Determination of cost and value of utility property.
62-46. Water gauging stations.
62-47. Reports from municipalities operating own utilities.
62-48. Appearance before courts and agencies.
62-49. Publication of utilities laws.
62-50. Safety standards for interstate and intrastate natural gas pipelines.
62-51. To inspect books and records of corporations affiliated with public utilities.
62-52 to 62-59. [Reserved.]

Article 4.
Procedure before the Commission.

62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.
62-61. Witnesses; production of papers; contempt.
62-62. Issuance and service of subpoenas.
62-63. Service of process and notices.
62-64. Bonds.
62-65. Rules of evidence; judicial notice.
62-66. Depositions.
62-67. Examination before hearing.
62-68. Use of affidavits.
62-69. Stipulations and agreements; prehearing conference.
62-70. Ex parte communications.
62-71. Hearings to be public; record of proceedings.

Sec.
62-72. Commission may make rules of practice and procedure.
62-73. Complaints against public utilities.
62-74. Complaints by public utilities.
62-75. Burden of proof.
62-76. Hearings by Commission, hearing division of Commission, commissioner, or examiner.
62-77. Recommended decision of hearing division, commissioner or examiner.
62-78. Proposed findings, briefs, exceptions, orders, expediting cases, and other procedure.
62-79. Final orders and decisions; findings; service; compliance.
62-80. Powers of Commission to rescind, alter or amend prior order or decision.
62-81. Special procedure in hearing and deciding rate cases.
62-82. Special procedure on application for certificate for generating facility; appeal from award order.
62-83 to 62-89. [Reserved.]

Article 5.

Review and Enforcement of Orders.

62-90. Right of appeal; filing of exceptions.
62-91. Appeal docketed; title on appeal; priorities on appeal.
62-92. Parties on appeal.
62-93. No evidence admitted on appeal; remission for further evidence.
62-94. Record on appeal; extent of review.
62-95. Relief pending review on appeal.
62-96. Appeal to Supreme Court.
62-97. Judgment on appeal enforced by mandamus.
62-98. Peremptory mandamus to enforce order, when no appeal.
62-99. [Repealed.]
62-100 to 62-109. [Reserved.]

Article 6.

The Utility Franchise.

62-110. Certificate of convenience and necessity.
62-110.1. Certificate for construction of generating facility.
62-110.2. Electric service areas outside of municipalities.
62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities.
62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises.
62-113. Terms and conditions of franchises.
62-114. Contract carriers; issuance of permits; terms and conditions.
62-115. Issuance of partnership franchises.
62-116. Issuance of temporary or emergency authority.
62-117. Same or similar names prohibited.
62-118. Abandonment and reduction of service.

Article 6A.

Radio Common Carriers.

62-119. Powers of Commission generally; definitions.
62-120. Certificate of convenience and necessity required; exceptions; rules and regulations.
62-121. Issuance of certificate for carrier licensed by Federal Communications Commission.
62-122. Commission may set and regulate rates.
62-123. Granting of certificate for operation in established service area of another carrier.
62-124. Article not applicable to mobile radio telephone service.
62-125 to 62-129. [Reserved.]

Article 7.

Rates of Public Utilities.

62-130. Commission to make rates for public utilities.
62-131. Rates must be just and reasonable; service efficient.
62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.
62-133. How rates fixed.
62-133.1. Small water and sewer utility rates.
62-134. Change of rates; notice; suspension and investigation.
62-135. Temporary rates under bond.
62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.
62-137. Scope of rate case.
62-138. Utilities to file rates, service regulations and service contracts with Commission; publication.
62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.
62-140. Discrimination prohibited.
62-141. Long and short hauls.
62-142. Contracts as to rates.
62-143. Schedule of rates to be evidence.
62-144. Free transportation.
62-145. Rates between points connected by more than one route.
62-146. Rates and service of motor common carriers.
62-147. Rates of motor contract carriers.
62-148. Rates on leased or controlled utility.
62-149. Unused tickets to be redeemed.
62-150. Ticket may be refused intoxicated person; penalty for prohibited entry.
62-151. Passenger refusing to pay fare or violating rules may be ejected.
62-152. Carriers to establish joint rates.

Sec.
62-153. Contracts of public utilities with certain companies and for services.
62-154. Surplus power rates.
62-155 to 62-159. [Reserved.]

Article 8.

Securities Regulation.

62-160. Permission to pledge assets.
62-161. Assumption of certain liabilities and obligations to be approved by Commission; refinancing of public utility securities.
62-162. Commission may approve in whole or in part or refuse approval.
62-163. Contents of application for permission.
62-164. Applications to receive immediate attention; continuances.
62-165. Notifying Commission as to disposition of securities.
62-166. No guarantee on part of State.
62-167. Article not applicable to note issues and renewals; notice to Commission.
62-168. Not applicable to debentures of court receivers.
62-169. Periodical or special reports.
62-170. Failure to obtain approval not to invalidate securities or obligations; noncompliance with Article, etc.
62-171. Commission may act jointly with agency of another state where public utility operates.
62-172 to 62-179. [Reserved.]

Article 9.

Acquisition and Condemnation of Property.

62-180. Use of railroads and public highways.
62-181. Electric and hydroelectric power companies may appropriate highways; conditions.
62-182. Acquisition of right-of-way by contract.
62-183. Grant of eminent domain; exception as to mills and water powers.
62-184. Dwelling house of owner, etc., may be taken under certain cases.
62-185. Condemnation on petition; parties' interests only taken; no survey required.
62-186. Copy of petition to be served.
62-187. Proceedings as under eminent domain.
62-188. Commissioners to inspect premises.
62-189. Powers granted corporations under Chapter exercisable by persons, firms or copartnerships.
62-190. Right of eminent domain conferred upon pipeline companies; other rights.
62-191. Flume companies exercising right of eminent domain become common carriers.
62-192. Map required for railroad condemnation.
62-193 to 62-199. [Reserved.]

Article 10.

Transportation in General.

Sec.
62-200. Duty to transport freight within a reasonable time.
62-201. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.
62-202. Baggage and freight to be carefully handled.
62-203. Claims for loss or damage to goods; filing and adjustment.
62-204. Notice of claims, statute of limitations for loss, damage or injury to property.
62-205. Joinder of causes of action.
62-206. Carrier's right against prior carrier.
62-207. Regulation of demurrage.
62-208. Common carriers to settle promptly for cash-on-delivery shipments; penalty.
62-209. Sale of unclaimed baggage or freight; notice; sale of rejected property; escheat.
62-210. Discrimination between connecting lines.
62-211. Regulating shipment of flammable substances.
62-212 to 62-219. [Reserved.]

Article 11.

Railroads.

62-220. Powers of railroad corporations.
62-221. Engaging in unauthorized business.
62-222. Agreements for through freight and travel.
62-223. Intersection with highways.
62-224. Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor.
62-225. Joint construction of railroads having same location.
62-226. Cattle guards and private crossings; failure to erect and maintain misdemeanor.
62-227. Change of route of railroad.
62-228. Obtaining temporary track across railroad.
62-229. Shelter at division points required; failure to provide a misdemeanor.
62-230. Maximum working hours and continuous service of employees; penalty; Commission to enforce.
62-231. Union depots required under certain conditions.
62-232. Construction of sidetracks.
62-233. Operation according to public schedule; certain trains and connections may be required.
62-234. Commission may authorize operation of fast mail trains; discontinuance of passenger service.
62-235. Commission to inspect railroads as to equipment and facilities, and to require repair.

Sec.
62-236. To require installation and maintenance of block system and safety devices; automatic signals at railroad intersections.
62-237. To regulate crossings and to abolish grade crossings.
62-238. To require extension or contraction of railroad switching limits.
62-239. To fix rate of speed through municipalities; procedure.
62-240. Injury to passenger while in prohibited place.
62-241. Negligence presumed from killing livestock.
62-242. Liability of railroads for injuries to employees; fellow-servant rule; defective machinery; contributory negligence; assumption of risk; contracts void.
62-243. Violation of rules causing injury; damages.
62-244. Certain employees to wear badges.
62-245. Duty to receive and forward freight tendered; penalty; regulations; charges.
62-246. Partial charges for partial deliveries.
62-247. Commission to establish and regulate stations for freight and passengers; abandonment of station or other facility or diminution of accommodations.
62-248 to 62-258. [Reserved.]

Article 12.

Motor Carriers.

62-259. Additional declaration of policy for motor carriers.
62-260. Exemptions from regulations.
62-261. Additional powers and duties of Commission applicable to motor vehicles.
62-262. Applications and hearings.
62-263. Application for broker's license.
62-264. Dual operations.
62-265. Emergency operating authority.
62-266. Interstate carriers.
62-267. Deviation from regular route operations.
62-268. Security for protection of public; liability insurance.
62-269. Accounts, records and reports.
62-270. Orders, notices, and service of process.
62-271. Collection of rates and charges of motor carriers of property.
62-272. Allowance to shippers for transportation services.
62-273. Embezzlement of C.O.D. shipments.
62-274. Evidence; joinder of surety.
62-275. Depots and stations.
62-276. Construction of Article.
62-277. Commission investigators and inspectors given enforcement authority.
Sec.
62-278. Revocation of license plates by Utilities Commission.
62-279. Injunction for unlawful operations.
62-280. [Reserved.]
62-281. Safety regulations applicable to motor carrier vehicles.
62-282 to 62-289. [Reserved.]

Article 13.

Reorganization of Public Utilities.

62-290. Corporations whose property and franchises sold under order of court or execution.
62-291. New owners to meet and organize; special rule for railroads.
62-292. Certificate to be filed with Secretary of State.
62-293. Effect on liens and other rights.
62-294 to 62-299. [Reserved.]

Article 14.

Fees and Charges.

62-300. Particular fees and charges fixed; payment.
62-301. Fees and charges supplemental; disposition.
62-302 to 62-309. [Reserved.]

Article 15.

Penalties and Actions.

62-310. Public utility violating any provision of Chapter, rules or orders; penalty; enforcement by injunction.
62-311. Willful acts of employees deemed those of public utility.
62-312. Actions to recover penalties.
62-313. Refusal to permit Commission to inspect records made misdemeanor.
62-314. Violating rules, with injury to others.
62-315. Failure to make report; obstructing Commission.
62-316. Disclosure of information by employee of Commission unlawful.
62-317. Remedies for injuries cumulative.
62-318. Allowing or accepting rebates a misdemeanor.
62-319. Riding on train unlawfully; venue.
62-320. Failure to place name on produce a misdemeanor.
62-321. Penalty for nondelivery of intrastate telegraph message.
62-322. Unauthorized manufacture or sale of switch-lock keys a misdemeanor.
62-323. Willful injury to property of public utility a misdemeanor.
62-324. Disclosure of information as to shipments unlawful.
62-325. Unlawful motor carrier operations.
62-326. Furnishing false information to the Commission; withholding information from the Commission.

ARTICLE 1.

General Provisions.

§ 62-1. Short title. — This Chapter shall be known and may be cited as the Public Utilities Act. (1963, c. 1165, s. 1.)

Editor's Note. — Session Laws 1963, c. 1165, amends, revises and rewrites Chapters 56, 60, and 62 of the General Statutes and recodifies them as a new Chapter 62 and a new Chapter 74A.

Cases construing provisions of former Chapter 62 have been placed in the annotations under appropriate sections of the new Chapters.

For case law survey on public utilities, see 41 N.C.L. Rev. 498 (1963).

Applied in S & R Auto & Truck Serv., Inc. v. City of Charlotte, 268 N.C. 374, 150 S.E.2d 743 (1966).

Cited in North Carolina Util. Comm'n v. United States, 253 F. Supp. 930 (E.D.N.C. 1966); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

§ 62-2. Declaration of policy. — Upon investigation, it has been determined that the rates, services and operations of public utilities, as defined herein, are affected with the public interest and it is hereby declared to be the policy of the State of North Carolina to provide fair regulation of public utilities in the interest of the public, to promote the inherent advantage of regulated public utilities, to promote adequate, economical and efficient utility services to all of the citizens and residents of the State, to provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, to encourage and promote harmony between public utilities and their users, to foster a statewide planning and coordinating program to promote continued growth of economical public utility services, to cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility services, and to these ends, to vest authority in the Utilities Commission to regulate public utilities generally and their rates, services and operations, in the manner and in accordance with the policies set forth in this Chapter. (1963, c. 1165, s. 1.)

Cross Reference. — See note to § 62-118.

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in § 62-133. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Section Declares Policy. — This section declares the policy of the State, which it is the purpose of this entire Chapter to put into effect. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Transportation of passengers by motor carriers for compensation is a business affected with a public interest. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Interconnection with Competitor Cannot Be Required. — There is no provision in this Chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission; the Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an

availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

The contractual obligation to provide water service to a recreational subdivision as well as the actual delivery thereof directly affect a utility's ability to function as a utility. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Jurisdiction over Rates and Service of Duke Power Company. — The Utilities Commission has general and supervisory jurisdiction over the retail electric rates and service of Duke Power Company pursuant to this Chapter. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

Rate Scheme Held Unconstitutional. — The state regulatory scheme by which Utilities Commission sets rates for franchised carriers to charge the U.S. Army in transportation of household goods violates the national procurement policy and is an unconstitutional burden on the United States in the exercise of its constitutional powers. United States v. North Carolina Util. Comm'n, 352 F. Supp. 274 (E.D.N.C. 1972).

Quoted in State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-3. Definitions. — As used in this Chapter, unless the context otherwise requires, the term:

(1) "Broker," with regard to motor carriers of passengers, means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which as principal or agent engages in the business of selling or offering for sale any transportation of passengers by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Commission pursuant to the provisions of this Chapter to a public utility.

(3) "Certified mail" means such mail only when a return receipt is requested.

(4) "Charter party," with regard to motor carriers, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(5) "Commission" means the North Carolina Utilities Commission.

(6) "Common carrier" means any person which holds itself out to the general public to engage in transportation of persons or property for compensation, including transportation by train, bus, truck, boat or other conveyance, except as exempted in G.S. 62-260.

(7) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or property or any class or classes thereof for compensation, whether over regular or irregular routes, except as exempted in G.S. 62-260.

(8) "Contract carrier by motor vehicle" means any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred

to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260.

(9) "Contract carrier" means any person which under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation of persons or property for compensation, except as exempted in G.S. 62-260.

(10) "Foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country.

(11) "Franchise" means the grant of authority by the Commission to any person to engage in business as a public utility or contract carrier, whether or not exclusive or shared with others or restricted as to terms and conditions and whether described by area or territory or not, and includes certificates and permits, and all other forms of licenses or orders and decisions granting such authority.

(12) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(13) "Industrial plant" means any plant, mill, or factory engaged in the business of manufacturing.

(14) "Interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state.

(15) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in interstate or foreign commerce, and includes all transportation within this State for compensation in interstate or foreign commerce which has been exempted by Congress from federal regulation.

(16) "Intrastate operations" means the transportation of persons or property for compensation in intrastate commerce.

(17) "Motor carrier" means both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(18) "Motor vehicle" means any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.

(19) "Municipality" means any incorporated community, whether designated in its charter as a city, town, or village.

(20) "Permit" means a permit issued by the Commission pursuant to the provisions of this Chapter to a contract carrier by motor vehicle.

(21) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof.

(22) "Private carrier" means any person not included in the definitions of common carrier or contract carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of property for compensation.

(23) a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now

or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation;
2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which constructs a water system in a subdivision with plans for 10 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 10 residential building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more building lots, without regard to the number of actual customers connected.
3. Transporting persons or property by street, suburban or interurban bus or railways for the public for compensation;
4. Transporting persons or property by railways or motor vehicles, or any other form of transportation or express service for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;
5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;
6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, electric or telephone membership corporation or nonprofit water membership corporations financed by the Farmers Home Administration or any person not otherwise a public utility, who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person, other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise

not a public utility, such enterprise is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973; and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

(24) "Rate" means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification.

(25) "Route" means the course or way which is traveled; the road or highway over which motor vehicles operate.

(26) "Securities" means stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guaranty thereof.

(27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

(28) The word "State" means the State of North Carolina; "state" means any state.

(29) "Town" means any unincorporated community or collection of people having a geographical name by which it may be generally known and is so generally designated. (1913, c. 127, s. 7; C. S., s. 1112(b); 1933, c. 134, ss. 3, 8; c. 307, s. 1; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1947, c. 1008, s. 3; 1949, c. 1132, s. 4; 1953, c. 1140, s. 1; 1957, c. 1152, s. 13; 1959, c. 639, ss. 12, 13; 1963, c. 1165, s. 1; 1967, c. 1094, ss. 1, 2; 1971, c. 553; c, 634, s. 1; cc. 894, 895; 1973, c. 372, s. 1.)

Editor's Note. — The 1973 amendment added paragraph f to subdivision (23).

Definitions Are Not Controlling Where Terms Are Used Elsewhere. — The definitions of "public utility" and "franchise" as contained in this section are not controlling in determining whether an agreement of a municipality constitutes a franchise or a license, since the definitions of the statute do not purport to be authoritative definitions of those terms as used elsewhere. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

Comparison of Definitions in Federal Motor Carrier Act and Bus Act of 1949. — See State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Provision Not Retroactive. — The definition of "contract carrier" in the Bus Act of 1949 was definitive or regulatory and intended to be applied prospectively with respect to applications for permits as contract carriers under the general provisions of the Bus Act, and had no bearing on or relation to the grandfather rights confirmed in the act. To make these definitive and regulatory provisions retroactive so as to place a limitation on the rights of a carrier under the grandfather clause contained in the act, would be in contravention of his constitutional rights and contrary to due process of law. Moreover, such a construction would completely nullify the grandfather clause and make it feckless. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

A common carrier by motor vehicle may be defined as a person who is not exempted from regulation under the provisions of § 62-260, and who holds himself out to the general public to engage in transportation of persons or property for compensation. State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972), aff'd, 283 N.C. 104, 194 S.E.2d 859 (1973).

What Constitutes a Contract Carrier. — See State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

Requirements for Permit to Operate as Contract Carrier. — In addition to the statutory requirements of § 62-262 and subdivision (8) of this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission in Rule R2-15(b). State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

The definition of "contract carrier" includes charter service. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Lessor of Vehicles Held Not Contract Carrier. — Where the owner of trucks leased them to another corporation under an agreement requiring lessor to carry insurance and maintain the vehicles and giving lessee control over the operation of the trucks with right to use same exclusively for the transportation and delivery of lessee's goods, the lessor was not a contract carrier within the meaning of the statute as it stood in 1949, since the lessor merely leased its vehicles and was not a carrier of any kind, and lessee was solely a private carrier, and therefore lessor was not liable for additional assessment at the "for hire" rates under the statute. Equipment Fin. Corp. v. Scheidt, 249 N.C. 334, 106 S.E.2d 555 (1959).

"Franchise" Generally Is Not Limited as in This Section. — The term "franchise," as used by the courts and by text writers, is not limited to a special right granted to a public utility, as it is defined in this section. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

And "Public Utility" under Former § 160-2 Need Not Meet Definition of This Section. — The status of the grantee was a material factor in determining the validity of a grant of a franchise under the authority of former § 160-2, for that statute authorized municipal corporations to grant franchises only to "public utilities," though it does not necessarily follow that such grantee must be the operator of a business within the definition of "public utility" contained in this section. Kornegay v. City of Raleigh, 269 N.C. 155, 152 S.E.2d 186 (1967).

Definition of "Public Utility" Cannot Be Expanded. — Neither the Commission nor the Supreme Court has authority to add to the types of business defined by the legislature as public utilities. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

If Applicant Is Not "Public Utility," Issuance of Certificate Is Nullity. — If an applicant's proposed service is not within the definition of "public utility" contained in subdivision (23) of this section, the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

A mobile radio service falls clearly within the definition of "public utility" in subparagraph 6 of paragraph a of subdivision (23). State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Telephone Answering or Message Relaying Service Not a "Public Utility". — Neither a telephone answering nor a message relaying service is a public utility within the purview of subdivision (23) and cannot therefore be determinative upon the question of whether an applicant's proposed telephone service is substantially the same as that of the existing franchise holder. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Municipal corporations are specifically excluded from the definition of a "public utility" in subdivision (23) of this section; consequently, a municipal corporation distributing and selling electric energy to its inhabitants, and to others in its vicinity, is not subject to regulation by the North Carolina Utilities Commission, and the provisions of this Chapter do not apply to it, except as otherwise expressly stated therein. Dale v. City of Morgantown, 270 N.C. 567, 155 S.E.2d 136 (1967); State ex rel. Utilities Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

A municipal corporation is specifically excluded from the definition of a public utility under the provisions of subdivision (23)d of this section. State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972), aff'd, 17 N.C. App. 522, 195 S.E.2d 76 (1973).

Where parties constructed water mains from end of municipal lines to their properties, permitting others to tap into the mains, and the municipality installed meters and furnished water to the others directly, parties were not public utilities within the Public Utilities Act of 1933 so as to give the Utilities Commission jurisdiction. State v. New Hope Road Water Co., 248 N.C. 27, 102 S.E.2d 377 (1958).

Service. — As to "service" rendered in contemplation of former statute, see State v. Andrews, 191 N.C. 545, 132 S.E. 568 (1926).

Service Up to Capacity Is Service to "Public". — One offers service to the "public" within the meaning of subparagraph 6 of paragraph a of subdivision (23) when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947); State ex rel. Utilities Comm'n v. Chapel Hill Tel. Co., 12 N.C. App. 543, 183 S.E.2d 802 (1971); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705, aff'd, 17 N.C. App. 727, 195 S.E.2d 311 (1972); Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974); State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974); State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Quoted in State ex rel. Utilities Comm'n v. Kenan Transport Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971); State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Stated in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Cited in Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

§ 62-4. Applicability of Chapter. — This Chapter shall not terminate the preexisting Commission or appointments thereto, or any certificates, permits, orders, rules or regulations issued by it or any other action taken by it, unless and until revoked by it, nor affect in any manner the existing franchises, territories, tariffs, rates, contracts, service regulations and other obligations and rights of public utilities, unless and until altered or modified by or in accordance with the provisions of this Chapter. (1963, c. 1165, s. 1.)

§§ 62-5 to 62-9: Reserved for future codification purposes.

ARTICLE 2.

Organization of Utilities Commission.

§ 62-10. Number, appointment and terms of commissioners; chairman; vacancies; compensation; practice of law prohibited. — The North Carolina Utilities Commission shall consist of five commissioners who shall be appointed by the Governor. The terms of the commissioners now serving shall expire at the conclusion of the term for which they were appointed. The appointments to fill the term expiring on July 1, 1963, and the two terms expiring July 1, 1965, shall be for eight years, and the appointments to fill the two terms expiring July 1, 1967, shall be for two years, and thereafter for eight years, with two regular eight-year terms expiring on July 1 of each fourth year after July 1, 1965, and the fifth term expiring on July 1 of each eighth year after July 1, 1963. The term of office of utilities commissioners thereafter shall be eight years, commencing on July 1 of the year in which the predecessor term expired, and ending on July 1 of the eighth year thereafter. A commissioner in office shall continue to serve until his successor is duly appointed and qualifies but such hold over shall not affect the expiration date of such succeeding term. On July 1, 1963, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission until July 1, 1965, and on July 1, 1965, and every four years thereafter, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission for the succeeding four years and until his successor is appointed and qualifies. In case of death, incapacity, resignation or vacancy for any other reason in the office of any commissioner or the chairman prior to the expiration of his term of office or the time for which he was designated as chairman, his successor shall be appointed by the Governor to fill the unexpired term. The salary of each commissioner shall be the same as that fixed from time to time for the judges of the superior court except that the commissioner designated as chairman shall receive one thousand dollars ($1,000) additional per annum. The prohibition of the practice of law by judges provided in G.S. 7-59 shall also apply to members of the Commission. (1941, c. 97, s. 2; 1949, c. 1009, s. 1; 1959, c. 1319; 1963, c. 1165, s. 1; 1967, c. 1238.)

Cross Reference. — See Editor's note to § 62-1.

Editor's Note. — Section 7-59, referred to near the end of this section, was repealed by Session Laws 1969, c. 1190, s. 57.

State Government Reorganization. — Utilities Commission was transferred to the Department of Commerce by § 143A-174, enacted by Session Laws 1971, c. 864.

Applied in State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

§ 62-11. Oath of office. — Each utilities commissioner before entering upon the duties of his office shall file with the Secretary of State his oath of office to support the Constitution and laws of the United States and the Constitution and laws of the State of North Carolina, and to well and truly perform the duties of his said office as utilities commissioner, and that he is not the agent or attorney of any public utility, or an employee thereof, and that he has no interest in any public utility. (1933, c. 134, s. 5; 1935, c. 280; 1939, c. 404; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-12. Organization of Commission; adoption of rules and regulations therefor. — To facilitate the work of the Commission and for administrative purposes, the chairman of the Commission, with the consent and approval of the Commission, may organize the work of the Commission in several hearing divisions and operating departments and may designate a member of the Commission as the head of any division or divisions and assign to members of the Commission various duties in connection therewith. Subject to the provisions of the State Personnel Act (Article 2 of Chapter 143 of the General Statutes), the Commission shall prepare and adopt rules and regulations governing the personnel, departments or divisions and all internal affairs and business of the Commission. (1941, c. 97, s. 3; 1949, c. 1009, s. 2; 1957, c. 1062, s. 1; 1963, c. 1165, s. 1.)

Editor's Note. — Article 2, Chapter 143 referred to in this section, was repealed by Session Laws 1965, c. 640, s. 1. For present provisions as to State Personnel System see §§ 126-1 through 126-12.

§ 62-13. Chairman to administer and execute internal rules and regulations, and direct staff. — (a) In order to carry out the administrative purposes and objectives necessary for the efficient operation of the internal affairs and activities of the Commission, the chairman shall be the chief executive and administrative officer of the Commission, and shall execute, administer and carry out the rules and regulations prepared and adopted by the Commission governing the personnel, departments, or divisions and the internal affairs and business of the Commission.

(b) The chairman shall determine whether matters pending before the Commission shall be heard initially by the full Commission, by a division of the Commission or by a hearing commissioner or hearing examiner and shall assign the members of the Commission to proceedings. The chairman may hear and determine, or assign to a single commissioner or division for decision, any procedural motion or petition made prior to hearings on the merits of the proceedings, including continuances, extensions, joinders, amendments, motions to strike, orders for examinations and depositions, temporary orders and other motions and orders of a similar nature not determinative of the merits of the controversy.

(c) The chairman acting alone, or any three commissioners, may initiate any investigations, complaints or any other proceedings within the jurisdiction of the Commission.

(d) The chairman shall be solely responsible for and charged with the duties of authorizing and approving all maintenance, subsistence and travel expense of all members of the Commission and its employees, and such expense shall be certified by the persons who incur same; the chairman shall not approve any such expense unless he is satisfied that it was incurred for necessary business of the Commission and the chairman may require the department or division heads to certify to him approval of such expense for employees in their departments or divisions. (1941, c. 97, s. 4; 1957, c. 1062, s. 2; 1963, c. 1165, s. 1.)

§ 62-14. Economic and statistical studies. — The Commission shall make economic and financial studies and surveys of the public utility services in the State and evaluations of future needs for such services, and shall establish an economics and planning section within the Commission staff to compile financial and economic data and statistics and to perform economic research and analysis for the Commission. (1963, c. 1165, s. 1.)

Cross Reference. — See Editor's note to § 62-1.

§ 62-15. Authority of Commission to employ technically qualified personnel. — The Commission is authorized and empowered to employ technically qualified personnel to serve as members of its staff and under its direction and supervision, including a communications engineer, an electrical engineer, a gas and water engineer, a director of accounting, a director of traffic, a director of economics and planning, a transportation expert and such other experts as the Commission may determine to be necessary in the proper discharge of the Commission's duties as prescribed by law. (1949, c. 1009, s. 3; 1963, c. 1165, s. 1.)

Cross Reference. — See Editor's note to § 62-1.

Editor's Note. — For brief comment on section, see 27 N.C.L. Rev. 489.

§ 62-16. Special investigators; clerical assistance. — The Commission shall be allowed such stenographic and other clerical assistance, and special investigators, as it may require for the performance of the duties and functions of the said office, to be established and fixed by such department, bureau, or other State agency as may be charged by law with the duty of determining the extent of such assistance in said departments. All such stenographers, clerks, assistants, and special investigators so provided for shall be appointed by the Commission and subject to removal or discharge by it. The salaries and compensation of such personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State departments. (1933, c. 134, s. 14; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-17. Annual reports; monthly or quarterly release; publication of procedural orders and decisions. — (a) It shall be the duty of the Commission to make and publish annual reports to the Governor of Commission activities, including copies of its general orders and regulations, comparative statistical data on the operation of the various public utilities in the State, comparisons of rates in North Carolina with rates elsewhere, a detailed report of its investigative division, a review of significant developments in the fields of utility law, economics and planning, a report of pending matters before the Commission, and a digest of the principal decisions of the Commission and the North Carolina courts affecting public utilities. A monthly or quarterly release

of such information shall be made if the Commission deems it advisable or if the Governor shall so request.

(b) The Commission shall publish in a separate volume at least once each year its final decisions made on the merits in formal proceedings before the Commission, and may include significant procedural orders and decisions. (1899, c. 164, s. 27; Rev., s. 1117; 1911, c. 211, s. 9; 1913, c. 10, s. 1; C. S., s. 1065; 1933, c. 134, s. 8; 1941, c. 97; 1955, c. 981; 1957, c. 1152, s. 1; 1963, c. 1165, s. 1.)

Matters of Public Record. — Reports of the Corporation Commission (now Utilities Commission) of North Carolina are matters of public record, of which the courts therein will take judicial notice. Staton v. Atlantic Coast Line R.R., 144 N.C. 135, 56 S.E. 794 (1907).

§ 62-18. Records of receipts and disbursements; payment into treasury. — (a) The Commission shall keep a record showing in detail all receipts and disbursements.

(b) All license fees and seal taxes, all money received from fines and penalties, and all other fees paid into the office of the Utilities Commission shall be turned in to the State treasury. (1899, c. 164, ss. 26, 33, 34; Rev., ss. 1114, 1115; C. S., ss. 1063, 1064; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-19. Public record of proceedings; chief clerk; seal. — (a) The Commission shall keep in its office at all times a record of its official acts, rulings, determinations and transactions, which shall be public records of the State of North Carolina.

(b) The Commission shall have and appoint a chief clerk, who shall file with the Secretary of State an oath of office similar to that prescribed for utilities commissioners. The Commission may appoint a deputy clerk to act in the absence of the chief clerk, who shall also file such oath with the Secretary of State. The chief clerk and such deputy clerk shall serve at the pleasure of the Commission.

(c) The Commission shall have and adopt a seal with the words "North Carolina Utilities Commission" and such other design as it may prescribe engraved thereon by which it shall authenticate its proceedings and of which the courts shall take judicial notice. Where an exemplified copy of Commission records and proceedings is required for full faith and credit outside of the State, such records and proceedings shall be attested by the chief clerk, or deputy clerk, and the seal of the Commission annexed, and there shall be affixed a certificate of a member of the Commission that the said attestation is in proper form. Such exemplification shall constitute an authenticated or exemplified copy of an official record of a court of record of the State of North Carolina. (1933, c. 134, ss. 13, 15; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-20. Assistant attorney general and staff attorneys assigned to Utilities Commission; to represent public; employment of additional attorneys, expert witnesses, office and clerical help. — The Attorney General shall assign an assistant attorney general and such staff attorneys as may be necessary to the handling of matters and proceedings before the Commission, who shall be under the direction of the Attorney General. Such assistant attorney general shall be assigned the duty and responsibility, when the Attorney General deems it to be advisable in the public interest, of intervening in proceedings before the Commission on behalf of the using and consuming public, including utility users generally and agencies of the State, such appearances including, but not being limited to, rate applications, rate changes and curtailments of service. He shall also have the authority to institute and originate proceedings before the Commission in the name of the State, its agencies and citizens, in all matters within the jurisdiction of the Commission, and shall have authority to appear before such other State and federal agencies and courts as he deems advisable on behalf of the State and its agencies and citizens in all matters affecting public

utility services. He shall have the assistance and cooperation of the Commission's staff, when available, and access to the Commission's books, records, studies and reports. In the performance of the duties set forth in this section the Attorney General shall have the right to employ additional attorneys, expert witnesses and office and clerical help and to incur expenses in connection therewith, and the compensation and expenses therefor shall be paid from the Contingency and Emergency Fund. The Commission shall furnish the Attorney General with copies of all applications, petitions and pleadings filed with it by public utilities doing business in this State or by any other persons in matters affecting the duties under this section. (1949, c. 989, s. 1; c. 1029, s. 3; 1959, c. 400; 1963, c. 1165, s. 1.)

Cross Reference. — See Editor's note to § 62-1.

Editor's Note. — For brief comment on earlier section, see 27 N.C.L. Rev. 489.

Applied in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Cited in State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972); State ex rel. Utilities Comm'n v. United Tel. Co. of the Carolinas, Inc., 15 N.C. App. 740, 190 S.E.2d 656 (1972).

§ 62-21. Commission attorney. — (a) The Commission is authorized to employ an attorney, to be known as the Commission attorney, to perform legal services for the Commission in proceedings and matters before the Commission, and to do research with respect to applicable utility laws for and on behalf of the Commission. The Commission attorney shall represent the Commission on appeal from any Commission orders and shall represent the Commission before the various State and federal agencies and courts. He shall perform such other legal services for the Commission as the chairman and the members of the Commission shall request.

(b) In any hearing or proceeding in which the Commission exercises any function judicial in nature, the Commission attorney, by leave of the Commission, may appear before the Commission in connection with the presentation of evidence and as an advocate, but after such leave is granted, he shall not advise with the Commission or participate in any manner in the determination or adjudication by the Commission of the issues in such hearing or proceeding. (1963, c. 1165, s. 1.)

Cross Reference. — See Editor's note to § 62-1.

§ 62-22. Utilities Commission and Department of Revenue to coordinate facilities for rate making and taxation purposes. — The Commission, at the request of the Department of Revenue, shall make available to the Department of Revenue the services of such of the personnel of the Commission as may be desired and required for the purpose of furnishing to the Department of Revenue advice and information as to the value of properties of public utilities, the valuations of which for ad valorem taxation are required by law to be determined by the Department of Revenue. It shall be the duty of the Commission and the Department of Revenue, with regard to the assessment and valuation of properties of public utilities doing business in North Carolina, to coordinate the activities of said agencies so that each of them shall receive the benefit of the exchange of information gathered by them with respect to the valuations of public utilities property for rate making and taxation purposes, and the facilities of each of said agencies shall be made fully available to both of them. (1949, c. 1029, s. 3; 1963, c. 1165, s. 1; 1973, c. 476, s. 193.)

Editor's Note. — The 1973 amendment substituted "Department of Revenue" for "State Board of Assessment" throughout the section.

§ 62-23. Commission as an administrative board or agency. — The Commission is hereby declared to be an administrative board or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the promulgation of rules and regulations and fixing utility rates pursuant to such administration; and in carrying out such purpose, the Commission shall assume the initiative in performing its duties and responsibilities in securing to the people of the State an efficient and economic system of public utilities in the same manner as commissions and administrative boards generally. In proceedings in which the Commission is exercising functions judicial in nature, it shall act in a judicial capacity as provided in G.S. 62-60. The Commission shall separate its administrative or executive functions, its rule making functions, and its functions judicial in nature to such extent as it deems practical and advisable in the public interest. (1963, c. 1165, s. 1.)

§§ 62-24 to 62-29: Reserved for future codification purposes.

ARTICLE 3.

Powers and Duties of Utilities Commission.

§ 62-30. General powers of Commission. — The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties. (1933, c. 134, s. 2; 1941, c. 97; 1963, c. 1165, s. 1.)

Editor's Note. — For comment on this and the subsequent section, see 12 N.C.L. Rev. 292.

Legislative Power to Regulate Public Utilities. — The general power of the legislature to provide reasonable rules and regulations, directly or through a commission, has been upheld in Atlantic Express Co. v. Wilmington & Weldon R.R., 111 N.C. 463, 16 S.E. 393, 32 Am. St. R. 805 (1892); Corporation Comm'n v. Seaboard Air Line Sys., 127 N.C. 283, 37 S.E. 266 (1900). See Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904).

The power of the legislature, either directly or through appropriate governmental agencies, to establish reasonable regulations for public service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved in well considered decisions dealing directly with the question. Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904); Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905); Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

The reason for strict regulation of public utilities is that they are either monopolies by nature or given the security of monopolistic authority for better service to the public. The public is best served in many circumstances where destructive competition has been removed and the utility is a regulated monopoly. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

No Interference with Interstate Commerce. — The former Railroad Commission, being concerned solely in domestic affairs and trade, did not interfere with interstate commerce. State ex rel. Caldwell v. Wilson, 121 N.C. 425, 28 S.E. 554 (1897).

The Commission has no jurisdiction over parties unless they are public utilities within the meaning of the statute. State ex rel. North Carolina Util. Comm'n v. New Hope Rd. Water Co., 248 N.C. 27, 102 S.E.2d 377 (1958).

Whether there shall be competition in any given field and to what extent is largely a matter of policy committed to the sound judgment and discretion of the Commission. The Commission must maintain a reasonable balance to see that the public is adequately served and at the same time to see that the public and the public

utilities involved are not prejudiced by the effects which flow from excessive competition brought about by excessive services. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Commission Can Authorize Sale of Facilities of Power Company to Municipality. — A power company, with the consent and approval of the Commission, has the right to sell its facilities to a city, and thereby permit the city to assume the obligation for meeting the public convenience and necessity for the service theretofore rendered by the power company. The Commission has not only the authority but the duty to pass upon such a contract and to determine whether or not it is in the public interest to permit its consummation. State ex rel. North Carolina Util. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); Duke Power Co. v. Blue Ridge Elec. Membership Corp., 253 N.C. 596, 117 S.E.2d 812 (1961).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947).

Stated in State ex rel. Utiliites Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973).

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-31. Power to make and enforce rules and regulations for public utilities. — The Commission shall have and exercise full power and authority to administer and enforce the provisions of this Chapter, and to make and enforce reasonable and necessary rules and regulations to that end. (1907, c. 469, s. la; 1913, c. 127, s. 2; C. S., s. 1037; 1933, c. 134, s. 8; 1941, c. 97; 1947, c. 1008, s. 2; 1949, c. 1132, s. 3; 1963, c. 1165, s. 1.)

Legislative Intent. — There was no intention to give a schedule of the thousands of appliances used in handling the business of common carriers nor to enumerate the countless dealings between them and their patrons, which the former Corporation Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts, instead of leaving such dealing to the unrestricted will of the carrier. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

Power to Make Orders and Regulations. — The former Corporation Commission was given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public service corporation. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

Commission Has Jurisdiction to Investigate with or without Complaint. — The Commission had the jurisdiction to investigate, upon complaint or upon its own initiative without complaint, to determine whether any motor carrier was operating in violation of the provisions of the Bus Act of 1949, as amended. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Commission Need Not Make Finding That Rule Is Reasonable and Necessary. — In adopting a rule pursuant to this section, the Utilities Commission need not make a finding of fact that the rule is reasonable and necessary in order for it to administer and enforce the provisions of the Public Utilities Act. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Rule Denying Rights under Grandfather Clause. — The Utilities Commission did not have the power to promulgate a rule and then to interpret or enforce the rule in such manner as to deny the exercise of rights which the legislature in clear and express terms preserved to all motor vehicle carriers of property who were in bona fide operation on January 1, 1947, and who met the additional requirements contained in the Bus Act of 1949. State ex rel. Utilities Comm'n v. Fox, 239 N.C. 253, 79 S.E.2d 391 (1954).

Cited in State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964); State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968); State ex rel. Utilities Comm'n v. Kenan Transport Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972), aff'd, 283 N.C. 104, 194 S.E.2d 859 (1973).

§ 62-32. Supervisory powers; rates and service. — (a) Under the rules herein prescribed and subject to the limitations hereinafter set forth, the

Commission shall have general supervision over the rates charged and service rendered by all public utilities in this State.

(b) The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service. (1913, c. 127, s. 7; C. S., s. 1112(b); 1933, c. 134, s. 3; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1959, c. 639, s. 12; 1963, c. 1165, s. 1.)

I. General Consideration.
II. Railroads and Other Common Carriers.
III. Telephone and Telegraph Companies.

I. GENERAL CONSIDERATION.

Cross References. — See note to § 62-118. As to report from municipality operating own utilities, see § 62-47.

Editor's Note. — For note on control of public utilities through zoning ordinances, see 42 N.C. L. Rev. 761 (1964).

This section is similar to former § 1035 of the Consolidated Statutes. Many of the following cases dated prior to 1963 were decided under that section and are given as an aid in construing the present law, but should be considered in the light of the former law.

Right of State to Regulate. — The right of the State to establish regulations for public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is firmly established. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907). See Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N.C. 52, 175 S.E. 698 (1934).

Purpose of Regulation. — An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

With public utilities the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Classification Must Not Be Arbitrary. — As to intrastate or domestic matters, the General Assembly has the right to establish regulations for public service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907).

Property of Utility Is Private Property and Business Is Private Business. — Notwithstanding the authority of the Commission to regulate its services and rates, and other matters incidental thereto, the property of the utility is private property and the business is private business. Except as otherwise provided, expressly or by reasonable implication, in this Chapter, a utility is free to manage its property and business as it sees fit and the Commission may not restrict, or control, the discretion of the board of directors in the acquisition of property, or in the price paid for it. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

The contractual obligation to provide water service to a recreational subdivision as well as the actual delivery thereof directly affect a utility's ability to function as a utility. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Scope of Power Delegated to Commission Not a Federal Question. — Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the power delegated to the commission is not a federal question. Atlantic Coast Line R.R. v. North Carolina Corp.

Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Fees and Charges Made by Municipality. — The North Carolina Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949). See Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951).

A rider approved by the Commission, which provided that the utility involved in a rate hearing would meter the protesting municipalities separately for purchases by the municipalities for normal resale and purchases by the municipalities for resale to industrial users, but which contained a provision that the municipalities were free to contract in respect to the price they would require the industrial users to pay, did not fix the rate at which the municipalities would be required to sell to industrial users in violation of the statute. State ex rel. North Carolina Util. Comm'n v. Municipal Corporations, 243 N.C. 193, 90 S.E.2d 519 (1955).

A sanitary district which, as a part of its functions, furnishes drinking water to the public and also filtered water for industrial consumers is a quasi-municipal corporation, and is not under the control and supervision of the North Carolina Utilities Commission as to services or rates. Halifax Paper Co. v. Roanoke Rapids San. Dist., 232 N.C. 421, 61 S.E.2d 378 (1950).

Applied in City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947); Fulghum v. Town of Selma, 238 N.C. 100, 76 S.E.2d 368 (1953); State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Quoted in State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Cited in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

II. RAILROADS AND OTHER COMMON CARRIERS.

Legislature May Regulate Directly or Indirectly. — Railroad companies from the public nature of the business by them carried on, and the interest which the public has in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Rate-Fixing Power May Be Delegated. — The General Assembly has the power to establish a commission to supervise and regulate the rates of common carriers. Atlantic Express Co. v. Wilmington & Weldon R.R., 111 N.C. 463, 16 S.E. 393 (1892); Corporation Comm'n v. Seaboard Air Line Sys. (Rate Case), 127 N.C. 283, 37 S.E. 266 (1900); Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904), aff'd, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907); Corporation Comm'n v. Railroad ("Track Scales Case"), 139 N.C. 126, 51 S.E. 793 (1905); Corporation Comm. v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905).

When State May Regulate Interstate Commerce. — The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. Morris-Scarboro-Moffitt Co. v. Southern Express Co., 146 N.C. 167, 59 S.E. 667 (1907).

General Power of Commission over Railroads. — The former Corporation Commission had general control and supervision of all railroad corporations. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

Power to Appraise and Assess. — The former Corporation Commission was not clothed with the power of appraising and assessing railroad property. Southern Ry. v. North Carolina Corp. Comm'n, 97 F. 513 (E.D.N.C. 1899).

When Power to Regulate Arbitrarily Exercised. — The public power to regulate railroads and the private right of ownership of such property coexist, and the one does not destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

When Duty of Railroad Entails Pecuniary Loss. — The State has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

III. TELEPHONE AND TELEGRAPH COMPANIES.

Telephone Company Subject to State Control. — A telephone company, acting under a

quasi-public franchise, is properly classified among the public service corporations, and as such is subject to public regulation and reasonable control. Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895); Godwin v. Telephone Co., 136 N.C. 258, 48 S.E. 813 (1904); Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912).

A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay is a public service corporation and comes within the provisions of this section. Horton v. Interstate Tel. & Tel. Co., 202 N.C. 610, 163 S.E. 694 (1932).

Jurisdiction of Court Not Ousted. — The statute giving general control of telephone companies to the former Corporation Commission did not oust the court of its jurisdiction to compel the company to perform a public duty it owed to an individual. Walls v. Strickland, 174 N.C. 298, 93 S.E. 857 (1917).

When Telegram Not Interstate Commerce. — See State ex rel. Railroad Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893); Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895).

§ 62-33. Commission to keep informed as to utilities. — The Commission shall at all times keep informed as to the public utilities, their rates and charges for service, and the service supplied and the purposes for which it is supplied. (1933, c. 134, s. 16; 1937, c. 165; 1939, c. 365, ss. 1, 2; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-34. To investigate companies under its control; visitation and inspection. — (a) The Commission shall from time to time visit the places of business and investigate the books and papers of all public utilities to ascertain if all the orders, rules and regulations of the Commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such public utilities, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this Chapter.

(b) The commissioners and the officers and employees of the Commission may during all reasonable hours enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any power provided for in this Article, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examinations, tests and inspections. (1899, c. 164, s. 1; Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; C. S., s. 1060; 1933, c. 134, s. 8; c. 307, s. 14; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-35. System of accounts. — (a) The Commission may establish a system of accounts to be kept by the public utilities under its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner of keeping such accounts.

(b) The Commission may require any public utility under its jurisdiction to keep separate or allocate the revenue from and the cost of doing interstate and intrastate business in North Carolina.

(c) The Commission may ascertain, determine, and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The Commission may prescribe such changes in such charges for depreciation as it finds necessary. (Ex. Sess. 1913, c. 20, s. 14; C. S., s. 1088; 1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 13; 1941, c. 97; 1963, c. 1165, s. 1.)

Review of Annual Charge to Operating Expenses on Account of Depreciation. — If a reasonably close relationship between the reserve for depreciation and the actual accumulated depreciation is not present, the Utilities Commission may and should review and make appropriate changes in the annual charge to operating expenses on account of depreciation. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-36. Reports by utilities; canceling certificates for failure to file. — The Commission may require any public utility to file annual reports in such form and of such content as the Commission may require and special reports concerning any matter about which the Commission is authorized to inquire or to keep informed, or which it is required to enforce. All reports shall be under oath when required by the Commission. The Commission may issue an order, without notice or hearing, canceling or suspending any certificate of convenience and necessity 30 days after the date of service of the order for failing to file the required annual report at the time it was due. In the event the report is filed during the 30-day period, the order of cancellation or suspension shall be null and void. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 15; 1941, c. 97; 1959, c. 639, ss. 7, 8; 1963, c. 1165, s. 1.)

Editor's Note. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-37. Investigations. — (a) The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the parties affected thereby notice and hearing.

(b) If after such an investigation, or investigation and hearing, the Commission, in its discretion, is of the opinion that the public interest shall be served by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the public utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the Commission to report its findings and recommendation to the Governor and Council of State with request for an allotment from the Contingency and Emergency Fund to defray the expense thereof, which may be granted as provided by law for expenditures from such fund or may be denied. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 16; 1941, c. 97; 1963, c. 1165, s. 1.)

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-38. Power to regulate public utilities in municipalities. — The Commission shall have the same power and authority to regulate the operation of privately owned public utilities within municipalities as it has to regulate such public utilities operating outside of municipalities, with the exception of the rights of such municipalities to grant franchises for such operation under G.S. 160-2, paragraph 6, and such public utilities shall be subject to the provisions of this Chapter in the same manner as public utilities operating outside municipalities. (1917, c. 136, subch. 3, s. 3; C. S., ss. 2783, 2784, 2785; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Editor's Note. — Section 160-2, referred to in this section, was repealed by Session Laws 1971, c. 698, s. 2.

Commission May Regulate Privately Owned Public Utilities within Cities. — The Utilities Commission has the same power and responsibility to regulate the operation of privately owned public utilities within cities as it does their operation outside of cities. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

The power of a municipality to grant franchises to public utilities for the use of its streets, and to provide service to its citizens, must yield to the paramount right of the State to regulate, through the Utilities Commission, public utilities

even when they are operated within the corporate boundaries of a municipality. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

Municipal Charter Is Subject to State Powers. — The power conferred by a city charter "to provide water and lights and to contract for same" is subject to the police power of the State, with respect to rates to be charged by a public service corporation under such contract as the city may make under its charter. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

And Contract Rate May Be Changed. — Although the rate to be charged for water is stipulated by contract between a city and a water company, this may be changed by the Commission if it appears that the rate contracted for is too low, and the one fixed by the Commission is just. The burden of proof is on the one alleging that the rate fixed by the Commission is unreasonable. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

Consent of Customer or Commission Necessary before Service Abandoned. — Power company may not abandon service to any customer, subject to the customer's paying his bill, without the consent of the customer or authorization of the Utilities Commission. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

Right to Injunction against Commission. — A public service corporation, having a contract with a city, applying to the Commission for the increase of the rate contracted for with the city and obtaining partial relief, will not be granted an injunction by the federal court against the Commission on the grounds that the rate is confiscatory, for such increase as is allowed by the Commission is that much more than could have been received under the contract with the city had the Commission refused to act. Henderson Water Co. v. Corporation Comm'n, 269 U.S. 278, 46 S. Ct. 112, 70 L. Ed. 273 (1925).

§ 62-39. To regulate crossings of telephone, telegraph, electric power lines and pipelines and rights-of-way of railroads and other utilities by another utility. — (a) The Commission, upon its own motion or upon petition of any public utility or upon petition of the North Carolina Rural Electrification Authority on behalf of any electric membership corporation, shall have the power and authority, after notice and hearing, to order that the lines and right-of-way of any public utility or electric membership corporation may be crossed by any other public utility or electric membership corporation. The Commission, in all such cases, may require any such crossings to be constructed and maintained in a safe manner and in accord with accepted and approved standards of safety and may prescribe the manner in which such construction shall be done.

(b) The Commission shall also have the power and authority to discontinue and prohibit such crossings where they are unnecessary and can reasonably be avoided and to order changes in existing crossings when deemed necessary.

(c) In all cases in which the Commission orders such crossings to be made or changed and when the parties affected cannot agree upon the cost of the construction of such crossings or the damages to be paid to one of the parties for the privilege of crossing the lines of such party, it shall be the duty of the Commission to apportion the cost of such construction and to fix the damage, if any, to be paid and to apportion the damages, if any, among the parties in such manner as may be just and equitable.

(d) This section shall not be construed to limit the right of eminent domain conferred upon public utilities and electric membership corporations by the laws of this State or to limit the right and duty conferred by law with respect to crossing of railroads and highways or railroads crossing railroads, but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. Any party shall have the right of appeal from any final order or decision or determination of the Commission as provided by law for appeals from orders or decisions or final determinations of the Commission. (1913, c. 130, s. 1; C. S., s. 1052; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1029, s. 1; 1963, c. 1165, s. 1.)

Local Modification. — Ashe: 1929, c. 101.

§ 62-40. To hear and determine controversies submitted. — When a public utility embraced in this Chapter has a controversy with another person and all the parties to such controversy agree in writing to submit such controversy to the Commission as arbitrator, the Commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and its award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county or counties in which said land, or any part thereof, is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall have the same effect as a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator. (1899, c. 164, s. 25; Rev., s. 1073; C. S., s. 1059; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross Reference. — As to power of Utilities Commission to settle dispute between railroad and drainage district, see § 156-91.

§ 62-41. To investigate accidents involving public utilities; to promote general safety program. — The Commission may conduct a program of accident prevention and public safety covering all public utilities with special emphasis on highway safety and transport safety and may investigate the causes of any accident on a railroad or highway involving a public utility, or any accident in connection with any other public utility. Any information obtained upon such investigation shall be reduced to writing and a report thereof filed in the office of the Commission, which shall be subject to public inspection but such report shall not be admissible in evidence in any civil or criminal proceeding arising from such accident. The Commission may adopt reasonable rules and regulations for the safety of the public as affected by public utilities and the safety of public utility employees. The Commission shall cooperate with and coordinate its activities for public utilities with similar programs of the Department of Motor Vehicles, the Insurance Department, the Industrial Commission and other organizations engaged in the promotion of highway safety and employee safety. (1899, c. 164, s. 24; Rev., s. 1065; C. S., s. 1061; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements. — (a) Whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:

(1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or

(2) That persons are not served who may reasonably be served, or

(3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or

(4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or

(5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,

The Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order. This section shall not apply to terminal or terminal facilities of motor carriers of property.

(b) If such order is directed to two or more public utilities, the utilities so designated shall be given such reasonable time as the Commission may grant within which to agree upon the portion or division of the cost of such additions, extensions, repairs, improvements or changes which each shall bear. If at the expiration of the time limited in the order of the Commission, the utility or utilities named in the order shall fail to file with the Commission a statement that an agreement has been made for division or apportionment of the cost or expense, the Commission shall have the authority, after further hearing in the same proceeding, to make an order fixing the portion of such cost or expense to be borne by each public utility affected and the manner in which the same shall be paid or secured.

(c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State. (1933, c. 307, s. 10; 1949, c. 1029, s. 2; 1963, c. 1165, s. 1; 1965, c. 287, s. 6.)

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Power and Duties of Commission. — This Chapter confers upon the Utilities Commission the power and the duty to compel a public utility to render adequate service, and it also confers upon the Commission the duty to fix reasonable rates for the rendering of adequate service. State ex rel. Utilities Comm'n General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

Protest Is Not Notice. — A protest filed by a city in a proceeding by a power company for an increased cash fare on its city buses was not sufficient to constitute such notice as is required by this section so as to authorize the Commission to consider whether or not the service rendered by the power company was adequate or inadequate. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

This section must be construed in connection with § 62-110, which requires the issuance of a certificate of public convenience and necessity to construct new facilities except where such construction is into territory contiguous to that already occupied and not receiving similar service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27 (1974).

Thus, Commission Is without Authority to Compel Duplicate Telephone Service. — A reading of this section in pari materia with § 62-110 results in the determination that the Commission does not have the authority to compel a public utility to provide local exchange service to an area which is already receiving such service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27 (1974).

To order a telephone company to render service to an area already occupied by another telephone company would foster duplication, wastefulness, and unwarranted competition — all of which are repugnant to the avowed policy of the public utility law. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27 (1974).

Duty of Utility to Render Adequate Service. — Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Utility Must Accept Responsibility. — A public utility, which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Reduction of Fair Value of Utilities' Property Where Service Is Inadequate. — See State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

Cited in State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-43. Fixing standards, classifications, etc.; testing service. — (a) The Commission may, after notice and hearing, had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices, or service to be furnished, imposed, observed or followed

by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility.

(b) The Commission shall fix, establish and promulgate standards of quality and safety for gas furnished by a public utility and prescribe rules and regulations for the enforcement of and obedience to the same. (1919, c. 32; C. S., s. 1055; 1933, c. 134, s. 8; c. 307, s. 11; 1941, c. 97; 1963, c. 1165, s. 1.)

Notice Held Adequate. — On review of a hearing on a proposed amendment of a Utilities Commission rule defining and listing products which may be carried under a petroleum authority, appellant's contention that the Commission's adoption of an amendment introduced by appellees at the hearing, rather than the proposed amendment attached to the notice of hearing, restricted the authorities of appellants without adequate notice was held to be without merit. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

§ 62-44. Commission may require continuous telephone lines. — The Commission may, upon its own motion or upon written complaint by any person, after notice and hearing, require any two or more telephone or telegraph utilities to establish and maintain through lines within the State between two or more localities, which cannot be communicated with or reached by the lines of either utility alone, where the lines or wires of such utilities form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points. The rate for such service shall be just and reasonable and the Commission shall have power to establish the same, and declare the portion thereof to which each utility affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such divisions of expense and labor, as may be required by the Commission. (1933, c. 307, s. 9; 1963, c. 1165, s. 1.)

Statutes Requiring Interconnection with Competitor Should Not Be Extended beyond Plain Meaning. — The power to require the proprietor of a business to interconnect its facilities with those of a competitor is a drastic power. Statutes conferring it should not be extended beyond their plain meaning. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Interconnection with Competitor to Increase Its Share of Business Cannot Be Compelled. — There is no provision in this Chapter which requires, or authorizes the Commission to require, a utility, with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Section Authorizes Requirement of Interconnection Only When One Company Cannot Serve Localities. — This section authorizes the Commission to require a connection of the lines of two telephone companies, but only when they serve localities which cannot be communicated with by the lines of one of them alone. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

It Does Not Authorize Compelling Telephone Company to Interconnect with Radio Company Serving Same Area. — This section may not reasonably be extended by construction to authorize the Commission to compel a telephone company to interconnect its system with the system of a radio company serving the identical area which the telephone company, itself,

serves or desires to serve. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Mobile Radio Service Company Is Not "Telephone or Telegraph Utility". — Even if the record is sufficient to support an order granting an applicant a certificate of public convenience and necessity to act as a common carrier of communications providing mobile radio service, the Commission has no statutory authority to require a telephone utility to interconnect the applicant's radio communications system with the utility's land telephone system. If permitted to render such service, the applicant would not be a "telephone or telegraph utility," through it would be a public utility conveying or transmitting messages by "other means of transmission," namely, radio. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

§ 62-45. Determination of cost and value of utility property. — The Commission, after notice and hearing, may ascertain and fix the cost or value, or both, of the whole or any part of the property of any public utility insofar as the same is material to the exercise of the jurisdiction of the Commission, make revaluations from time to time, and ascertain the cost of all new construction, extensions and additions to the property of every public utility. (1933, c. 307, s. 12; 1963, c. 1165, s. 1.)

§ 62-46. Water gauging stations. — The Commission may require the location, establishment, maintenance and operation of any water gauging station which it finds is needed in the State over and above those required by federal agencies, and the Commission may cooperate with federal and other State agencies as to the location, construction and reports and the results of operation of such station. (1933, c. 307, s. 33; 1963, c. 1165, s. 1.)

§ 62-47. Reports from municipalities operating own utilities. — Every municipality furnishing gas, electricity or telephone service shall make an annual report to the Commission, verified by the oath of the general manager or superintendent thereof, on the same forms as provided for reports of public utilities, giving the same information as required of public utilities. (1933, c. 307, s. 34; 1963, c. 1165, s. 1.)

Cross Reference. — As to admissibility of records in utility rate hearing, see § 62-65.

§ 62-48. Appearance before courts and agencies. — The Commission is authorized and empowered to initiate or appear in such proceedings before federal and State courts and agencies as in its opinion may be necessary to secure for the users of public utility service in this State just and reasonable rates and service. (1899, c. 164, s. 14; Rev., s. 1110; 1907, c. 469, s. 5; C. S., s. 1075; 1929, c. 235; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-49. Publication of utilities laws. — The Commission is authorized and directed to secure publication of all North Carolina laws affecting public utilities, together with the Commission rules and regulations, in an annotated edition, and the Commission may adopt rules for distribution of said publication, and shall publish biennial supplements to said utilities laws containing all amendments and additions thereto, and may republish said laws at such times as may be reasonable and necessary. (1963, c. 1165, s. 1; 1967, c. 1133.)

Cross Reference. — See Editor's note to § 62-1.

Stated in State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Cited in State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

§ 62-50. Safety standards for interstate and intrastate natural gas pipelines. — (a) The safety standards of this Chapter shall apply to the North Carolina portion of interstate natural gas pipelines extending to, from, within or through this State in interstate commerce to the same extent as said safety provisions apply to intrastate natural gas pipelines of natural gas utility companies and pipeline carriers operating under a franchise from the Utilities Commission. The Commission may require that interstate natural gas companies and interstate natural gas pipeline carriers operating interstate natural gas pipelines in this State and all intrastate natural gas utilities shall file with the Commission reports of all accidents occurring in connection with the operation of all natural gas pipelines located in North Carolina and to file with the Commission copies of its construction, operation and maintenance standards and procedures, and any amendments thereto, and such other information as may be necessary to show compliance with the safety standards promulgated by the Commission hereunder. Where the Commission has reason to believe that any interstate natural gas company or any intrastate natural gas utility is not in compliance with the Commission's safety standards, the Commission may, after notice and hearing, order said interstate natural gas company or intrastate natural gas utility, to take such measures as may be necessary to comply with such standards. The Commission is authorized to require said interstate natural gas pipeline companies or carriers and intrastate natural gas utilities to furnish engineering reports showing that said pipelines are in safe operating condition and are being operated in conformity with the Commission's safety standards.

(b) The Commission is hereby authorized to enter into agreements with the United States Department of Transportation and other federal agencies and with other states or public utilities commissions of other states for the regulation of natural gas pipelines located within the State of North Carolina and upon the execution of such cooperative agreements, the Commission is authorized to utilize Commission personnel for inspection, investigation, and regulation of safety standards for interstate and intrastate natural gas pipelines in North Carolina, and to share in the cost of such regulation with other agencies having duties with respect to the regulation of said natural gas pipelines, and to receive funds from the United States Department of Transportation for such regulation.

(c) The Utilities Commission is hereby authorized to enter into cooperative agreements for inspection of all natural gas pipelines of North Carolina to the end that the Utilities Commission may enter into agreements with the United States Department of Transportation or other federal or state agencies to regulate and inspect the safety standards for all natural gas pipelines in the State of North Carolina, including interstate natural gas pipelines.

(d) Any person who violates any provision of this section, or any regulation of the Utilities Commission issued thereunder, shall be subject to a civil penalty not to exceed one thousand dollars ($1,000) for each violation for each day that the violation persists, the maximum civil penalty not to exceed two hundred thousand dollars ($200,000) for any continuing violation.

(e) Any action for civil penalty or any claim for said penalty may be compromised by the Utilities Commission and settled for an agreed amount. In determining the amount of the penalty imposed in civil action, or the amount agreed upon in compromise, the amount of the penalty shall be considered in relation to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after any prior notification of a violation. The amount of the penalty, when finally determined in a civil action, or the amount agreed upon in compromise, may be deducted from any sums owing by the State to the person charged, or may be collected as in the case of any judgment in a civil action in the State courts.

(f) The General Court of Justice of North Carolina is authorized to issue court orders, restraining orders, injunctions and other processes of the court in actions by the Utilities Commission to enforce the provisions of this Chapter relating to gas pipeline safety, and the Commission is authorized to bring actions in said court, including actions for mandatory injunctions, restraining orders, temporary restraining orders, penalties, damages and such other relief as may be necessary to secure compliance with the provisions of this section and regulations of the Commission duly enacted and adopted hereunder relating to gas pipeline safety. This provision is in addition to other powers of the Commission and the courts in relation to the enforcement of provisions of this Chapter in the courts, and shall not limit the present powers of the Commission in bringing actions in the courts for enforcement of other provisions of this Chapter.

(g) For the purposes of this section, "intrastate natural gas utilities" shall include municipal corporations operating municipally owned gas distribution systems, to the end that said systems shall be subject to the enforcement of gas safety standards by the Commission, provided that this Chapter shall in no other way apply to municipally owned gas distribution systems. (1967, c. 1134, s. 1; 1969, c. 646; 1971, cc. 549, 1145.)

§ 62-51. To inspect books and records of corporations affiliated with public utilities. — The Utilities Commission and its employees are hereby authorized to inspect the books and records of corporations affiliated with public utilities regulated by the Utilities Commission under the provisions of this Chapter, including parent corporations and subsidiaries of parent corporations. This authorization shall extend to all reasonably necessary inspection of all books and records of account and agreements and transactions between public utilities doing business in North Carolina and their affiliated corporations where such records relate either directly or indirectly to the provision of intrastate service by the utility. The right to inspect such books and records shall apply both to books and records in the State of North Carolina and such books and records located outside of the State of North Carolina. If any such affiliated corporation shall refuse to permit such inspection of its books and records and its transactions with public utilities doing business in North Carolina, the Utilities Commission is empowered to order the public utility regulated in North Carolina to show cause why it should not secure from its affiliated corporation such books and records for inspection in North Carolina or why their franchise to operate as a public utility in North Carolina should not be cancelled. (1969, c. 764, s. 1.)

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§§ 62-52 to 62-59: Reserved for future codification purposes.

ARTICLE 4.

Procedure before the Commission.

§ 62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum. — For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The

commissioners and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Editor's Note. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

Commission Is an Administrative Agency. — The Utilities Commission, a creature of the General Assembly, is an administrative agency of the State, with such powers and duties as are given it by this Chapter. These powers and duties are of a dual nature — supervisory or regulatory, and judicial. State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

When the Commission is conducting a hearing, it is acting in a judicial capacity and shall render its decision upon questions of law and of fact in the same manner as a court of record. State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

With Powers of Court of General Jurisdiction as to Certain Matters. — See State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Liberality and informality is essential to the workings of the Commission. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

The Commission is required by § 62-65 (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." This section provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules in order that regulation may be consistent with changing conditions. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Great liberality is indulged in pleadings in proceedings before the Commission, and the technical and strict rules of pleading applicable in ordinary court proceedings do not apply. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Substance and not form is controlling. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The Commission may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Order in Opinion Concurred In by Majority Is Order of Commission. — Where a majority of the commissioners concurred in the order set forth in the opinion by one of them, it was the order of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

If three commissioners concur, the order entered by them constitutes the order of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

But All Commissioners Concurring Must Have Heard Evidence. — See State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

It seems inconceivable that the General Assembly intended that when a matter is heard by a hearing division, if "as many as three commissioners hearing the case approved the recommended order," as provided by § 62-76, the order shall become a final order, but that the Commission, when a matter is heard before it, can issue a final order when only one of the commissioners who heard the case approves the order. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Or Order Is Not Final. — An order was held to be a recommended order and not a final order where only one of the three commissioners who had heard the evidence in a hearing before the Commission participated in approving the order. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

Res Judicata. — Only specific questions actually heard and finally determined by the Commission in its judicial character are res judicata, and then only as to the parties to the hearing. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Findings of Fact Not Disagreed With in Other Opinions Are Those of Commission. — Where neither of the two concurring opinions nor the two dissenting opinions indicate any disagreement with any of the findings of fact stated in the opinion of another commissioner and the opinion of no other commissioner suggests any other findings of fact, the findings of fact so stated in the opinion of the commissioner are, therefore, concurred in by a majority, if not all of the members of the Commission, and are, therefore, the findings of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Issues of Fact Not to Be Decided before All Evidence Is Offered. — It is erroneous if controverted questions of fact, or issues of fact, are decided by the Commission before all of the competent evidence of the parties is offered with respect thereto. State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972).

Deferring Use of Increased Rates Pending Investigation. — After rates for certain intrastate shipments had been duly established by the Utilities Commission, defendant sought to increase such rates by filing tariff schedules to that effect. The Commission, in a proceeding to which defendant was a party, by order of postponement, which was not objected to, deferred use of the new increased rates pending investigation, and also directed that the rates previously fixed should not be changed by subsequent tariffs or schedules until this investigation and suspension proceeding had been disposed of, continuing the investigation from time to time at the request of defendant. It was held that such action of the Commission was binding on defendant. However, defendant should be given a reasonable time to comply with the order before penalties might be invoked. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

Commission Is without Inherent Powers of Appellate Court. — The North Carolina Utilities Commission is a court of general jurisdiction only as to subjects embraced within this Chapter. It is a court of original jurisdiction and does not possess the inherent powers of an appellate court. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

Different Reasons Given by Concurring Commissioners Are Not Grounds for Reversal. — When this section and § 62-79(a) are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, may be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Finding May Be Based on "Late" Exhibits. — The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the capacity and ability of an applicant for a certificate of public convenience and necessity to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Former Statute. — For cases construing § 1023 of the Consolidated Statutes, containing similar provisions, see State ex rel. Caldwell v. Wilson, 121 N.C. 425, 28 S.E. 554 (1897); State ex rel. North Carolina Util. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909); North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1917); State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

§ 62-61. Witnesses; production of papers; contempt. — The Commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Cross References. — As to attendance of witnesses, see §§ 8-59 to 8-64. As to contempt, see § 5-1 et seq.

§ 62-62. Issuance and service of subpoenas. — All subpoenas for witnesses to appear before the Commission, a division of the Commission or a hearing commissioner or examiner and notice to persons or corporations, shall be issued by the Commission or its chief clerk or a deputy clerk and be directed to any sheriff, constable or other officer authorized by law to serve process issued out of the superior courts, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. The Commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-63. Service of process and notices. — The chief clerk, a deputy clerk, or any authorized agent of the Commission may serve any notice issued by it and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and all officers authorized by law to serve process issuing out of the superior courts, to serve any process, subpoenas and notices issued by the Commission, and such officers shall be entitled to the same fees as are prescribed by law for serving similar papers issuing from the superior court. Service of notice of all hearings, investigations and proceedings by the Commission may be made upon any person upon whom a summons may be served in accordance with the provisions governing civil actions in the superior courts of this State, and may be made personally by an authorized agent of the Commission or by mailing in a sealed envelope, registered, with postage prepaid, or by certified mail. (1949, c. 989, s. 1; 1957, c. 1152, s. 2; 1963, c. 1165, s. 1.)

Cross Reference. — As to penalty upon sheriff for failing to execute and return process, see § 162-14.

§ 62-64. Bonds. — All bonds or undertakings required to be given by any of the provisions of this Chapter shall be payable to the State of North Carolina, and may be sued on as are other undertakings which are payable to the State. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-65. Rules of evidence; judicial notice. — (a) When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record. Oral evidence shall be taken on oath or affirmation. The rules of privilege shall be effective to the same extent that they are now or hereafter recognized in civil actions in the superior court. The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence. All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing. Any party introducing any document or record in evidence by reference shall bear the expense of all copies required for the record in the event of an appeal from the Commission's order. Every party to a proceeding shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues, to impeach any witness

regardless of which party first called such witness to testify and to rebut the evidence against him. If a party does not testify in his own behalf, he may be called and examined as if under cross-examination.

(b) The Commission may take judicial notice of its decisions, the annual reports of public utilities on file with the Commission, published reports of federal regulatory agencies, the decisions of State and federal courts, State and federal statutes, public information and data published by official State and federal agencies and reputable financial reporting services, generally recognized technical and scientific facts within the Commission's specialized knowledge, and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice. When any Commission decision relies upon such judicial notice of material facts not appearing in evidence, it shall be so stated with particularity in such decision and any party shall, upon petition filed within 10 days after service of the decision, be afforded an opportunity to contest the purported facts noticed or show to the contrary in a rehearing set with proper notice to all parties; but the Commission may notify the parties before or during the hearing of facts judicially noticed, and afford at the hearing a reasonable opportunity to contest the purported facts noticed, or show to the contrary. (1949, c. 989, s. 1; 1959, c. 639, s. 2; 1963, c. 1165, s. 1; 1973, c. 108, s. 21.)

Cross Reference. — As to rules of evidence generally, see § 8-1 et seq.

Editor's Note. — The 1973 amendment substituted "justices and judges of the General Court of Justice" for "Justices of the Supreme Court and judges of the superior courts" at the end of the first sentence of subsection (b).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

Informality of Procedure. — The Commission is required by subsection (a) in deciding on an application for a certificate of public convenience and necessity to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." Section 62-60 provides that the Commission shall render its decision "in the same manner as a court of record." The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Admissibility of Annual Reports of Municipalities. — In a proceeding by a utility for an increase in rates, wherein municipalities engaged in resale of electrical energy purchased from the utility protested against the proposed schedules of the utility, copies of annual reports of the municipality to the Commission pursuant to statute, which showed profits made by the municipalities from resale of electrical energy, were admissible in evidence on the question of whether the proposed schedules were fair and equitable as between groups or classifications to be served under such schedules. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Admissibility of Evidence of Rates Charged by Another Utility. — In a proceeding by a utility for a rate increase the Commission properly excluded evidence of rates charged by another utility in the same area as that involved in the proceeding in the absence of evidence as to the relative cost conditions of the two utilities. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Admission of Expert-Opinion Evidence. — In a rule-making proceeding, the Utilities Commission did not err in the admission of expert-opinion evidence without a specific finding that the witness was an expert, since the admission of the evidence over objection and the denial of a motion to strike constituted the Commission's ruling that the witness was qualified as an expert. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Findings May Be Based on "Late" Exhibits. — The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the capacity and ability of an applicant for a certificate of public convenience and necessity to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Burden of Proof. — In the hearing before the Utilities Commission, the burden was on the applicant to offer competent, material and substantial evidence in support of his application for modification of his existing franchise. State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943); State ex rel.

Utilities Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

Quoted in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Cited in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

§ 62-66. Depositions. — The Commission or any party to a proceeding may take and use depositions of witnesses in the same manner as provided by law for the taking and use of depositions in civil actions in the superior court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-67. Examination before hearing. — Any party to a proceeding may make application to the Commission for examination of any other party before hearing. The Commission, if it finds good cause therefor, shall issue the order for such examination, and the deposition taken thereunder shall be filed with the Commission's chief clerk, in accordance with and subject to the procedure prescribed for such examinations in the superior court. In cases in which the Commission is a party, it may order such examination upon its own motion, upon the affidavit of any member of the Commission's staff. The Commission may adopt rules for the taking of such examinations. (1963, c. 1165, s. 1.)

§ 62-68. Use of affidavits. — At any time, 10 or more days prior to a hearing or a continued hearing, any party or the Commission may send by registered or certified mail or deliver to the opposing parties a copy of any affidavit proposed to be used in evidence, together with the notice as herein provided. Unless an opposing party or the Commission at least five days prior to the hearing, if the affidavit and notice are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing, sends by registered or certified mail or delivers to the proponent a request to cross-examine the affiant at the hearing, the right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant at the hearing is not afforded after request therefor is made as herein provided, the affidavit shall not be received in evidence. The notice accompanying the affidavit shall set forth the name and address of the affiant and shall contain a statement that the affiant will not be called to testify orally and will not be subject to cross-examination unless the opposing parties or the Commission demand the right of cross-examination by notice mailed or delivered to the proponent at least five days prior to the hearing if the notice and affidavit are received at least 20 days prior to such hearing, otherwise at any time prior to or during such hearing. (1949, c. 989, s. 1; 1957, c. 1152, s. 3; 1963, c. 1165, s. 1.)

Editor's Note. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 62-69. Stipulations and agreements; prehearing conference. — (a) In all contested proceedings the Commission, by prehearing conferences and in such other manner as it may deem expedient and in the public interest, shall encourage the parties and their counsel to make and enter stipulations of record for the following purposes:

(1) Eliminating the necessity of proof of all facts which may be admitted and the authenticity of documentary evidence,

(2) Facilitating the use of exhibits, and

(3) Clarifying the issues of fact and law.

The Commission may make informal disposition of any contested proceeding by stipulation, agreed settlement, consent order or default.

(b) Unless otherwise provided in the Commission's rules of practice and procedure, such prehearing conferences may be ordered by the Commission or requested by any party to a proceeding in substantially the same manner, and with substantially the same subsequent procedure, as provided by law for the conduct of pretrial hearings in the superior court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-70. Ex parte communications. — (a) In all matters and proceedings on the Commission's formal docket with adversary parties of record, all communications or contacts of any nature between any party and the Commission or any of its members or any hearing examiner assigned to such docket, whether verbal or written, formal or informal, which pertain to the merits of such matter or proceeding, shall be made only with full knowledge of or notice to all other parties of record. All parties shall have an opportunity to be informed fully as to the nature of such communication and to be present and heard with respect thereto.

(b) In the event any such communication or contact shall be received by the Commission or any commissioner or any hearing examiner assigned to such docket without such knowledge or notice to all other parties, the Commission shall immediately cause a formal record of such violation to be made in its docket and thereafter no ruling or decision shall be made in favor of such violating party until the aggrieved party shall waive such violation or the Commission shall find as a fact that such party was not prejudiced thereby or that any such prejudice, if present, has been removed.

(c) Any contacts or communications made in violation of this section which are not recorded by the Commission may be recorded by notice to the Commission by any aggrieved party and, unless the Commission shall find that such violation did not in fact occur, such recording shall have the same effect as if done by the Commission.

(d) In matters not under this section, the Commission may secure information and receive communications ex parte, it being the purpose of this section to protect adversary interests where they exist but not otherwise to restrict unduly the administrative and legislative functions of the Commission.

(e) This section shall not modify any notice required in the case of pleadings and proceedings which are subject to other requirements of notice to parties of record, whether by statute or by rule of the Commission, and the Commission may adopt reasonable rules to coordinate this section with such other requirements.

(f) In addition to the foregoing provisions regarding contacts with members of the Commission and hearing examiners, if any party of record, including the assistant attorney general when he is a party, confers with or otherwise contacts any staff personnel employed by the Commission regarding the merits of a pending proceeding, the staff employee shall promptly forward by regular mail a memorandum of the date and general subject matter of such contact to all other parties of record to the proceeding. (1963, c. 1165, s. 1.)

§ 62-71. Hearings to be public; record of proceedings. — (a) All formal hearings before the Commission, a hearing division, a commissioner or an examiner shall be public, and shall be conducted in accordance with such rules as the Commission may prescribe. A full and complete record shall be kept of all proceedings on any formal hearing, and all testimony shall be taken by a reporter appointed by the Commission. Any party to a proceeding shall be entitled to a copy of the record or any part thereof upon the payment of the reasonable cost thereof as determined by the Commission.

(b) The Commission in its discretion may approve stenographic or mechanical methods of recording testimony, or a combination of such methods, and a transcript of any such record shall be valid for all purposes, subject to protest and settlement by the Commission.

(c) The Commission is authorized to provide daily transcripts of testimony in cases of substantial public interest and in other cases where time is an important factor to the parties involved. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Formal Hearing. — An informal conference between members of the Commission and representatives of the utility involved in a rate proceeding, which was called at the suggestion of the Commission, and which involved only a single question as to whether the protesting municipalities having industrial users could secure an industrial rate, and at which conference no testimony and no record was taken, was not a formal hearing within the meaning of this section. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

§ 62-72. Commission may make rules of practice and procedure. — Except as otherwise provided in this Chapter, the Commission is authorized to make and promulgate rules of practice and procedure for the Commission hearings. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Editor's Note. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

In the absence of statutory inhibition, the Commission may regulate its own procedure within broad limits, and may prescribe and adopt reasonable rules and regulations with respect thereto, provided such rules are consistent with the statutes governing its actions. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Rules Must Not Be Contrary to Statutes. — While the power of the legislature to delegate authority to an administrative agency of the State to prescribe rules and regulations for the due and orderly performance of its public functions is unquestioned, this does not authorize the formulation of rules contrary to the statute. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

Waiver or Suspension of Rules. — The Commission may adopt its own rules governing pleadings, and has the power to waive or suspend the rules. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Challenging Validity of Rules by Appeal under Former Law. — See State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944).

Cited in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-73. Complaints against public utilities. — Complaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. Upon good cause shown and in compliance with the rules of the Commission, the Commission shall also allow any such person authorized to file a complaint, to intervene in any pending proceeding. The Commission, by rule, may prescribe the form of complaints filed under this section, and may in its discretion order two or more complaints dealing with the same subject matter to be joined in one hearing. Unless the Commission shall determine, upon consideration of the complaint or otherwise, and after notice to the complainant and opportunity to be heard, that no reasonable ground exists for an

investigation of such complaint, the Commission shall fix a time and place for hearing, after reasonable notice to the complainant and the utility complained of, which notice shall be not less than 10 days before the time set for such hearing. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Cited in State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

§ 62-74. Complaints by public utilities. — Any public utility shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases, except that the complaint and notice of hearing shall be served by the Commission upon such interested persons as it may designate. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-75. Burden of proof. — In all proceedings instituted by the Commission for the purpose of investigating any rate, service, classification, rule, regulation or practice, the burden of proof shall be upon the public utility whose rate, service, classification, rule, regulation or practice is under investigation to show that the same is just and reasonable. In all other proceedings the burden of proof shall be upon the complainant. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Legality of Rule Placing Burden upon All Carriers as to All Rates. — This section uses the word "carrier" or "utility" in the singular. Therefore, when the Commission initiates an investigation of the entire rate structure of motor carriers, and places upon the carriers the burden of showing that the old rates, which have been in effect for a number of years with the approval of the Commission, are just and reasonable, a question arises as to whether the Commission has exceeded its legislative authority. See State ex rel. Utilities Comm'n v. North Carolina Motor Carriers Ass'n, 253 N.C. 432, 117 S.E.2d 271 (1960).

Plaintiff Must Prove Facts Essential to Relief. — This section imposes upon plaintiff the burden of proving the facts essential to its right to relief from the relationship of which it complains. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

The burden is upon carriers asking for an increase in rates to prove justification for the increase and that the proposed rate is just and reasonable. State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966).

And Not upon Shippers or Customers. — At a hearing on a proposed increase in charges for railroad services the shippers and customers of the railroads have no burden of proving anything; the previous rates are presumed to be fair and reasonable and so are the orders of the Commission. State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966).

And the burden of proof is upon an applicant for a certificate of public convenience and necessity to show there is a public convenience and necessity for its proposed service. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Burden of Proof as to Counterclaim. — Where the challenge to the rate of return arose from protestants' counterclaim, the protestants were therefore complainants, and the burden was upon them. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Applied in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Stated in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

§ 62-76. Hearings by Commission, hearing division of Commission, commissioner, or examiner. — (a) Except as otherwise provided in this Chapter, any matter requiring a hearing shall be heard and decided by the Commission or shall be referred to a division of the Commission or one of the commissioners

or a qualified member of the Commission staff as examiner for hearing, report and recommendation of an appropriate order or decision thereon. Subject to the limitations prescribed in this Article, a hearing division, hearing commissioner or examiner to whom a hearing has been referred by order of the chairman shall have all the rights, duties, powers and jurisdiction conferred by this Chapter upon the Commission. The chairman, in his discretion, may direct any hearing by the Commission or any division, commissioner or examiner to be held in such place or places within the State as he may determine to be in the public interest and as will best serve the convenience of interested parties. Before any member of the Commission staff enters upon the performance of duties as an examiner, he shall first take, subscribe to and file with the Commission an oath similar to the oath required of members of the Commission.

(b) In all cases where a division of the Commission hears a proceeding and as many as three commissioners hearing the case approved the recommended order, such order shall thereby become and shall be issued as a final order of the Commission. If less than three commissioners approve such order, it shall be a recommended order only, subject to review by the full Commission, with all commissioners eligible to participate in the final arguments and decision.

(c) In all cases in which a pending proceeding shall be assigned to a hearing commissioner, such commissioner shall hear and determine the proceedings and submit his recommended order, but, in the event of a petition to the full Commission to review such recommended order, the hearing commissioner shall take no part in such review, either in hearing oral argument or in consideration of the Commission's decision, but his vote shall be counted in such decision to affirm his original order. (1949, c. 989, s. 1; 1959, c. 639, s. 3; 1963, c. 1165, s. 1.)

Section Supports Holding That Three Commissioners Concurring in Order of Commission Must Have Heard Evidence. — See State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 21 N.C. App. 251, 204 S.E.2d 181 (1974).

§ 62-77. Recommended decision of hearing division, commissioner or examiner. — Any report, order or decision made or recommended by a hearing division, commissioner or examiner with respect to any matter referred for hearing shall be in writing and shall set forth separately findings of fact and conclusions of law and shall be filed with the Commission. A copy of such recommended order, report and findings shall be served upon the parties who have appeared in the proceeding. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

§ 62-78. Proposed findings, briefs, exceptions, orders, expediting cases, and other procedure. — (a) Prior to each decision or order by the Commission in a proceeding initially heard by it and prior to any recommended decision or order of a hearing division, commissioner or examiner, the parties shall be afforded an opportunity to submit, within the time prescribed by order entered in the cause, unless further extended by order of the Commission, for the consideration of the Commission, division, commissioner or examiner, as the case may be, proposed findings of fact and conclusions of law and briefs.

(b) Within the time prescribed by the hearing division, commissioner, or examiner, the parties shall be afforded an opportunity to file exceptions to the recommended decision or order and a brief in support thereof, provided the time so fixed shall be not less than 15 days from the date of such recommended decision or order. The record shall show the ruling upon each requested finding and conclusion or exception.

(c) In all proceedings in which a hearing division, commissioner or examiner has filed a report, recommended decision or order to which exceptions have been filed, the Commission, before making its final decision or order, shall afford the

party or parties an opportunity for oral argument. When no exceptions are filed within the time specified to a recommended decision or order, such recommended decision or order shall become the order of the Commission and shall immediately become effective unless the order is stayed or postponed by the Commission; provided, the Commission may, on its own motion, review any such matter and take action thereon as if exceptions thereto had been filed.

(d) When exceptions are filed, as herein provided, it shall be the duty of the Commission to consider the same and if sufficient reason appears therefor, to grant such review or make such order or hold or authorize such further hearing or proceeding as may be necessary or proper to carry out the purposes of this Chapter. The Commission, after review, upon the whole record, or as supplemented by a further hearing, shall decide the matter in controversy and make appropriate order or decision thereon.

(e) The Commission may expedite the hearing and decision of any case if the public interest so requires by the use of pretrial conferences, daily transcripts of evidence, trial briefs, and prompt oral argument, and by granting priority to the hearing and decision of such case. (1949, c. 989, s. 1; 1959, c. 639, s. 4; 1963, c. 1165, s. 1.)

Ordinarily, the procedure before the Commission is more or less informal and is not as strict as in superior court, nor is it confined by technical rules; substance and not form is controlling. State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

This section requires the Commission to find all facts essential to a determination of the question at issue. Having found the facts, it may then make factual conclusions. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The reason for compelling adequate factual findings is to permit proper judicial review. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The duty imposed is similar to that duty imposed on a judge of the superior court by former § 1-185 when a jury trial is waived, and on the Industrial Commission by § 97-84 before it can award or deny compensation. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Failure to Make Findings Necessitates Remand. — A failure by the Commission to find facts essential to a determination of the rights of the parties necessitates a remand to the Commission to make necessary findings on which it may base its order. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Applied in State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

§ 62-79. Final orders and decisions; findings; service; compliance. — (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:

(1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and

(2) The appropriate rule, order, sanction, relief or statement of denial thereof.

(b) A copy of every final order or decision under the seal of the Commission shall be served by registered or certified mail upon the person against whom it runs or his attorney and notice thereof shall be given to the other parties to the proceeding or their attorney. Such order shall take effect and become operative when issued unless otherwise designated therein and shall continue in force either for a period which may be designated therein or until changed or revoked by the Commission; provided, upon filing of new, changed or additional rates, it shall not be necessary to obtain relief from an outstanding order of the Commission fixing rates except in the case of transportation rates where the rates have been in effect less than one year. If an order cannot, in the judgment of the Commission, be complied with within the time designated

therein, the Commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. (1949, c. 989, s. 1; 1957, c. 1152, s. 4; 1959, c. 639, s. 4; 1961, c. 472, s. 1; 1963, c. 1165, s. 1.)

The Commission is required by this section to find all facts essential to a determination of the question at issue. State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

"Material Issues of Fact". — When the record before the Commission presents the questions of the original cost, less depreciation, and the replacement cost, less depreciation, these are "material issues of fact," upon each of which the Commission must make its finding. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Determination of "Fair Value". — Having made the findings, properly supported, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

While the Commission has the duty to weigh evidence of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Different Reasons Given by Concurring Commissioners Are Not Grounds for Reversal. — When § 62-60 and subsection (a) of this section are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, may be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. The diversity of the reasons given by the three commissioners who join in an ultimate decision and order are not a sufficient ground for its reversal. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Applied in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Stated in State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

§ 62-80. Powers of Commission to rescind, alter or amend prior order or decision. — The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Procedure Informal. — Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules in order that regulation may be consistent with changing conditions. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Authority to Rescind, Alter or Amend Is Discretionary. — The statutory authority of the Utilities Commission, to rescind, alter or amend any order or decision made by it, upon proper notice to parties and after opportunity for hearing, is obviously discretionary. State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

"Complaint Proceeding". — A hearing pursuant to the provisions of this section and § 62-136 which involves a single rate or small part of a rate structure of a public utility is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of a utility and may be resolved without involving the procedure outlined in § 62-133. State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

The Commission may not arbitrarily or capriciously rescind its order approving a contract between utilities. It must appear that such rescission is made because of a change of circumstances requiring it in the public interest. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

In the absence of statutory authority and in the absence of any additional evidence or a change in conditions, the Commission has no power to reopen a proceeding and modify or set aside an order theretofore made by it where the order was made in pursuance of an agreement entered into by the parties to the proceeding. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Circumstances Justifying Rescission of Prior Order Approving Contract. — The improvement and construction of highways between two municipalities making feasible a new and quicker bus route between them was sufficient change of condition to empower the Utilities Commission to modify or rescind a prior order entered by it approving an agreement between two carriers in regard to their respective services to the public between the two municipalities along the older routes. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

An appeal does not lie from the denial of a petition to rehear. State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

Revocation of Prior Order Reversed. — An order of the Utilities Commission revoking its prior order approving an agreement between carriers in regard to their respective services along the route in question and substituting in lieu thereof an order of the Commission having the same effect as the agreement, was reversed, there being no evidence to support the Commission's conclusion that the new order would promote harmony among the carriers, and there being no showing of a change of condition requiring a revision of the prior order in the public interest. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

§ 62-81. Special procedure in hearing and deciding rate cases. — (a) All proceedings for an increase in rates and all other rate proceedings declared to be general rate cases under G.S. 62-137 shall be set for hearing within six months of the institution or filing thereof, and the procedure for rendering decisions therein shall be given priority over all other cases on the Commission's calendar of hearings and decisions. Such cases shall be heard by the full Commission, and the Commission shall furnish a transcript of the evidence and testimony presented by the end of the second business day after the taking of each day of testimony. The Commission shall require that briefs and oral arguments in such cases be submitted within 30 days after receipt of such transcripts, and the Commission shall render its decision in such cases within 60 days after submission of such briefs and arguments. All public utilities filing or applying for an increase in rates for electric, telephone, natural gas or water service shall notify their consumers of such filing by regular mail or by newspaper publication within 30 days thereafter, which notice shall state that any hearing on said filing shall be set within six months of said filing date. Other public utilities shall give such notice in a manner to be prescribed by the Commission.

(b) In matters where the total annual revenue requested or where the total annual revenue increase requested is less than fifty thousand dollars ($50,000), even though all or a substantial portion of the rate structure is being initially established or is under review, the chairman of the Commission may refer the matter to a division of the Commission or to a hearing commissioner or to a hearing examiner for hearing. (1963, c. 1165, s. 1; 1973, c. 1074.)

Editor's Note. — The 1973 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

§ 62-82. Special procedure on application for certificate for generating facility; appeal from award order. — (a) Notice of Application for Certificate for Generating Facility; Hearing; Briefs and Oral Arguments. — Whenever there is filed with the Commission an application for a certificate of public convenience and necessity for the construction of a facility for the generation

of electricity under G.S. 62-110.1, the Commission shall require the applicant to publish a notice thereof once a week for four successive weeks in a daily newspaper of general circulation in the county where such facility is proposed to be constructed and thereafter the Commission, upon complaint shall, or upon its own initiative may, upon reasonable notice, enter upon a hearing to determine whether such certificate shall be awarded. Any such hearing must be commenced by the Commission not later than three months after the filing of such application, and the procedure for rendering decisions therein shall be given priority over all other cases on the Commission's calendar of hearings and decisions, except rate proceedings referred to in G.S. 62-81. Such applications shall be heard by the full Commission, and the Commission shall furnish a transcript of evidence and testimony submitted by the end of the second business day after the taking of each day of testimony. The Commission shall require that briefs and oral arguments in such cases be submitted within 30 days after the conclusion of the hearing, and the Commission shall render its decision in such cases within 60 days after submission of such briefs and arguments. If the Commission does not, upon its own initiative, order a hearing and does not receive a complaint within 10 days after the last day of publication of the notice the Commission shall enter an order awarding the certificate.

(b) Compensation for Damages Sustained by Appeal from Award of Certificate under G.S. 62-110.1; Bond Prerequisite to Appeal. — Any party or parties opposing, and appealing from, an order of the Commission which awards a certificate under G.S. 62-110.1 shall be obligated to recompense the party to whom the certificate is awarded, if such award is affirmed upon appeal, for the damages, if any, which such party sustains by reason of the delay in beginning the construction of the facility which is occasioned by the appeal, such damages to be measured by the increase in the cost of such generating facility (excluding legal fees, court costs, and other expenses incurred in connection with the appeal). No appeal from any order of the Commission which awards any such certificate may be taken by any party opposing such award unless, within the time limit for filing notice of appeal as provided for in G.S. 62-90, such party shall have filed with the Commission a bond with sureties approved by the Commission, or an undertaking approved by the Commission, in such amount as the Commission determines will be reasonably sufficient to discharge the obligation hereinabove imposed upon such appealing party. The Commission may, when there are two or more such appealing parties, permit them to file a joint bond or undertaking. If the award order of the Commission is affirmed on appeal, the Commission shall determine the amount, if any, of damages sustained by the party to whom the certificate was awarded, and shall issue appropriate orders to assure that such damages be paid and, if necessary, that the bond or undertaking be enforced. (1965, c. 287, s. 3.)

§§ 62-83 to 62-89: Reserved for future codification purposes.

Article 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions. — (a) No party to a proceeding before the Commission may appeal from any final order or decision of the Commission unless within 30 days after the entry of such final order or decision, or within such time thereafter as may be fixed by the Commission, by order made within 30 days, the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

(b) Any party may appeal from all or any portion of any final order or decision of the Commission in the manner herein provided. Copy of the notice of appeal shall be mailed by the appealing party at the time of filing with the Commission, to each party to the proceeding to the addresses as they appear in the files of the Commission in the proceeding. The failure of any party, other than the Commission, to be served with or to receive a copy of the notice of appeal shall not affect the validity or regularity of the appeal.

(c) The Commission may on motion of any party to the proceeding or on its own motion set the exceptions to the final order upon which such appeal is based for further hearing before the Commission.

(d) The appeal shall lie to the Court of Appeals as provided in G.S. 7A-29. The appellant shall cause to be prepared a statement of the case as required by the rules of the Court of Appeals. A copy of this statement shall be served on the Commission and all other parties, as appellees, within 45 days from the entry of the appeal taken; within 20 days after such service, the appellee shall return the copy with its approval or specified amendments endorsed or attached; if the case be approved by the appellee it shall be filed by the appellant with the Clerk of the Court of Appeals as part of the record; if not returned with objections within the time prescribed, it shall be deemed approved. The Commission shall have the power, in the exercise of its discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counterstatement of case.

(e) If the case on appeal is returned by appellee with objections as prescribed, or if a countercase is served on appellant, the appellant shall immediately request the Utilities Commission to fix a time and place for meeting to agree on the case on appeal. If the appellant delays longer than 15 days after the appellee serves its countercase or exceptions to request the Commission to set a meeting to agree on the case on appeal, then the exceptions filed by the appellee shall be allowed, or the countercase served by him shall constitute the case on appeal; but the time may be extended by agreement of counsel.

(f) The Commission shall forthwith notify the attorneys of the parties to meet before it for the purpose at a certain time and place, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the Commission shall determine if all parties have agreed on a case on appeal. If they have, the appellant shall within five days thereafter file it with the Clerk of the Court of Appeals, and if he fails to do so the appellee may file its copy. If the case on appeal is not agreed upon by all parties to the appeal at said meeting, the Commission shall immediately file with the Court of Appeals a request for appointment of a referee to settle the case on appeal, whereupon the chief judge of the Court of Appeals shall appoint a referee to settle and sign the case on appeal under such rules as may be set forth in his appointment.

(g) The Court of Appeals shall hear and determine all matters arising on such appeal, as in this Article provided, and may in the exercise of its discretion assign the hearing of said appeal to any panel of the Court of Appeals. (1949, c. 989, s. 1; 1955, c. 1207, s. 1; 1959, c. 639, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 1.)

I. General Consideration.
II. Cases Decided prior to 1949 Revision of Procedural Sections.

Cross Reference.

As to appeal directly to Supreme Court from order approving or authorizing rate increase, see § 62-99.

I. GENERAL CONSIDERATION.

Necessity for Filing Exceptions; Appeal Limited to Parties. — An affected party must file exceptions to the determination or decision within 10 (now 30) days after notice of the determination or decision. And on appeal from the Utilities Commission is limited to parties to the proceeding, and a party is not affected by a ruling of the Utilities Commission unless the decision affects or purports to affect

some right or interest of a party to the controversy and is in some way determinative of some material question involved. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1961).

When Review by Court of Appeals Precluded. — The Court of Appeals is without jurisdiction to review an original order of the Utilities Commission where no appeal has been taken from the order and the time for giving notice and perfecting appeal has expired. State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

Applied in State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963); State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

Cited in State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973).

II. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

Editor's Note. — All of the cases in the following note were decided before the 1949 revision of the statute relating to procedure before the Utilities Commission and appeals therefrom, and construe former §§ 62-19 and 62-20, to which this section corresponds.

Powers and Jurisdiction of Commission. — Under this Chapter as it stood prior to the revision of 1949, it was held that, for the purpose of making investigations and conducting hearings, the legislature had constituted the North Carolina Utilities Commission a court of record, with all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within the purview of the statute, for which procedure was prescribed and authorized, with the right in "any party affected thereby" to appeal "from all decisions or determinations made by the Utilities Commission." State ex rel. North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944); Utilities Comm'n v. Atlantic Greyhound Corp., 224 N.C. 672, 32 S.E.2d 23 (1944). See § 62-60.

Orders of Commission Need No Confirmation. — The Utilities Commission is a State administrative agency of original and final jurisdiction, and its orders require no confirmation by any court to be effective. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Independent Action to Restrain Exercise of Rights Granted by Commission. — Plaintiffs instituted action against a competing carrier to restrain it from exercising rights given it by orders of the Utilities Commission amending its franchise. The orders were entered in proceedings to which plaintiffs were parties. It was held that plaintiffs had adequate remedy for the protection of their rights by appeal under former §§ 62-19 and 62-20, and judgment sustaining defendant's demurrer in the independent action was proper. Atlantic Greyhound Corp. v. North Carolina Util. Comm'n, 229 N.C. 31, 47 S.E.2d 473 (1948).

Right of Appeal Confined to Parties. — Former § 62-20 distinctly confined the right of appeal to a party to the proceeding. North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

The right of appeal conferred by former § 62-20 was limited to a party to the proceeding. For purposes of appeal, those who had no property or proprietary rights which were or might be affected by orders of the Commission were not such parties. An appeal by persons who were not parties to the proceeding would be dismissed by the superior court for the reason that said court acquired no jurisdiction by such appeal. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928); State ex rel. North Carolina Util. Comm'n v. City of Kinston, 221 N.C. 359, 20 S.E.2d 322 (1942).

"Any Party Affected". — Under the provisions of former § 62-20, "any party affected" by the order of the Commission as to rates or charges for passengers by a street railway company, etc., was given the right of appeal to the court from such order. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

The former statute, providing that "from all decisions or determinations made by the Corporation [now Utilities] Commission any party affected thereby shall be entitled to an appeal," must necessarily mean from a decision which affects or purports to affect some right or interest of a party to the controversy and is in some way determinative of some material question involved. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

It is the duty of a municipality granting a charter to a corporation to operate a streetcar system therein which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon a petition filed by the railway company before the Commission requesting that it be permitted to raise the fares beyond those limited in the contract, and thus the municipality might appeal through the courts as former § 62-20 prescribed, when the order was adverse to it or the interest it represented, as a "party affected by the decision and determination of the Commission," expressly provided for by the statute. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

Who Were Not Parties under Former § 62-20. — Citizens seeking to have a railway station moved could not appeal from the Commission's decision, under former § 62-20, because they

were not parties. North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Notice Mandatory. — Under former § 62-20, it was held that the statutory notice of an appeal by a railroad company from an order of the Commission was mandatory, and could not be extended by the consent of the parties of record. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923); State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

Notice to Complaining Party under Former § 62-20. — When notice of appeal to the superior court was given to the Commission by a railroad company, and other requirements of former § 62-20 relating thereto were met by the company, it was sufficient without giving notice of the appeal to the complaining party in the proceedings had before the Commission, as upon this appeal the statute made the Commission the party plaintiff. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Removal to Federal Courts. — Assuming that an order of the Commission made to compel a carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, this does not transform the proceedings in which the order is made into "a suit at law or in equity," and, as such, removable from the superior court of the State to an inferior federal tribunal, upon the ground of diverse citizenship. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

In proceedings for the removal of a cause from the State to the federal courts upon the question of diversity of citizenship under the federal statute applicable, the State court is not bound to surrender its jurisdiction until a case has been made which, on the face of the petition, shows the petitioner has a right to the transfer of the cause to the federal courts. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Final Process. — Under this Article as it stood before the 1949 revision, it was held that the Commission had no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908). See §§ 62-97, 62-98.

Removal of Franchise Restriction as to Carriage of Passengers by Motor Carrier. — Former § 62-20 authorized a petitioner to appeal to the superior court from an adverse ruling of the Utilities Commission on its petition for the removal from its franchise of a restriction in regard to the carriage of passengers, and the contention that no appeal would lie from such order because the right of appeal was governed by the motor carrier laws authorizing an appeal from an order affecting franchise only when entered for violation of law, was untenable. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 216 N.C. 325, 4 S.E.2d 897 (1939).

Petitioner had the right to appeal to the superior court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the said cities. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

§ 62-91. Appeal docketed; title on appeal; priorities on appeal. — Unless otherwise provided by the rules of the Court of Appeals, the cause on appeal from the Utilities Commission shall be entitled "State of North Carolina ex rel. Utilities Commission (here add any additional parties in support of the Commission Order and their capacity before the Commission), Appellee(s) v. (here insert name of appellant and his capacity before the Commission), Appellant." Appeals from the Utilities Commission pending in the superior courts on September 30, 1967, shall remain on the civil issue docket of such superior court and shall have priority over other civil actions. Appeals to the Court of Appeals under G.S. 7A-29 shall be docketed in accordance with the rules of the Court of Appeals. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 6.)

Utilities Commission as Party. — When the Utilities Commission sits as a court of record to determine the rights of rival claimants to a valuable franchise, it is somewhat anomalous to find it appearing in the Supreme Court to uphold its order from which one or the other party had appealed. However, this procedure seems to have been authorized by the General Assembly. State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

§ 62-92. Parties on appeal. — In any appeal to the Court of Appeals, the complainant in the original complaint before the Commission shall be a party to the record and each of the parties to the proceeding before the Commission shall have a right to appear and participate in said appeal. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 2.)

The Utilities Commission is a party of record in a proceeding before it, and upon appeal the Commission becomes the party plaintiff. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 224 N.C. 762, 32 S.E.2d 346 (1944).

§ 62-93. No evidence admitted on appeal; remission for further evidence. — No evidence shall be received at the hearing on appeal but if any party shall satisfy the court that evidence has been discovered since the hearing before the Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence, and after consideration thereof, to make such order as the Commission may deem proper, from which order an appeal shall lie as in the case of any other final order from which an appeal may be taken as provided in G.S. 62-90. (1949, c. 989, s. 1; 1955, c. 1207, s. 2; 1963, c. 1165 s. 1.)

Cross Reference. — See note to § 62-94.

Record Must Show Basis for Remand. — Where nothing in the record indicates that any party made a motion to remand or that any party desired to offer further evidence, or that newly discovered evidence was available, there is no basis for the court, in its discretion, to remand the cause. State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

§ 62-94. Record on appeal; extent of review. — (a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of the Court of Appeals, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of the Court of Appeals.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or
(2) In excess of statutory authority or jurisdiction of the Commission, or
(3) Made upon unlawful proceedings, or
(4) Affected by other errors of law, or
(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

(d) The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable. (1949, c. 989, s. 1; 1955, c. 1207, s. 3; 1963, c. 1165, s. 1; 1969, c. 614.)

I. General Consideration.
II. Cases Decided prior to 1949 Revision of Procedural Sections.

I. GENERAL CONSIDERATION.

Editor's Note. — For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

Appeals from the Utilities Commission are confined to questions of law upon grounds specifically set forth in appellant's petition for rehearing by the Commission. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951). See State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Where the evidence is sufficient to permit and sustain the Commission's findings of fact, conclusions and the decision based thereon, the Supreme Court will consider the proceedings before the Commission only to the extent necessary to determine whether the Court of Appeals committed an error of law. State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 283 N.C. 104, 194 S.E.2d 859 (1973).

Limitation on Authority to Review. — The authority of the Court of Appeals and of the Supreme Court in reviewing an order of the Utilities Commission is limited to that conferred by this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Upon appeal, the authority of the reviewing court to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Supreme Court may not reverse an order of the Commission because of its weighting of the respective indicators of "fair value," unless it finds such weighting to have been arbitrary and lacking support in the evidence, in view of the entire record, or otherwise affected by error of law. State ex rel. Utility Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Subsection (b) States Authority of Court. — The authority of the court to which an appeal is taken from an order of the Utilities Commission is stated in subsection (b) of this section. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Courts do not ordinarily review or reverse the exercise of discretionary power by an administrative agency such as the Utilities Commission, except on showing of capricious, unreasonable or arbitrary action or disregard of law. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Weighing of Evidence and Exercise of Judgment Thereon Are Matters for Commission. — The decisions of the Utilities Commission must be within the authority conferred by statute, yet the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The credibility of testimony and the weight to be given it are for the Commission, not for the reviewing court. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

And Court May Not Find Facts or Regulate Utilities. — Although in reviewing an order of the Commission, a court might, upon the same facts, have reached a different result, it is not for the court to find the facts or to regulate utilities. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

What constitutes public convenience and necessity is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Commission without Discretionary Power Where No Evidence to Weigh. — The weighing of the evidence and the exercise of judgment thereon within the scope of its authority are matters for the Commission; even so, the Commission has no discretionary power, where its function is to weigh the evidence and make judgment thereon, if there is no evidence to weigh. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Determination by Commission Is Prima Facie Just and Reasonable. — A determination by the Commission is made by statute, not simply prima facie evidence of its validity, but prima facie just and reasonable. State ex rel. Utilities

Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953); State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955); State ex rel. North Carolina Util. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

An order of the Commission requiring a transportation company to maintain public service facilities must be considered prima facie reasonable and just, but this does not preclude the transportation company affected from showing that the order was unsupported by competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 238 N.C. 701, 78 S.E.2d 780 (1953); State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

By this section an order of the Commission is prima facie just and reasonable. This applies to orders approving contracts of public utilities. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Upon appeal, rates fixed by the Commission shall be deemed prima facie just and reasonable. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

This section provides that on an appeal, the Commission's decision is considered "prima facie just and reasonable," and it should be affirmed if supported by substantial evidence. State ex rel. Utilities Comm'n v. Southern Coach Co., 20 N.C. App. 597, 199 S.E.2d 731 (1973).

And Burden Is on Appellant to Show Error of Law in Proceedings. — The law imposes the duty upon the Utilities Commission and not the courts to fix rates, and the burden is upon appellant from an order of the Commission to show error of law in the proceeding before the Commission. State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

But Appellant May Show That Order Was Unsupported by Evidence. — Upon appeal the orders made by the Utilities Commission "shall be prima facie just and reasonable," but this does not preclude the appellant from showing that the evidence offered rebuts the prima facie effect of the order, and that the order was unsupported by competent, material and substantial evidence in view of the entire record. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utilities Comm'n v. Gulf-Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886 (1959).

While the determination of a petition by a carrier to be allowed to discontinue an established service rests in large measure in the sound judgment and discretion of the Utilities Commission, and its order in regard thereto is prima facie just and reasonable, such order is reviewable to ascertain whether it is arbitrary or capricious or if the essential findings of fact on which it is based are supported by competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

Additional Findings of Fact by Superior Court (now Court of Appeals) Not Authorized. — When an appeal to the superior court (now to Court of Appeals) is taken from an order entered by the North Carolina Utilities Commission, the review is limited to the record as certified and to the questions of law presented therein. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order entered by the Commission. State ex rel. Utilities Comm'n v. Fox, 236 N.C. 553, 73 S.E.2d 464 (1952); State v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953). See State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

And where the trial judge made findings of fact and upon the findings so made rendered judgment that the order of the Commission was null and void, the Supreme Court will remand the case to the superior court (now Court of Appeals) for judgment on the questions of law presented by the record as certified, or for remand to the Utilities Commission for additional findings if any may be deemed necessary. State ex rel. Utilities Comm'n v. Fox, 236 N.C. 553, 73 S.E.2d 464 (1952).

Commission's Findings Are Conclusive if Supported by Evidence. — On the appeal to the superior court the Commission's findings of fact are conclusive and binding if they are supported by competent, material, and substantial evidence in view of the entire record. State ex rel. Utilities Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

Findings supported by competent, material, and substantial evidence in view of the entire record are binding upon the reviewing court. State ex rel. Utilities Comm'n v. Carolina Tel & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

It is well established that the Commission's findings of fact are conclusive and binding when supported by competent, material, and substantial evidence in view of the entire record as submitted. State ex rel. Utilities Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967).

All findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

The Commission's finding, being supported by competent, material and substantial evidence in view of the entire record as submitted, is conclusive and binding on appeal. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Although Reviewing Court would Have Reached Different Conclusion. — Neither findings of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Evidence of Reasonableness of Practice. — Where the Commission's order required the defendants to do no more than they did voluntarily and without objection for 30 years or more, preceding the last six or eight years this would seem to be "strong evidence" of the reasonableness of the practice. State ex rel. Utilities Comm'n v. Southern Ry., 256 N.C. 359, 124 S.E.2d 510 (1962).

Substantial Evidence Defined. — Substantial evidence is defined as "more than a scintilla or a permissible inference." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

Determination of "Fair Value". — While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

The Commission, not the reviewing court, is to make the determination of the fair value of the properties. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

When Order Remanded to Commission for Further Hearing. — An order of the Commission based on erroneous interpretation of law should be remanded to the Commission for further hearing and not be terminated by the court, where the Commission has the duty to make a positive determination, such as the fixing of rates, and because of some error of law the determination is in suspense and the utility is entitled to have the determination made. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

When Order Granting Rate Increase Affirmed. — Where the order of the Utilities Commission granting petitioner an increase in rates in a general rate case is justified by the findings of fact which are supported by plenary evidence, the order of the Commission will be affirmed. State ex rel. Utilities Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

Questions on appeal from the Commission must be determined upon the record certified by it. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Unless Facts Are in Record, Commission's Expert Knowledge Cannot Be Considered. — The Commission's knowledge, however expert, cannot be considered by the Supreme Court on appeal, unless the facts embraced within that knowledge are in the record. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

In the consideration of an appeal the court is required to review the whole record, or such portions thereof as may be cited. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

And due account shall be taken of the rule of prejudicial error in the consideration of an appeal. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Issues Not Raised before Commission. — Appellant may not rely on new grounds for relief on appeal when such grounds were not set forth specifically in his petition for rehearing before the Commission. State ex rel. Utilities Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959).

Contents of Order Remanding Cause. — If a cause is remanded under this section, the order should specify the ground on which it is based and thereby indicate to the Commission the nature of its further proceedings. State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

Applied in State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963); State ex rel. North Carolina Utils. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Stated in State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Cited in State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

II. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

Editor's Note. — All of the cases in the following note were decided before the 1949 revision of the procedural provisions of this Chapter, and construe former §§ 62-20 and 62-21, corresponding to § 62-90 and this section. It should be noted that the 1949 revision made many changes in procedure, and especially in the extent of review.

Prior to the 1949 revision, on appeal to the superior court the trial was under the same rules and regulations applicable in other civil causes, save and except the prima facie effect to be

given the decision or determination of the Commission. State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Appeal under Former Law Was Trial de Novo. — Upon appeal under the former statute by a party to a proceeding before the Corporation (now Utilities) Commission from an order made therein under former §§ 62-42 and 62-43, the superior court had jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Commission. The trial of such issues by the superior court was de novo. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928), citing State ex rel. Corporation Comm'n v. Seaboard Air Line & S. Ry., 161 N.C. 270, 76 S.E. 554 (1912).

Under this Chapter as it stood before the 1949 revision, the trial was de novo, and from thence only would a further appeal lie to the Supreme Court, governed by the rule that such an appeal must not be fragmentary, but shall be from a final judgment or one final in its nature. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

A provision of former § 62-21 that on appeal the trial should be "under the same rules and regulations as are prescribed for the trial of other civil causes," was interpreted to mean that the trial should be de novo. State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943), citing North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Appeals from the Utilities Commissioner were analogous to appeals from a justice of the peace rather than appeals from a referee, and since the trial in the superior court was de novo upon issues of fact raised by the exceptions, the superior court properly refused to pass upon appellant's exceptions to the findings of fact seriatim. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Decision of Commission Was "Prima Facie Just and Reasonable". — While on appeal from the Utilities Commission to the superior court the provision of former § 62-21 was interpreted to mean that the trial should be de novo, the section also provided that the decision or determination of the Commission "shall be prima facie just and reasonable." State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

Findings of Fact Not Conclusive. — Former §§ 62-20 and 62-21 did not contain any provision that the findings of fact by the Utilities Commission should be conclusive on appeal. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

Evidence. — On appeal from an order of the Commission under former § 62-21 the trial was de novo, tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence could be there introduced, whether it had theretofore been introduced before the Commission or not. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912). See § 62-26.9.

In case wherein a union passenger depot had been ordered by the Commission it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a nearby town, where the present station of one of the roads is located. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

Affirmance of Decision of Commission. — Under former § 62-21, in the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, appellee, on appeal to the superior court, was entitled to an affirmance of the decision of the Commission. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944).

In an application for a certificate of public convenience and necessity the Utilities Commission must act within the authority conferred by the statute, yet the findings from the evidence and the exercise of judgment thereon within the scope of its powers are matters for the Commission, and its order will not be disturbed when sustained by the findings upon competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Fredrickson Motor Express, 232 N.C. 180, 59 S.E.2d 582 (1950).

§ 62-95. Relief pending review on appeal. — Pending judicial review, the Commission is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, a judge of the Court of Appeals is authorized to issue all necessary and appropriate process to postpone the effective date of any action by the Commission or take such action as may be necessary to preserve status or rights of any of the parties pending conclusion of the proceedings on appeal. The court may require the

applicant for such stay to post adequate bond as required by the court. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 8.)

§ 62-96. Appeal to Supreme Court. — In all appeals heard in the Court of Appeals, any party may file a motion for review in the Supreme Court of the decision of the Court of Appeals under G.S. 7A-31, and in cases entitled to be appealed as a matter of right under G.S. 7A-30(3) any party may appeal to the Supreme Court from the decision of the Court of Appeals under the same rules and regulations as are prescribed by law for appeals, except that the Commission, if it shall appeal, shall not be required to give any undertaking or make any deposit to assure the cost of such appeal, and such court may advance the cause on its docket. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 3.)

Cross References. — As to appeal generally, see § 1-268 et seq. As to Commission appearing before Supreme Court to uphold its own order, see note to § 62-91.

An appeal does not lie directly from the Commission to the Supreme Court. North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916), citing State ex rel. Board of R.R. Comm'rs v. Wilmington & Weldon R.R., 122 N.C. 877, 29 S.E. 334 (1898).

When Supreme Court May Affirm Judgment Reversing Commission. — Upon an appeal to the Supreme Court from a judgment of the superior court (now the Court of Appeals), reversing a decision of the Commission and remanding the matter for further proceedings, the Supreme Court may affirm the judgment of the superior court, if the record discloses one or more of the statutory grounds for such judgment and if such ground therefor is set forth specifically in the notice of appeal from the Commission to the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

In order to affirm a judgment of the superior court (now the Court of Appeals) reversing and remanding a decision of the Commission, it is not required that the Supreme Court concur in the ruling by the superior court upon every ground for relief set forth in the notice of appeal from the Commission to the superior court. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Applied in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965).

§ 62-97. Judgment on appeal enforced by mandamus. — In all cases in which, upon appeal, an order or decision of the Commission is affirmed, in whole or in part, the appellate court shall include in its decree a mandamus to the appropriate party to put said order in force, or so much thereof as shall be affirmed, or the appellate court may make such other order as it deems appropriate. (1949, c. 989, s. 1; 1963, c. 1165, s. 1.)

Performance Compelled by Mandamus. — Under former § 62-25, corresponding to this section prior to the 1949 revision of the procedural sections of this Article, it was said that the State court could compel performance only by resort to the high prerogative writ of mandamus, and that by authority of the statute. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 151 N.C. 447, 66 S.E. 427 (1909).

Under former § 62-25, the right to a mandamus to enforce a valid order was given in causes which had been carried to the superior court by appeal. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

§ 62-98. Peremptory mandamus to enforce order, when no appeal. — (a) If no appeal is taken from an order or decision of the Commission within the time prescribed by law and the person to which the order or decision is directed fails to put the same in operation, as therein required, the Commission may apply to the judge regularly assigned to the superior court district which includes Wake County, or to the resident judge of said district at chambers, or to the judge holding the superior court in any judicial district in which the business is

conducted upon 10 days' notice, for a peremptory mandamus upon said person for the putting in force of said order or decision; and if said judge shall find that the order of said Commission was valid and within the scope of its powers, he shall issue such peremptory mandamus.

(b) An appeal shall lie to the Court of Appeals in behalf of the Commission, or the defendant, from the refusal or the granting of such peremptory mandamus. The remedy prescribed in this section for enforcement of orders of the Commission is in addition to other remedies prescribed by law. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1967, c. 1190, s. 4.)

Orders of Commission Are Not Judgments. — The Commission makes such orders as the circumstances of the case justify, but these orders are not judgments of a court. The Commission cannot issue execution to enforce them; they simply serve as the basis for judicial action in the superior court to enforce them or to punish their violation. 2 N.C.L. Rev. 74. See Mayo v. Western Union Tel. Co., 112 N.C. 343, 16 S.E. 1006 (1893).

Independent Proceedings for Mandamus. — An appeal may be had by independent proceedings for mandamus to enforce a valid order from which no appeal has been taken. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Mandamus to Enforce Final Order. — Where the Commission had ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads had lost or waived their statutory right to appeal, such order was regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom was the remedy authorized by statute. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

§ 62-99: Repealed by Session Laws 1967, c. 1190, s. 5.

§§ 62-100 to 62-109: Reserved for future codification purposes.

ARTICLE 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity. — No public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross Reference. — As to necessity for certificate of convenience and necessity for housing projects, see § 157-28.

Editor's Note. — See article in 16 N.C.L. Rev. 46.

The basis for the requirement of a certificate of public convenience and necessity, as a prerequisite to the right to serve, is the adoption, by the General Assembly, of the policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Requirement Curtails Competition. — Regarding public utilities, competition, deemed unnecessary, is curtailed by the requirement that one desiring to engage in such business procure from the Utilities Commission a certificate of public convenience and necessity. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

By this section the State has granted to the utility company a legal monopoly upon a ser-

vice vital to the economic well-being and the domestic life of the people of a large territory. This franchise is a property right of great value. Normally, when the grantee sells its business to another company, the monopolistic franchise commands a substantial price, over and above the exchange value of the physical properties transferred with it. Thus, the value of the franchise enters into and affects the market price of the utility's stock. It does not, however, enter into the computation of the utility's rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Certificate Is Not Required If Business Is Not Public Utility. — One does not need a certificate of public convenience and necessity in order to engage in a business which is not that of a "public utility" as defined in § 62-3 (23). State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Nor before City Issues Franchise to Television Cable Company. — Even if a television cable company be a "public utility" as defined in § 62-3, it is not required that it obtain from the Utilities Commission a certificate of public convenience and necessity before a franchise be issued by a city to it. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

But It Is Required before Utility Commences Construction or Operation. — A certificate of public convenience and necessity from the Utilities Commission is required by this section before a public utility may commence construction of its plant or operation of its business. Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967).

Issuance of Certificate Is Nullity If Applicant Is Not Public Utility. — If an applicant's proposed service is not within the definition of "public utility" contained in subdivision (23) of § 62-3, the issuance of a certificate of public convenience and necessity by the Commission to the applicant would be a nullity. It would not supply a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And in Excess of Commission Authority. — To grant a certificate of public convenience and necessity to conduct a business which is not a public utility, within the definition of the statute, would be both arbitrary and in excess of the statutory authority of the Commission. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

And Issuance Does Not Transform Ordinary Business into Public Utility. — The issuance of a certificate of public convenience and necessity by the Commission does not transform an ordinary business into a public utility, so as to entitle its operator to the rights of a public utility, or so as to impose upon him the duties and limitations of a public utility. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Definition of Public Utility Cannot Be Extended. — Neither the Commission nor the Supreme Court has authority to add to the types of business defined by the legislature as public utilities. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Finding of Both Convenience and Public Need Is Required. — A finding by the Commission that the rendering of the proposed service by an applicant would be a convenience to the public, even if supported by competent and substantial evidence, is not adequate basis for an order granting the applicant a certificate of public convenience and necessity. To entitle the applicant to such a certificate it is, of course, not necessary for him to show, and the Commission to find, that the proposed service is necessary in the sense of being indispensable. Nevertheless, a mere showing of convenience is not sufficient. There must be an element of public need for the proposed service by the applicant in the area. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

The Commission is authorized to issue a certificate of public convenience and necessity if, but only if, the Commission has made findings of fact, supported by competent, material, and substantial evidence, which findings, in turn, support the conclusion that public convenience and necessity "require or will require" the proposed operation by the applicant. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Certificate Will Not Be Granted to Competitor without Finding Service Will Not Be Rendered. — The requirement of a certificate of public convenience and necessity is not an absolute prohibition of competition between public utilities rendering the same service. There is, however, inherent in this requirement the concept that, once a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Where a public utility has a certificate of convenience and necessity for telephone service in a certain area and is ready and able to provide such area a mobile radio service, the Utilities Commission should deny an application for a certificate of public convenience and necessity to an applicant who proposes to render substantially the same mobile radio service in the area,

and the fact that the applicant proposes to offer an electronic personal paging service as an auxiliary to its mobile radio service is not a sufficient difference to justify the issuance of the certificate when it appears that the Commission can compel the established utility to install such a service when the public convenience so requires. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Services Need Not Be Identical to Give Utility Serving Area Prior Right. — Two services need not be identical in every respect in order to give the utility already serving the area the prior right. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Section 62-42 must be construed in connection with this section, which requires the issuance of a certificate of public convenience and necessity to construct new facilities except where such construction is into territory contiguous to that already occupied and not receiving similar service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27 (1974).

Thus, Commission Is without Authority to Compel Duplicate Telephone Service. — A reading of § 62-42 in pari materia with this section results in the determination that the Commission does not have the authority to compel a public utility to provide local exchange service to an area which is already receiving such service from another public utility. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27 (1974).

To order a telephone company to render service to an area already occupied by another telephone company would foster duplication, wastefulness, and unwarranted competition — all of which are repugnant to the avowed policy of the public utility law. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 21 N.C. App. 182, 204 S.E.2d 27 (1974).

A certificate of public convenience and necessity authorizing its holder to render telephone service grants to the holder the right to adopt new methods of telephonic communications, including a mobile radio telephone service. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

A certificate of public convenience and necessity, which authorizes its holder to render "telephone service," does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment and methods then in use. Obviously, it is the intent of such a certificate to authorize the holder to improve its service by adopting and using new and improved devices and methods for telephonic communication. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

Neither a telephone answering nor a message relaying service is a public utility within the purview of § 62-3 (23) and cannot therefore be determinative upon the question of whether an applicant's proposed telephone service is substantially the same as that of the existing franchise holder. State ex rel. Utilities Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968).

This section does not apply to municipal corporations. Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951).

A municipal corporation in the operation of a municipally owned electric power plant with transmission lines extended to supply consumers beyond its corporate limits is not required under this section to obtain from the Utilities Commission a certificate of public convenience and necessity before it can lawfully operate. Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951); Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co., 253 N.C. 610, 117 S.E.2d 764 (1961).

This section is not applicable to an electric membership corporation organized under the provisions of §§ 117-6 to 117-27. And by reason of the provisions of § 117-27 there was no error in holding that the defendant electric membership corporation was not required to obtain from the Utilities Commissioner (now Utilities Commission) of North Carolina a certificate of public convenience and necessity. Carolina Power & Light Co. v. Johnston County Elec. Membership Corp., 211 N.C. 717, 192 S.E. 105 (1937); Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co., 255 N.C. 258, 120 S.E.2d 749 (1961).

Applied in State ex rel. Utilities Comm'n v. Town of Pineville, 17 N.C. App. 522, 195 S.E.2d 76 (1973); State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973).

Stated in State ex rel. Utilities Comm'n v. Town of Pineville, 13 N.C. App. 663, 187 S.E.2d 473 (1972), aff'd, 17 N.C. App. 522, 195 S.E.2d 76 (1973).

§ 62-110.1. Certificate for construction of generating facility. — (a) Notwithstanding the proviso in G.S. 62-110, no public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility

service, even though the facility be for furnishing the service already being rendered, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

(b) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State, and the term "public utility service" shall include the service rendered by any such electric membership corporation. (1965, c. 287, s. 2.)

§ 62-110.2. Electric service areas outside of municipalities. — (a) As used in this section, unless the context otherwise requires, the term:

(1) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one "premises," except that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; and

(2) "Line" means any conductor for the distribution or transmission of electricity, other than

a. In the case of overhead construction, a conductor from the pole nearest the premises of a consumer to such premises, or a conductor from a line tap to such premises, and

b. In the case of underground construction, a conductor from the transformer (or junction point, if there be one) nearest the premises of a consumer to such premises.

(3) "Electric supplier" means any public utility furnishing electric service or any electric membership corporation.

(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

(1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.

(2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.

(3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965, to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.

(4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20, 1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(5) Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(6) Any premises initially requiring electric service after April 20, 1965, which are located partially within a service area assigned to one electric supplier and partially within a service area assigned to another electric supplier pursuant to subsection (c) hereof, or are located partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and partially within 300 feet of the lines of another electric supplier, as such lines exist on April 20, 1965, or as extended to serve consumers it has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and the electric supplier not so chosen shall not thereafter furnish service to such premises.

(7) Any premises initially requiring electric service after April 20, 1965, which are located only partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and are located wholly outside the service areas assigned to other electric suppliers and are located wholly more than 300 feet from other electric suppliers' lines, may be served by any electric supplier which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(8) Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it pursuant to subsection (c) hereof.

(9) No electric supplier shall furnish temporary electric service for the construction of premises which it would not have the right to serve under this subsection if such premises were already constructed. The construction of lines for, and the furnishing of, temporary service for the construction of premises which any other electric supplier, if chosen by the consumer, would have the right to serve if such premises were already constructed, shall not impair the right of such other electric supplier to furnish service to such premises after the construction thereof, if then chosen by the consumer; nor, unless the consumer chooses to have such premises served by the supplier which furnished the temporary service, shall the furnishing of such temporary service or the construction of a line therefor impair the right of any other electric supplier to furnish service to any other premises which, without regard to the construction of such temporary service line, it has the right to serve.

(10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section; provided, that nothing in this section shall restrict the right of an electric supplier to furnish electric service to itself or to exchange or interchange electric energy with, purchase electric energy from or sell electric energy to any other electric supplier.

(c) (1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of

municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

(2) The Commission, upon agreement of the affected electric suppliers, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another; and the Commission, notwithstanding the lack of such agreement, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another, except premises being served by the other electric supplier or to which any of its facilities for service are attached and except such portions of such area as are within 300 feet of the other electric supplier's lines, upon finding that such reassignment is required by public convenience and necessity. In determining whether public convenience and necessity requires such reassignment, the Commission shall consider, among other things, the adequacy and dependability of the service of the affected electric suppliers, but shall not consider rate differentials between such electric suppliers.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section:

(1) Any electric supplier may furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, upon agreement of the affected electric suppliers; and

(2) The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

(e) The furnishing of electric service in any area which becomes a part of any municipality after April 20, 1965, either by annexation or incorporation, (whether or not such area, or any portion thereof, shall have been assigned pursuant to subsection (c) of this section) shall be subject to the provisions of Article 41 of Subchapter X of Chapter 160 of the General Statutes, and any provisions of this section inconsistent with said Article shall not be applicable within such area after the effective date of such annexation or incorporation. (1965, c. 287, s. 5.)

Editor's Note. — Article 41 of Subchapter X of Chapter 160, referred to in subsection (e), was repealed by Session Laws 1971, c. 698, s. 2. For present provisions as to electric service in urban areas, see §§ 160A-331 through 160A-338.

Purpose. — One of the purposes of this Chapter is to vest the Utilities Commission with authority and responsibility to assign territory to electric suppliers. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

A principal purpose of this section is to provide an orderly method for allocation of service areas as among competing suppliers of electricity and thereby to eliminate unnecessary duplication of electric line facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 3 N.C. App. 318, 164 S.E.2d 895 (1968).

Another purpose of this Chapter, and particularly subsection (b) of this section, is to declare certain rights of electric suppliers in areas outside of municipalities pending the assignment of territory. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

The overriding purpose of this section is to promote the public interest, not the business of the electric membership cooperative or that of the investor-owned utility. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The clear purpose of Session Laws 1965, c. 287, is to prevent wasteful duplication of competing facilities, and thereby serve the public interest. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

This section was passed together with §§ 160A-331 through 160A-338, as part of the same act. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Prior to the enactment of this section in 1965, there was no restraint upon competition in rural areas between electric membership corporations and public utility suppliers of electric power except as established by contract. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Prior to the enactment of this section, electric membership cooperatives and investor-owned public utility companies were free to compete in the rural portions of this State, in the absence of contractual restrictions upon such right, irrespective of the fact that such competition resulted in substantial duplication of power lines and facilities. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The former absence of statutory provisions restricting competition between electric membership corporations and public utility suppliers of electric power gave rise to many contracts between these two types of suppliers designed to fix their respective territorial rights, which contracts, in turn, gave rise to much litigation. In the hope of putting an end to or reducing this turmoil, the 1965 legislature enacted this section, the language of which was the result of collaboration and agreement between the two types of suppliers. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Construction. — Where provisions of this section relating to assignment of electric service territory in rural areas are clear and understandable on their face, the Supreme Court is not required to construe this statute in connection with other provisions of this Chapter relating to powers of the Utilities Commission to regulate public utilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Section and §§ 160A-331 to 160A-338 Were Part of Same Act. — This section applying to rural areas, and §§ 160A-331 to 160A-338, applying to municipalities, were part of the same act, and both sought to eliminate the wasteful duplication of power lines by assigning territories to specific suppliers of electricity. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Considered together, the sections cover the entire State and reflect the interests of municipalities, utility companies and cooperatives. They form a unified plan for eliminating duplication of electric facilities by assigning territories to particular suppliers. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E. 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Section controls over § 160A-312 in case of dispute regarding electrical services. — See Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Competitive Rights as to Areas outside City Limits Not Altered. — Session Laws 1965, c. 287, including this section, did not, without more, alter the competitive rights of municipalities, investor-owned utilities and electric membership corporations to compete for patronage in areas outside the corporate limits of municipalities. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

"Premises," as that word is defined in subsection (a)(1), embraces the manufacturing plant of an electric consumer and not the tract upon which it is located; consequently, public membership corporation had no right under subsec-

tion (b)(1) to provide electric service to a plant on the ground that it had served a residence and electric signs previously located on the tract. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

"Electric Suppliers" Defined. — Electric power companies and electric membership corporations are defined by statute as "electric suppliers"; municipally owned systems are not so defined. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

A municipality is not an "electric supplier" as that term is used in this section. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

And Is Not Prohibited from Serving Customers outside City. — Since a city is neither a "public utility" nor an electric membership corporation and therefore is not an "electric supplier," the city is not prohibited from serving customers outside the city. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

Concerns of Municipality and Utility Company Distinguished. — The primary purpose of a municipal electrical system is to serve customers within the boundaries of the municipality, while a utility company or cooperative is chiefly concerned with customers outside the city limits. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 20 N.C. App. 347, 201 S.E.2d 508, aff'd on other grounds, 285 N.C. 135, 203 S.E.2d 838 (1974).

Service to Premises Assigned to a Supplier. — Subsection (b) of this section confers upon each electric supplier in the State the right, in territories outside of municipalities, to serve all "premises" being served by it on April 20, 1965, and the right to serve "premises" initially requiring service after that date, located within 300 feet of a line of such supplier and not in a territory assigned by the Utilities Commission to a different supplier, pursuant to subsection (c) of this section. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Any "premises" in territories lying outside of a municipality and more than 300 feet from the line of any electric supplier can be served, prior to an assignment of such territory by the Utilities Commission, by any electric supplier chosen by the user, and services of such premises by any other supplier is prohibited. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The language of subsection (b)(5) is clear and unambiguous and presents no problem of construction. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 3 N.C. App. 318, 164 S.E.2d 895 (1968).

Subsection (c) contemplates the assignment of a territory to a single supplier for all classes of users of electric power, nothing else appearing. However, the statutory direction that the Commission assign service areas "by adequately defined boundaries" does not compel the conclusion that the intent of the legislature was to require the Commission to choose between (1) jeopardizing the industrial development of a geographic area by assigning it exclusively to an electric membership cooperative, or (2) boxing the cooperative into the narrow strips bordering its existing lines by assigning the territory outside those strips to an investor-owned utility for all types of electric service. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

But One Area May Be Assigned Jointly to Two Electric Suppliers. — The Utilities Commission did not exceed its authority under this section in assigning the same areas jointly to two electric suppliers, subject to consumers' reasonable choice of supplier, since under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may require such an assignment. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

The Commission did not exceed its statutory authority in making an assignment of an area jointly to two electric suppliers. State ex rel. Utilities Comm'n v. Edgecombe-Martin County Elec. Membership Corp., 5 N.C. App. 680, 169 S.E.2d 225 (1969).

The Utilities Commission did not arbitrarily exercise its discretion in assigning the same areas jointly to two electric suppliers, where it is shown that the Commission exercised its discretionary authority in good faith in the light of existing facts and circumstances. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

Under appropriate circumstances and appropriate findings by the Commission, public convenience and necessity may determine that some areas be assigned to two or more electric suppliers with later determination of the circumstances under which a particular electric supplier may properly extend service to a particular consumer. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

And Division May Be Made on Basis of Users' Demand Level. — Subsection (c) of this section authorizes the Commission, having determined, upon sufficient and competent evi-

dence, that the public convenience and necessity would best be promoted by dividing the geographic area into two service areas on the basis of the users' demand levels, to permit, on the basis of public convenience and necessity, an electric membership cooperative, to which the area of the smaller demands has been assigned, to serve a user whose demand is above the division line, if that user desires to become a member of the cooperative and thus to use its service. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

It is within the statutory authority of the Commission, when the public convenience and necessity so requires, to assign a territory to one supplier of electricity for service below a specified level of demand and to another supplier for service above that level of demand. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Legislature Determines What Policy Is in Public Interest. — It is for the legislature, not for the Supreme Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power, or the policy of territorial monopoly, or an intermediate policy is in the public interest. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Neither Supreme Court Nor Utilities Commission May Forbid Service. — If the legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the customer, neither the Supreme Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

The Commission cannot arbitrarily attach conditions to a franchise, for it must exercise its discretion in good faith in the light of existing facts and circumstances. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 5 N.C. App. 663, 169 S.E.2d 214 (1969), rev'd on other grounds, 276 N.C. 108, 171 S.E.2d 406 (1970).

What Commission May Consider in Assigning Areas to Electric Suppliers. — In assigning rural service areas to electric suppliers pursuant to this section, the Utilities Commission may consider, in addition to development of natural resources and employment opportunities, (1) the past history of service to residential, agricultural, and small commercial users in adjacent territories, (2) the capital required for supplying electric power to large users in the territory and the past experience of a supplier in serving such users, and (3) the demonstrated preference of a substantial class of potential users for one supplier over another. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Subsection (c) of this section declares the purpose for which the authority to assign "areas" is conferred upon the Commission. That purpose is "to avoid unnecessary duplication of electric facilities." To accomplish this objective, the statute directs the Commission to make assignments "in accordance with public convenience and necessity." In determining whether an assignment is in accord with "public convenience and necessity," the Commission is directed to consider the "adequacy and dependability of the service of electric suppliers." It is also directed to consider "other things." State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

The attraction to a sparsely settled rural territory of industry, which will develop its natural resources and provide opportunity of employment to its residents, is one of the "other things" to be considered by the Commission in determining what assignment of territory to electrical suppliers will be in accord with public convenience and necessity. State ex rel. Utilities Comm'n v. Woodstock Elec. Membership Corp., 276 N.C. 108, 171 S.E.2d 406 (1970).

Authority of Utilities Commission to Restrict Competition. — The Utilities Commission is a creature of the legislature and has no authority to restrict competition between suppliers of electricity, except insofar as that authority has been conferred upon it by statute. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

One seeking electric service should not be denied the right to choose between vendors unless compelled by some cogent reason. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Right of Chosen Electric Supplier to Deny Service. — Conclusion of the Utilities Commission that a consumer has the unrestricted choice of electric supplier under subsection (b) of this section is subject to the right of the chosen electric supplier to deny the service unless required by the Utilities Commission. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

An electric membership corporation and a public utility corporation are free to compete in rural areas unless forbidden by some provision of this section. State ex rel. Utilities Comm'n v. Union Elec. Membership Corp., 3 N.C. App. 309, 164 S.E.2d 889 (1968).

Except as restricted by contract, electric membership corporations and public utility companies supplying electricity are free to compete in the rural areas of this State, notwithstanding the fact that such competition may result in substantial duplication of electric power lines and other facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

No Territorial Monopoly. — In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly or other right to prevent its competitor from serving anyone who desires the competitor to do so. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

Right to Serve Is Not Exclusive. — While electric supplier has the right to serve all premises in its assigned area, the mere grant of a right to serve is not the grant of an exclusive right to do so. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

The assignment to an electric supplier by the Utilities Commission of an area does not automatically preclude a city from extending its service lines into the area. Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

Extension by City of Its Electric System across Its City Limits Held beyond Its Authority. — See Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 203 S.E.2d 838 (1974).

Extension of Facilities Requires Certificate of Public Convenience and Necessity. — The police power of the State is broad enough to include a statute providing that a public utility company, desiring to serve a new area, must obtain from the Utilities Commission a certificate that public convenience and necessity requires the proposed extension of its distribution facilities. State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 166 S.E.2d 663 (1969).

§ 62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities. — (a) No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity. Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets.

(b) No certificates or permits issued under the provisions of this Chapter for motor carriers of passengers shall be sold, assigned, pledged, transferred, or control changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier of passengers be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the Commission as in this section provided, provided that the above provisions shall not apply to regular trading in listing securities on recognized markets. The applicant shall give not less than 10 days' written notice of such application by registered mail or by certified mail to all connecting and competing carriers. When the Commission is of the opinion that the transaction is consistent with the purposes of this Chapter, the Commission may, in the exercise of its discretion, grant its approval, provided, however, that when such transaction will result in a substantial change in the service and operations of any motor carrier of passengers party to the transaction, or will substantially affect the operations and services of any other motor carrier, the Commission shall not grant its approval except upon notice and hearing as required in G.S. 62-262 upon an application for an original certificate or permit. In all cases arising under this subsection it shall be the duty of the Commission to require the successor carrier to satisfy the Commission that the operating debts and obligations of the seller, assignor, pledgor, lessor or transferor, including taxes due the State of North Carolina or any political subdivision thereof are paid or the payment thereof is

adequately secured. The Commission may attach to its approval of any transaction arising under this section such other conditions as the Commission may determine are necessary to effectuate the purposes of this Article.

(c) No sale of a franchise for a motor carrier of property shall be approved by the Commission until the seller shall have filed with the Commission a statement under oath of all debts and claims against the seller, of which such seller has any knowledge or notice, (i) for gross receipts, use or privilege taxes due or to become due the State, as provided in the Revenue Act, (ii) for wages due employees of the seller, other than salaries of officers and in the case of motor carriers, (iii) for unremitted c.o.d. collections due shippers, (iv) for loss of or damage to goods transported, or received for transportation, (v) for overcharges on property transported, and, (vi) for interline accounts due other carriers, together with a bond, if required by the Commission, payable to the State, executed by a surety company authorized to do business in the State, in an amount double the aggregate of all such debts and claims conditioned upon the payment of the same within the amount of such bond as the amounts and validity of such debts and claims are established by agreement of the parties, or by judgment. This subsection shall not be applicable to sales by personal representatives of deceased or incompetent persons, receivers or trustees in bankruptcy under court order.

(d) No person shall obtain a franchise for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate or permit was obtained for the purpose of sale.

(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has been continuously offered to the public up to the time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62-112(b)(5). (1947, c. 1008, s. 22; 1949, c. 1132, s. 20; 1953, c. 1140, s. 3; 1957, c. 1152, s. 10; 1961, c. 472, ss. 6, 7; 1963, c. 1165, s. 1; 1967, c. 1202.)

"Public Convenience and Necessity". — The requirement of "public convenience and necessity" referred to in subsection (a) of this section is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need which was shown to exist when the authority was originally acquired. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

The criteria "if justified by the public convenience and necessity" in subsection (a) of this section has been interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in § 62-262(e). Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity was shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Showing of Public Need Not Required. — The showing of public need which § 62-262(e)(1) requires of an application for a new authority is not applicable in a transfer proceeding under this section and was not written into it by subsection (a) of this section. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

State Policy Favors Transfers of Actively Operated Motor Freight Carrier Certificates. — The policy of the State, as declared in the Public Utilities Act of 1963, clearly favors trans-

fers of actively operated motor freight carrier certificates without unreasonable restraint. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Section Does Not Protect Existing Certificate Holders from Lawful Competition. — Subsection (e) of this section does not indicate a policy change toward protecting existing certificate holders from lawful competition. Like the subsection (a) "public convenience and necessity" test, the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need required by § 62-262(e)(1). State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

And a Transfer to a More Competitive Carrier Is Not Prohibited. — The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to the public interest as a matter of law. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Requirement of subsection (e) of this section that the Commission find that the proposed transfer "will not adversely affect the service to the public under said franchise" is satisfied by a determination that the proposed transferee of the franchise is capable of rendering service equal to that of the proposed transferor, and does not prohibit approval where transfer of the franchise to a more competitive hauler would have an adverse effect on existing carriers. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Bond as Condition Precedent to Commission's Approval. — This section requires as a condition precedent to Commission's approval of the sale of a motor carrier's franchise a bond from the seller conditioned for the payment of (1) taxes, (2) wages due employees of the seller, (3) unremitted C.O.D. collections due seller, (4) "for loss or damage of goods transported or received for transportation," (5) overcharge on property transported, and (6) for interline accounts to other carriers. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963), decided prior to effective date of 1963 amendment.

Certificate Holder Not Released from Liability for Nonperformance of Duties. — This section does not confer upon the Utilities Commission the power to release the holder of a certificate of convenience and necessity from liability for the nonperformance of public duties incident to the certificate. And the Commission possesses no such power in the absence of a delegation thereof by the legislature. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

A lease of intrastate motor vehicle common carrier operating rights, approved by the Utilities Commission, does not release lessor, the holder of the certificate of convenience and necessity, from liability for nonperformance of franchise duties or torts incident to operation, and a shipper may hold lessor liable for lessee's failure to make prompt remittance of C.O.D. collections as required by § 62-273. In the instant case the Utilities Commission, in approving the lease, did not attempt to relieve lessors of such obligations, nor would it have the power to do so. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

Contract to Pay Claims for Which Assured Liable under Section Is Surety Contract. — That portion of a contract under which a company obligates itself to pay any shipper or consignee claims for which the assured would be liable by provision of this section, with stipulation that the assured should reimburse the company for any such payment, is a surety contract. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

Transferee Must Render Services Called for. — The approval by the Commission of the transfer of a carrier's certificate of authority implies the duty on the part of the transferee to render the service called for in the certificate, which it must perform in a substantial manner. State ex rel. Utilities Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

Combining Purchased Route Authority and Original Route Authority of Purchasing Carrier. — Where an irregular carrier acquires the certificate of another irregular carrier with the authority of the Utilities Commission, the purchasing carrier has the legal right to combine or "tack" the irregular route authority purchased by it and its original irregular route authority, there being no conditions or restrictions imposed by statute or any rule or regulation of the Commission in effect at the time of the purchase. State ex rel. Utilities Comm'n v. Forbes Transf. Co., 259 N.C. 688, 131 S.E.2d 452 (1963).

Findings Obviating Application of Subsection (d). — In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of a franchise carrier from one holding corporation to another, findings of the Commission supported by substantial evidence to the effect that the franchise carrier did not in fact obtain its franchise for the purpose of transferring it to another obviates the application of subsection (d) of this section. State ex rel. Utilities Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967).

Findings Supporting Conclusion That Transfer of Stock Is Justified. — In a proceeding to obtain approval of the Utilities Commission for the transfer of all the capital stock of

a franchise carrier from one holding corporation to another, findings supported by evidence that the franchise carrier was conducting active operations under the franchise and that its ability to render service to the public within the limits of its franchise rights would not be adversely affected by the proposed transfer of its stock, support conclusions that the proposed sale of its stock is justified by the public convenience and necessity within the meaning of this section. State ex rel. Utilities Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967).

§ 62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises. — (a) Franchises shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(b) Any franchise may be suspended or revoked, in whole or in part, in the discretion of the Commission, upon application of the holder thereof; or, after notice and hearing, may be suspended or revoked, in whole or in part, upon complaint, or upon the Commission's own initiative, for wilful failure to comply with any provision of this Chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition or limitation of such franchise; provided, however, that any such franchise may be suspended by the Commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(1) For failure to provide and keep in force at all times security, bond, insurance or self-insurance for the protection of the public as required in G.S. 62-268 of this Chapter.

(2) For failure to file and keep on file with the Commission applicable tariffs or schedules of rates as required in this Chapter.

(3) For failure to pay any gross receipts, use or privilege taxes due the State of North Carolina within 30 days after demand in writing from the agency of the State authorized by law to collect the same; provided, that this subdivision shall not apply to instances in which there is a bona fide controversy as to tax liability.

(4) For failure for a period of 60 days after execution to pay any final judgment rendered by a court of competent jurisdiction against any holder or lessee of a franchise for any debt or claim specified in G.S. 62-111(b) and (c).

(5) For failure to begin operations as authorized by the Commission within the time specified by order of the Commission, or for suspension of authorized operations for a period of 30 days without the written consent of the Commission, save in the case of involuntary failure or suspension brought about by compulsion upon the franchise holder or lessee.

(c) The failure of a common carrier or contract carrier of passengers or property by motor vehicles to perform any transportation for compensation under the authority of its certificate or permit for a period of 30 consecutive days shall be prima facie evidence that said franchise is dormant and the public convenience and necessity is no longer served by such common carrier certificate or that the needs of a contract shipper are no longer served by such a contract carrier. Upon finding after notice and hearing that no such service has been performed for a period of 30 days the Commission is authorized to find that the franchise is dormant and to cancel the certificate or permit of such common or contract carrier. The Commission in its discretion may give consideration in such finding to other factors affecting the performance of such service, including seasonal requirements of the passengers or commodities authorized to be transported, the efforts of the carrier to make its services known to the public or to its contract shipper, the equipment and other facilities maintained by the carrier for performance of such service, and the means by which such carrier

holds itself out to perform such service. A proceeding may be brought under this section by the Commission on its own motion or upon the complaint of any shipper or any other carrier. The franchise of a motor carrier may be canceled under the provisions of this section in any proceeding to sell or transfer or otherwise change control of said franchise brought under the provisions of G.S. 62-111, upon finding of dormancy as provided in this section. Any motor carrier who has obtained authority to suspend operations under the provisions of G.S. 62-112(b)(5) and the rules of the Utilities Commission issued thereunder shall not be subject to cancellation of its franchise under this section during the time such suspension of operations is authorized. In determining whether such carrier has made reasonable efforts to perform service under said franchise the Commission may in its discretion give consideration to disabilities of the carrier including death of the owner and physical disabilities. (1947, c. 1008, s. 23; 1949, c. 1132, s. 21; 1963, c. 1165, s. 1; 1967, c. 1201.)

Applied in Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Cited in State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

§ 62-113. Terms and conditions of franchises. — Each franchise shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, a motor carrier or other public utility is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the privileges granted by the franchise such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of a carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of a carrier or other public utility, the requirements established by the Commission under this Chapter; provided, however, that no terms, conditions, or limitations shall restrict the right of a motor carrier of property only to add to its equipment and facilities over the routes, between the termini, or within the territory specified in the franchises, as the development of the business and the demands of the public shall require. (1947, c. 1008, s. 12; 1949, c. 1132, s. 11; 1963, c. 1165, s. 1.)

The Commission need not approve or reject an application as submitted. It may attach to the certificate granted such reasonable terms, conditions and limitations as the public convenience and necessity may require. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Obligations Inherent in Acceptance of Certificate. — Inherent in the acceptance of a certificate and the exercise of the rights and privileges evidenced thereby, is the correlative obligation to serve the shipping public faithfully in accordance with reasonable rules and regulations prescribed by the Utilities Commission and in conformity with the requirements of provisions of the statute prescribing duties to be performed by the carrier for the protection of the shipping public. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

§ 62-114. Contract carriers; issuance of permits; terms and conditions. — When the Commission issues a permit to any contract carrier, it shall specify in the permit, or amendment thereto, the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements

established by the Commission under G.S. 62-261 provided, that the permit shall list the name of all contract parties the carrier is authorized to serve, and no additions or substitutions of contracts shall be made without approval of the Commission, and the Commission may adopt rules and regulations limiting the number of contract parties served by a contract carrier so that contract carriers shall not hold themselves out to serve in the manner of common carriers. (1947, c. 1008, s. 13; 1949, c. 1132, s. 12; 1963, c. 1165, s. 1; 1967, c. 1094, s. 3.)

§ 62-115. Issuance of partnership franchises. — No franchise shall be issued under this Article to two or more persons until such persons have executed a partnership agreement, filed a copy of said agreement with the Commission, and indicated to the Commission, in writing, that they have complied with Article 14 of Chapter 66 relating to doing business under an assumed name. (1947, c. 1008, s. 14; 1949, c. 1132, s. 14; 1961, c. 472, s. 5; 1963, c. 1165, s. 1.)

§ 62-116. Issuance of temporary or emergency authority. — (a) Upon the filing of an application in good faith for a franchise, the Commission may in its discretion, after notice by regular mail to all persons holding franchises authorizing similar services within the same territory and upon a finding that no other adequate existing service is available, pending its final decision on the application, issue to the applicant appropriate temporary authority to operate under such just and reasonable conditions and limitations as the Commission deems necessary or desirable to impose in the public interest; provided, however, that pending such final decision on the application, the applicant shall comply with all the provisions of this Chapter, and with the lawful orders, rules and regulations of the Commission promulgated thereunder, applicable to holders of franchises, and upon failure of an applicant so to do, after reasonable notice from the Commission requiring compliance therewith in the particulars set out in the notice, and after hearing, the application may be dismissed by the Commission without further proceedings, and temporary authority issued to such applicant may be revoked. The authority granted under this section shall not create any presumption nor be considered in the action on the permanent authority application.

(b) Upon its own initiative, or upon written request by any customer or by any representative of a local or State government agency, and after issuance of notice to the owner and operator and after hearing in accordance with G.S. 1A-1, Rule 65(b), the Commission may grant emergency operating authority to any person to furnish water or sewer utility service to meet an emergency to the extent necessary to relieve the emergency; provided, that the Commission shall find from such request, or from its own knowledge, that a real emergency exists and that the relief authorized is immediate, pressing and necessary in the public interest, and that the person so authorized has the necessary ability and is willing to perform the prescribed emergency service. Upon termination of the emergency, the emergency operating authority so granted shall expire upon order of the Commission. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. (1947, c. 1008, s. 10; 1949, c. 1132, s. 9; 1963, c. 1165, s. 1; 1973, c. 1108.)

Editor's Note. — The 1973 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

§ 62-117. Same or similar names prohibited. — No public utility holding or operating under a franchise issued under this Chapter shall adopt or use a name used by any other public utility, or any name so similar to a name of another public utility as to mislead or confuse the public, and the Commission may, upon complaint, or upon its own initiative, in any such case require the public utility

to discontinue the use of such name, preference being given to the public utility first adopting and using such name. (1947, c. 1008, s. 15; 1949, c. 1132, s. 15; 1963, c. 1165, s. 1.)

§ 62-118. Abandonment and reduction of service. — (a) Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service. Upon request from any party having an interest in said utility service, the Commission shall hold a public hearing on such petition, and may on its own motion hold a public hearing on such petition. Provided, however, that abandonment or reduction of service of motor carriers shall not be subject to this section, but shall be authorized only under the provisions of G.S. 62-262(k).

(b) If any person or corporation furnishing water or sewer utility service under this Chapter shall abandon such service without the prior consent of the Commission, and the Commission subsequently finds that such abandonment of service causes an emergency to exist, the Commission may, unless the owner or operator of the affected system consents, apply in accordance with G.S. 1A-1, Rule 65, to the resident superior court judge of any judicial district where such person or corporation operates, or to any superior court judge holding court in such judicial district, for an order restricting the lands, facilities and rights-of-way used in furnishing said water or sewer utility service to continued use in furnishing said service during the period of the emergency. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. The court shall have jurisdiction to restrict the lands, facilities, and rights-of-way to continued use in furnishing said water or sewer utility service by appropriate order restraining their being placed to other use, or restraining their being prevented from continued use in furnishing said water or sewer utility service, by any person, corporation, or their representatives. The court may, in its discretion, appoint an emergency operator to assure the continued operation of such water or sewer utility service. The court shall have jurisdiction to require that reasonable compensation be paid to the owner, operator or other party entitled thereto for the use of any lands, facilities, and rights-of-way which are so restricted to continued use for furnishing water or sewer utility service during the period of the emergency, and it may require the emergency operator of said lands, facilities, and rights-of-way to post bond in an amount required by the court. In no event shall such compensation, for each month awarded, exceed the net average monthly income of the utility for the 12-month period immediately preceding the order restricting use.

(c) Whenever the Commission, upon complaint or investigation upon its own motion, finds that the facilities being used to furnish water or sewer utility service are inadequate to such an extent that an emergency (as defined in G.S. 62-118(b) above) exists, and further finds that there is no reasonable probability of the owner or operator of such utility obtaining the capital necessary to improve or replace the facilities from sources other than the customers, the Commission shall have the power, after notice and hearing, to authorize by order that such service be abandoned or reduced to those customers who are unwilling or unable to advance their fair share of the capital necessary for such improvements. The amount of capital to be advanced by each customer shall be subject to approval by the Commission, and shall be advanced under such conditions as will enable each customer to retain a proprietary interest in the system to the extent of the capital so advanced. The remedy prescribed in this subsection is in addition to other remedies prescribed by law. (1933, c. 307, s. 32; 1963, c. 1165, s. 1; 1971, c. 552, s. 1; 1973, c. 1393.)

Editor's Note. — The 1973 amendment designated the former provisions of this section as subsection (a) and added subsections (b) and (c).

Paramount Right of State to Regulate Public Utilities. — The power of a municipality to grant franchises to public utilities for the use of its streets and to provide service to its citizens must yield to the paramount right of the State to regulate, through the Utilities Commission, public utilities even when they are operated within the corporate boundaries of a municipality. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

Utility Owes Duty of Continuous Operation. —While a public utility retains its franchise, it owes to the State and the public the duty of continuous operation. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

Consent of Customer or Commission Necessary before Abandonment.—Power company may not abandon service to any customer, subject to the customer's paying his bill, without the consent of the customer or authorization of the Utilities Commission. Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

Power of Commission to Authorize Discontinuance Discretionary. — The power conferred upon the Utilities Commission to authorize a discontinuance of an established service indicates that the General Assembly intended that the Commission exercise this power in large measure according to its judgment and discretion. State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

Order Must Be Obtained. — Where a power company discontinued its service for nonpayment of charges, the customer, upon payment of the charges, is entitled to restoration of the service where the company did not obtain an order from the Commission. Sweetheart Lake, Inc. v. Carolina Power & Light Co., 211 N.C. 269, 189 S.E. 785 (1937).

Waste of a utility's manpower or other resources, with no substantial resulting benefit to the public, is not in the public interest and is not required. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

What Utility Must Show. — When a public utility seeks to abandon service it must establish that the public no longer needs the service which it was created to render or that there is no reasonable probability of its being able to realize sufficient revenue by the rendition of such service to meet its expenses. State ex rel. Utilities Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963).

The doctrine of convenience and necessity is a relative or elastic theory rather than an abstract or absolute rule. The facts in each case must be separately considered and from those facts it must be determined whether or not public convenience and necessity require a given service to be performed or dispensed with. The convenience and necessity required are those of the public and not of an individual or individuals. State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

A railroad may not be denied the right to curtail or abandon a service for which there is no substantial public need, even though, upon its entire business, the company is earning a fair rate of return. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

Though prosperous, a railroad or other utility company may not be denied the right to effect economies in its operation, so as to increase its earnings, unless it may reasonably be found, upon the evidence before the Commission, that the public convenience and necessity requires the continuation of the service in question. An occasional inconvenience to a shipper, which is trivial in comparison with the saving to the railroad from the elimination of the service, will not suffice to show such public convenience and necessity. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

But It May Be Required to Keep Open Station Required by Public Convenience and Necessity. — A railroad may be required to keep a station open, with an agent in attendance, if the public convenience and necessity requires such service, even though this can be done only at a loss to the railroad, provided such loss is not so great as to be unreasonable in comparison with the public's benefit from the service. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

And It May Not Substantially Reduce Hours Station Is Open without Commission's Order. — A liberal construction of §§ 62-2, 62-32, 62-131, 62-247, and this section, so as to effectuate the policy of the State as therein declared, compels the conclusion that when a railroad corporation has established and maintained a freight depot or passenger station pursuant to the order of the Commission, or has established and maintained for a year or more such depot or station on its own initiative, it may not, without first obtaining an order from the Commission authorizing it to do so, substantially reduce the number of hours per day during which such station shall be kept open for the service of the public and attended by an agent of the railroad. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

But Commission May Not Withhold Approval of Reduction Unreasonably. — When a railroad company applies for an order authorizing it to substantially reduce the number of hours per day during which a depot or station shall be kept open and attended by an agent, the

Commission may not withhold its approval unreasonably and arbitrarily. It may deny such permission only after a hearing and only if it finds and concludes, upon competent, material and substantial evidence in view of the entire record, both that the public convenience and necessity requires the station or depot to be so kept open for a greater portion of the day, and that the railroad, by so doing, will not incur costs out of proportion to any benefit to the public. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

As to power of Commission under former § 62-39 to require transportation and transmission companies to maintain facilities, see State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 233 N.C. 365, 64 S.E.2d 272 (1951); State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 238 N.C. 701, 78 S.E.2d 780 (1953).

ARTICLE 6A.

Radio Common Carriers.

§ 62-119. Powers of Commission generally; definitions. — The North Carolina Utilities Commission shall exercise over and in relation to radio common carriers the powers conferred by this Article.

(1) The word "Commission" when used in this Article means the North Carolina Utilities Commission.

(2) The word "commissioners" when used in this Article means the commissioners of the North Carolina Utilities Commission.

(3) The term "radio common carriers" when used in this Article includes every corporation, company, association, partnership and person and lessees, trustees, or receivers, appointed by any court whatsoever owning, operating or managing a business of providing or offering a service for hire to the public of one-way or two-way radio or radiotelephone communications whether interconnected with the land line telephone system or not and licensed by the Federal Communications Commission, but not engaged in the business of providing a public land line message telephone service or a public message telegraph service. The terms "telephone or telegraph utilities," "telephone or telegraph company," or a "person operating telegraph or telephone lines" when used in this Chapter, shall not be construed as including radio common carriers. (1969, c. 766; 1973, c. 1274.)

Editor's Note. — The 1973 amendment, in subdivision (3), substituted "business of providing or offering a service for hire to the public of one-way or two-way radio or radiotelephone communications whether interconnected with the land line telephone system or not and licensed" for "radio common carrier engaged in the business of providing a service of one-way or two-way radio communications and licensed as a miscellaneous common carrier."

Cited in State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

§ 62-120. Certificate of convenience and necessity required; exceptions; rules and regulations. — No radio common carrier shall begin, or continue, the construction or operation of any radio system, or any extension thereof, or acquire ownership or control thereof either directly or indirectly without first obtaining from the Public Utilities Commission a certificate that the present or future public convenience and necessity requires or will require such construction, operation or acquisition; provided this Article shall not require, nor shall it be so construed as to require, any such carrier to secure a certificate for an extension within any authorized service area within which such person has heretofore lawfully commenced operations, or for any extension within or to territory already served by such carrier, necessary in the ordinary course of

business, or for substitute facilities within or to any authorized service area or territory already served by such carrier, or for any extension into territory contiguous to that already served by such carrier and not receiving similar service from another such carrier when no certificate of convenience and necessity has been issued to or applied for by any other radio common carrier, or for the acquisition and operation of any plant or system heretofore constructed or hereafter constructed under authority of a certificate of convenience and necessity hereafter issued. The commissioners are hereby authorized to prescribe appropriate and reasonable rules and regulations governing the issuance of such certificates. (1969, c. 766.)

§ 62-121. Issuance of certificate for carrier licensed by Federal Communications Commission. — Any person not presently franchised or certificated by the North Carolina Utilities Commission as a radio common carrier but engaged in the operation of any radio common carrier licensed by the Federal Communications Commission on June 11, 1969, shall receive a certificate of convenience and necessity from the North Carolina Utilities Commission authorizing such person to continue the operation of such radio common carrier in the territory professed to be served by such person on June 11, 1969, if, within 30 days after June 11, 1969, such person shall file with the Commission an application for such certificate, including copies of any license or licenses issued by the Federal Communications Commission to such person, showing the area professed to be served by such person. (1969, c. 766.)

§ 62-122. Commission may set and regulate rates. — The Commission shall have the power and authority to set and regulate rates charged to the public by radio common carriers. (1969, c. 766.)

§ 62-123. Granting of certificate for operation in established service area of another carrier. — The Commission shall not grant a certificate for a proposed radio common carrier operation or extension thereof into the established service area which will be in competition with or duplication of any other radio common carrier unless it shall first determine that the existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonably adequate service. (1969, c. 766.)

§ 62-124. Article not applicable to mobile radio telephone service. — The provisions of this Article relate only to "radio common carriers" as defined herein and are distinguishable from mobile radio telephone service offered by land line telephone or telegraph utilities regulated by the Commission. (1969, c. 766.)

Cited in State ex rel. Utilities Comm'n v. Services Unlimited, 9 N.C. App. 590, 176 S.E.2d 870 (1970).

§§ 62-125 to 62-129: Reserved for future codification purposes.

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities. — (a) The Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction. A rate is made, fixed, established or allowed when it becomes effective pursuant to the provisions of this Chapter.

(b) The Commission may make or approve in its discretion special passenger or excursion rates.

(c) The Commission may make, require or approve, after public hearing, for intrastate shipments what are known as milling-in-transit, processing-in-transit, or warehousing-in-transit rates on grain, lumber to be dressed, cotton, peanuts, tobacco, or such other commodities as the Commission may designate.

(d) The Commission shall from time to time as often as circumstances may require, change and revise or cause to be changed or revised any rates fixed by the Commission, or allowed to be charged by any public utility. (1899, c. 164, ss. 2, 7, 14; 1903, c. 683; Rev., ss. 1096, 1099, 1106; 1907, c. 469, s. 4; Ex. Sess. 1908, c. 144, s. 1; 1913, c. 127, s. 2; 1917, c. 194; C. S., ss. 1066, 1071, 3489; Ex. Sess. 1920, c. 51, s. 1; 1925, c. 37; 1929, cc. 82, 91; 1933, c. 134, s. 8; 1941, c. 97; 1953, c. 170; 1963, c. 1165, s. 1.)

Cross Reference. — As to the regulation of rates for ferries connecting links of the State highway system, see §§ 136-84 and 136-85.

Editor's Note. — See 12 N.C.L. Rev. 289, for article on "Electric Rates."

Purpose of Regulation. — With public utilities the State has undertaken to protect the public from the customary consequences of monopoly by making the rates and services of the certificate holder subject to regulation and control by the Utilities Commission. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Article Not in Conflict with Chapter 75. — The provisions of this Article as to rate regulation are not in conflict with Chapter 75, Monopolies and Trusts. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Police Power of State. — The authority, conferred upon the Commission to establish reasonable and just rates of charges by a public service corporation for furnishing to its customers electrical power, comes within the police powers of the State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investments, having proper regard to the public interest that plants of this character should be properly run and maintained. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Supervisory Power of Commission. — The Commission is given general supervision over railways, street railways, and the like companies of the State, and empowered to fix such notes, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these are police powers delegated to this Commission, governmental so far as they extend. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

An uncontrolled legal monopoly in an essential service leads, normally and naturally, to poor service and exorbitant charges. To prevent such result, the legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

General Rate-Fixing Power. — The Commission is given broad and general powers to make rates for freight and passenger service. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

This section, in general terms, directs the Commission to establish just and reasonable rates for all utilities. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

Duty to Fix Rates. — When the Commission is called upon, by either a corporation or those to whom the services are rendered, under its franchise to exercise its rate fixing power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such services. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925).

The General Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Power to Ascertain Corporation in Control. — The Commission has the incidental power (subject to the right of appeal) to ascertain what particular corporation is in the control of or operates any telegraph line in this State, in order that it may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. State ex rel. Railroad Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893).

Classification Must Not Be Arbitrary. — In Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666 (1897), it was said: "The mere fact of classification in rate regulating is

not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground — something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection." Efland v. Southern Ry., 146 N.C. 135, 140, 59 S.E. 355 (1907).

Effect of Private Agreements. — The rates of transportation allowed carriers of freight are established by the Interstate Commerce Commission, and the State Corporation Commission (now the Utilities Commission), which may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; and, notwithstanding such agreement, the carrier may demand and enforce the rates established by law. Southern Ry. v. Latham, 176 N.C. 417, 97 S.E. 234 (1918).

A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the Commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919); City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

Rates Set by Commission Supersede Contrary Private Contract Provisions. — Rates for public utility service fixed by an order of the Commission, otherwise lawful, supersede contrary provisions in private contracts concerning rates for such service. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Enforcement of Such Rates Does Not Impair Obligations of Contract. — The enforcement of an order of the Commission superseding rates set by contract does not constitute an impairment of the obligation of such contract, since contracts of public utilities, fixing rates for service, are subject to the police power of the State. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Discrimination Remedied by Mandamus. — Where a public service corporation has discriminated among its patrons in its charges for electricity, mandamus will lie to compel it to charge a uniform or undiscriminating rate, for the question does not require the courts to fix a rate, or pass upon its reasonableness. North Carolina Pub. Serv. Co. v. Southern Power Co., 179 N.C. 18, 101 S.E. 593 (1919).

Fees and Charges Made by Municipality. — The Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949).

City Bus Fares. — The Commission has authority to fix city bus fares. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956). See § 62-260 and annotation thereto.

An intracity carrier, holding a certificate of exemption issued by the Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission except as to rates and controversies with respect to extensions and services. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

When Fares of Street Railway May Be Raised. — A public service street railway company, operating under a city charter, and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized by the Commission to raise its charges to its passengers, when in the opinion of the Commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919).

Joint Rate between Lumber Railroad and Connecting Carrier. — When a lumber railroad is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. Corporation Comm'n ex rel. Raleigh Granite Co. v. Atlantic Coast Line R.R., 187 N.C. 424, 121 S.E. 767 (1924).

Electric Power Rates Coextensive with State's Jurisdiction. — When the Commission has finally established, under the provisions of the statute, rates to be charged by a public service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Sale of Electricity Generated in Another State. — While the generation of electricity in another state when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Commission to establish a just and reasonable rate of charge in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

Telephone Company Must Not Discriminate. — In Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912), it was held that a telephone company is subject to public regulation and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions. See Godwin v. Telephone Co., 136 N.C. 258, 48 S.E. 636 (1904); Walls v. Strickland, 174 N.C. 298, 93 S.E. 857 (1917).

When Telegram Transmitted over Lines of Another Company. — Where a telegraph company has a continuous line between two points in this State, the fact that, in transmitting a message, it sent the message over the lines of another company does not excuse its violation of the rate prescribed by the Railroad Commission (now Utilities Commission) for the transmission of a message sent over the lines of one company. Leavell v. Western Union Tel. Co., 116 N.C. 211, 21 S.E. 391 (1895).

Telegraphic Messages Traversing Another State. — Telegraphic messages transmitted by the company from and to points in this State, although traversing another state in the route, are subject to the tariff regulations of the Railroad Commission (now Utilities Commission). State ex rel. Railroad Comm'rs v. Western Union Tel. Co., 113 N.C. 213, 18 S.E. 389 (1893).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

The contractual obligation to provide water service to a recreational subdivision as well as the actual delivery thereof directly affects a utility's ability to function as a utility. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Quoted in State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

§ 62-131. Rates must be just and reasonable; service efficient. — (a) Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable.

(b) Every public utility shall furnish adequate, efficient and reasonable service. (1933, c. 307, ss. 2, 3; 1963, c. 1165, s. 1.)

Cross Reference. — See note to § 62-118.

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in § 62-133. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Duty and Authority of Commission. — The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Duty of Utility to Render Adequate Service. — Having been granted a monopoly in its franchise area, the utility is under a duty to render reasonably adequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Necessity for Findings Showing Effect of Inadequacy on Decision Fixing Rates. — If the Commission found the quality of a utility's service to fall short of the requirement in this section that it be adequate, efficient and reasonable, then the Commission should make specific findings showing the effect of any such inadequacy upon its decision under § 62-133 fixing rates which are fair both to the public utility and to the consumer. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Utility Must Accept Responsibility. — A public utility, which has been allowed to charge rates sufficient to enable it to maintain its properties, in addition to the earning of a fair return thereon, and which nevertheless permits its properties to fall into such a poor state of maintenance as to impair the quality of its service, must accept the responsibility for its resulting inability to render adequate service to its patrons. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The term "public utility" in subsection (b) includes a railroad corporation. State ex rel. Utilities Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

§ 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates. — The

rates established under this Chapter by the Commission shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any interested person, and a hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may enter an order awarding such petitioner and all other persons in the same class a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the Commission to be just and reasonable, nondiscriminatory and nonpreferential, to the extent that such rates or charges were collected within two years prior to the filing of such petition. (1913, c. 127, s. 3; C. S., s. 1067; 1929, cc. 241, 342; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Rates Fixed by Commission Are Prima Facie Valid, Just and Reasonable. — The rates fixed by the Commission are not only prima facie evidence of their validity, but also prima facie evidence that they are just and reasonable. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Rates Other Than Those Fixed Deemed Unjust. — The rates approved by the Commission shall be deemed to be just and reasonable, and any different rate shall be deemed unjust and unreasonable. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

The Commission is authorized by statute to fix just and reasonable rates or charges, and when they are so fixed, other or lower rates are to be deemed as unjust and unreasonable. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

As When Mistake Made in Tariff Distance Table. — Hence, in a proceeding to recover excessive freight charges collected because of an error in the tariff distance table filed with the Utilities Commission, the charges being in conformity with the tariff schedule for a greater distance than the correct distance between the termini, evidence offered by the carriers as to whether the higher rate was fair and reasonable for the shorter distance was properly excluded, since the carriers should not be permitted to change the rate by reason of a mistake in their tariff distance table, and petitioners were entitled to recover that part of the excess charged which was not barred by the limitation contained in the statute. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Rates Deemed Reasonable Until Modified. — Rates or charges fixed by an order of the Commission are to be considered just and reasonable unless and until they shall be changed or modified on appeal or by the further action of the Commission itself. In re Southern Pub. Util. Co., 179 N.C. 151, 101 S.E. 619 (1919), approving State ex rel. North Carolina Corp. Comm'n v. Seaboard Air Line Ry., 173 N.C. 413, 92 S.E. 150 (1917).

Where Rates Re-established upon Reconsideration. — Where the Utilities Commission, after due notice and hearing, had established rates for intrastate shipments of pulpwood which it found to be just and reasonable, and thereafter upon petition of defendant and other carriers for reconsideration, the rate so established was ordered "to remain in full force and effect," it was held that these rates so established must be deemed the only just and reasonable rates for this commodity over defendant's lines, rendering it unlawful for defendant to charge a greater amount. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

Burden of Proof. — One claiming that the rates or charges established by the Commission are unreasonable or excessive has the burden of proving his contention. Corporation Comm'n v. Henderson Water Co., 190 N.C. 70, 128 S.E. 465 (1925); State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

Applied in State ex rel. Utilities Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Stated in State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

§ 62-133. How rates fixed. — (a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utility and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to paragraph (3) of this subsection the rate of return fixed pursuant to paragraph (4) on the fair value of the public utility's property ascertained pursuant to paragraph (1).

(c) The public utility's property and its fair value shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. Unless otherwise ordered by the Commission, the test period shall be the 12 months beginning on the first day of the month following the date the rates are proposed to become effective.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding.

(f) Unless otherwise ordered by the Commission subsections (b), (c), and (d) shall not apply to rate changes of utilities engaged in the distribution of natural gas bought at wholesale by the utility for distribution to consumers to the extent such rate changes are occasioned by changes in the wholesale rate of such natural gas. The Commission may permit such rate changes to become effective simultaneously with the effective date of the change in the wholesale cost of such natural gas, or at such other time as the Commission may direct. This subsection shall not prohibit the Commission from investigating and changing unreasonable rates in accordance with the provisions of this Chapter. The public utility shall give such notice, which may include notice by publication, of the changes to interested parties as the Commission in its discretion may direct. (1899, c. 164, s. 2, subsec. 1; Rev., s. 1104; C. S., s. 1068; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 1092; 1973, c. 956, s. 1; c. 1041, s. 1.)

I. General Consideration.
II. Utilities Commission.
III. Fixing of Rates.
A. In General.
B. Rate base — Value of Investment, Property, etc.

C. Operating Expenses and Working Capital.
D. Rate of Return.
IV. Test Period.
V. Other Facts.
A. In General.
B. Quality and Adequacy of Service.
C. Intrastate Rates.

I. GENERAL CONSIDERATION.

Cross References. — See Editor's note under § 62-133.1. As to small water and sewer utility rates, see § 62-133.1.

Editor's Note. — The first 1973 amendment inserted "and certain water and sewer utilities" in subsection (a).

The second 1973 amendment added the second sentence of subsection (c).

Session Laws 1973, c. 956, s. 3, provides: "Except as herein amended, the provisions of Chapter 62 of the General Statutes of North Carolina shall remain in full force and effect. To the extent that other laws or clauses of law are in conflict with the provisions of this act, such laws and clauses are, to that extent, hereby repealed."

Session Laws 1973, c. 1041, s. 2, provides: "Nothing in this act shall affect or apply to public utility rate proceedings pending before the North Carolina Utilities Commission on the effective date of this act." The act was ratified March 25, 1974, and made effective on ratification.

See 12 N.C.L. Rev. 289.

Statute Is Constitutional. — The power to grant franchises to public service corporations and to fix their rates rests in the General Assembly, which power the General Assembly may delegate to an administrative agency provided the General Assembly prescribes rules and standards to guide such agency in the exercise of the delegated authority. The statute delegating to the Utilities Commission this authority is constitutional in fixing adequate rules and standards. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

And merely codified the former statute as interpreted by Supreme Court. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Purpose of Chapter. — The clear purpose of this Chapter is to confer upon the Utilities Commission the power and the duty to compel a public utility company to render adequate service and to fix therefor reasonable rates pursuant to the procedure prescribed in this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Applied in City of High Point v. Duke Power Co., 34 F. Supp. 339 (M.D.N.C. 1940); State ex rel. Utilities Comm'n v. Martel Mills Corp., 232 N.C. 690, 62 S.E.2d 80 (1950); State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974); State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974); State ex rel. Utilities Comm'n v. VEPCO, 21 N.C. App. 45, 203 S.E.2d 418 (1974).

Cited in State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923); State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944); State ex rel. Utilities Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959); State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962); In re North Carolina Fire Ins. Rating Bureau, 275 N.C. 15, 165 S.E.2d 207 (1969); State ex rel. Commissioner of Ins. v. State ex rel. Attorney Gen., 16 N.C. App. 724, 193 S.E.2d 432 (1972).

II. UTILITIES COMMISSION.

Commission Exercises Function of Legislative Branch of Government. — In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government. It may not, therefore, exceed the limitations imposed upon the legislature by the State and federal Constitutions. The Commission, however, does not have the full power of the legislature but only that portion conferred upon it in this Chapter. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

And Must Comply with Requirements of This Chapter. — In fixing the rates to be charged by a public utility for its service, the Commission must comply with the requirements of this Chapter. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The legislative mandate is that the Commission shall fix rates which will enable a well managed utility to earn a "fair rate of return" on the "fair value" if its properties are "used and useful" in rendering its service. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

This section is a part of the rate-making power of the Commission. State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

And Controls Commission in Establishing Rates. — In establishing rates, the Commission is governed and controlled by the provision of

this section. Southern Ry. v. McNeill, 155 F. 756 (E.D.N.C. 1907).

The responsibility for fixing rates rests with the Utilities Commission and not on the Supreme Court. However, there is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

It is the prerogative of the Commission, and not the Court of Appeals, to decide the question as to what constitutes fair and reasonable rates that may be charged by a utility. It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes upon it, not the Court of Appeals, the duty to fix the rates. State ex rel. Utilities Comm'n v. Morgan, 1 N.C. App. 576, 173 S.E.2d 479 (1970).

The statutes confer upon the Commission, not upon the Supreme Court, the duty and authority to determine adequacy of service and reasonable rates therefor. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Thus, neither the Supreme Court nor the Court of Appeals is authorized to fix rates for a public utility. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Power to Compel Adequate Service and Duty to Fix Rates. — This Chapter confers upon the Utilities Commission the power and the duty to compel a public utility to render adequate service, and it also confers upon the Commission the duty to fix reasonable rates for the rendering of adequate service. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

Commission Intended to Fix Rates As Low as Constitutionally Possible. — The origin of this section supports the inference that the legislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the due process clause of the Fourteenth Amendment to the Constitution of the United States, those of N.C. Const., Art. I, § 19, being the same in this respect. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Requirement as to Notice Implemented by Rule of Commission. — The requirement of the statute that the 30 days' notice of an increase in rates to be given the Utilities Commission properly may be implemented by rule of the Commission requiring that the notice be in writing in triplicate. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

The Utilities Commission's rules of practice and procedure, promulgated under legislative authority, required a defendant, if it desired the vacation or modification of a previous order, to file a written notice of intention to make changes resulting in increases. This would seem to implement the requirements of the statute that 30 days' notice of an increase be given the Commission. State ex rel. North Carolina Util. Comm'n v. Atlantic Coast Line R.R., 224 N.C. 283, 29 S.E.2d 912 (1944).

The findings of the Commission, when supported by competent evidence, are conclusive. State ex rel. Utilities Comm'n v. Duke Power Co., 21 N.C. App. 89, 203 S.E.2d 404 (1974).

Specific and unambiguous factual findings by the Commission are necessary to enable a reviewing court to determine whether the duty imposed by § 62-131 has been performed. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Material Issues of Fact upon Which Commission Must Make Findings. — When the record before the Commission presents the questions of the original cost, less depreciation, and the replacement cost, less depreciation, these are material issues of fact, upon each of which the Commission must make its finding. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Where evidence of original cost, less depreciation, and of replacement cost, less depreciation, is introduced, the Commission must make, and set forth in its order, its findings as to both of these evidential facts, along with any "other facts" considered by it. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Commission May Determine Nature of Proceeding. — It is within the province of the Commission to determine whether a hearing is a general rate case or a complaint proceeding. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

And Such Determination Must Be Made as to Every Hearing. — It is necessary as a matter of procedure that a determination as to whether a hearing is a general rate case or a complaint proceeding be made in every hearing involving the establishment, modification or revocation of rates. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Weight of Determination by Commission. — The findings of the Commission on whether a hearing is a general rate case or a complaint proceeding will not be disturbed in any case in the absence of a clear showing that the right of the parties have been prejudiced. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Reversing Determination of Commission. — The Commission's determination, reached pur-

suant to the mandate of this section and to the statutory procedural requirements, may not be reversed by the Court of Appeals or by the Supreme Court merely because it would have reached a different conclusion upon the evidence, but it is otherwise if it does not appear from the order of the Commission that the statutory mandates have been obeyed. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of these factors in the fixing of reasonable rates, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission. State ex rel. Utilities Comm'n v. VEPCO, 385 N.C. 398, 206 S.E.2d 283 (1974).

III. FIXING OF RATES.

A. In General.

Section Applies to Fixing or Revising of Rate Schedules and Rate Classifications. — In fixing the rate schedules and rate classifications, or in revising said rates and classifications, or a substantial part thereof, the procedure indicated by this section must be observed. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

It May Not Apply Where Only One Rate or a Few Rates Are Involved. — This section may not apply where a public utility has many rate schedules applying to many different classes of service customers, and only one rate or a few rates are involved in a petition for amendment, modification or recission. Ordinarily it is not required that the utility's property be valued and that the provisions of this section be observed in such case. State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

Where a public utility has many rate schedules applying to many different classes of service customers and only one rate or a few rates are involved in a petition for amendment, modification or rescission, ordinarily it is not required that the utility's property be valued and that the provisions of this section be observed in such case. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

General Rate Case and Complaint Proceeding Distinguished. — Where the whole or a substantial portion of the rate structure of a public utility is being initially established or is under review, and where the required procedure under this section is being carried out, the hearing before the Commission to establish or revise the rates is referred to as a "general rate." State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

A hearing which involves a single rate or a small part of the rate structure is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure and may be resolved without involving the procedure outlined in this section, and does not justify the expense and loss of time involved in such procedure. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Objective of Rate Making. — The fixing of rates for service which will enable the utility to do the things enumerated in subsection (b)(4), and no more, is the ultimate objective of rate making. At best, the result of the complex ratemaking procedure is an approximation of this objective. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Rate making is, of necessity, a matter of estimate and prediction since rates are set for the future. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

A schedule of rates fixed by the Commission under the standard prescribed by the legislature is binding upon the interested parties and the courts, provided it is within the bounds of reason. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

The ultimate question in determining appropriate rates is: What is a reasonable rate to be charged by the particular utility company for the service it proposes to render in the immediate future? The determination of this question is for the Commission, in accordance with the direction of this section. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

A rate must not only be fair, just and reasonable to the consumer, but fair, just and reasonable to the utility. State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

Manner of Arriving at Rate. — The Commission, in fixing a reasonable and just rate of charges for public service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant. State ex rel. Corporation Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

What is a "just and reasonable" rate which will produce a fair return on the investment depends on (1) the value of the investment — usually referred to in rate-making cases as the

rate base — which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined rate base. In finding these essential, ultimate facts, the Commission must consider all the factors particularized in the statute and "all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs." It must then arrive at its own independent conclusion, without reference to any specific formula, as to (1) what constitutes a fair value, for rate-making purposes, of applicant's investment used in rendering intrastate service — the rate base, and (2) what rate of return on the predetermined rate base will constitute a rate that is just and reasonable both to the applicant and to the public. While both original cost and replacement value are to be considered, neither constitutes a proper rate base. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954); State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959); State ex rel. North Carolina Util. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961); State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Necessarily, what is a "just and reasonable" rate which will produce a fair return on the investment depends on (1) the value of the investment — usually referred to in rate-making cases as the rate base — which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined rate base. When these essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Section prescribes formula which Commission is required to follow in fixing rates for service to be charged by a public utility. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

In order to assure the utility of earnings sufficient to attract capital and also in order to limit its charges for service to levels sufficient for that purpose, the legislature has prescribed in this section the steps which the Commission must take in fixing such charges. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The formula of the mandate of this section is: A x B=C (fair rate of return multiplied by the fair value of the properties equals the fair return in dollars). State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

B. Rate Base — Value of Investments, Property, etc.

The general doctrine is that the rate base is made up of values used in furnishing the service. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Acceptance by Commission of "book value" or "cost less depreciation" as rate base is in conflict with the standard prescribed in the statute. The conclusion is inescapable that by accepting the book value as the rate base, it, ex necessitate, excluded consideration of present cost of replacement and all other factors from effective consideration. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

There Is But One Rate Base. — It is incorrect to speak of "the original cost rate base" and the "trended original cost rate base." There is but one rate base — the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, which value the Commission must determine as of the end of the test period. The original cost of the properties is simply evidence to be considered in making this determination. The replacement cost, whether determined by use of trended cost indices or otherwise, is also but evidence of the fair value of the properties. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

It is the duty of the Commission to arrive at an independent rate base upon consideration of all factors, including cost, replacement and trended cost, and it is its duty to exercise its independent judgment in doing so. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

The rate base should include working capital supplied by the company. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

But such rate base should not include funds supplied by its customers. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Funds collected from the customers and used by the utility as working capital are not "the public utility's property" within the meaning of subsection (b)(1). State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

The utility is not entitled to include in its rate base funds which it has not provided but which it has been permitted to collect from its cus-

tomers for the purpose of paying expenses at some future time and which it actually uses as working capital in the meantime. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Must Consider Requirements of Section in Arriving at Value of Property. — In arriving at the fair value of a public utility's property used and useful in providing the service rendered to its customers, the Commission is charged with the duty to consider the requirements set forth in this section, as well as other relevant factors. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Neither the Commission nor the Supreme Court may evade the mandate of this section by determining the number of dollars which would be a fair return on the original cost, depreciated, and then simply translating that amount into a percentage of "fair value." State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

"Value" Does Not Mean "Market Value" as Secondhand Property. — The term "value" in this section does not refer to the original or the replacement cost of the property or to the exchange or sales price it would command, as used or secondhand property, on the market. It has reference to the value of the property actually in use, serving its purpose as a part of a composite public utility, earning an income for its owner. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Nor is it the price for which the property could be sold as used or secondhand property. It is not the sale or exchange value of the entire business as a going concern. It is not the same as the fair value to be awarded by a jury in a condemnation case. The concept of "fair value," as used with reference to a public utility's rate base, is unique to rate making. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Necessity for Determining Fair Value of Utility's Property. — The first step prescribed by subsection (b)(1), that of ascertaining the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, becomes of critical importance in the rate-making process, for only after the determination of this rate base can judgment be intelligently exercised fixing the rate of return which the utility is entitled to receive on the fair value of its property and fixing rates to be charged by the utility which are fair both to the public utility and to the consumer. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Factors to Be Considered in Determining Fair Value. — This section contemplates a weighing of (1) the reasonable original cost, less depreciation, (2) the replacement cost, which may be determined by trending such reasonable depreciated cost to current cost levels or by any other reasonable method, and (3) any other relevant factor, by the Commission in the exercise of its own expert judgment in determining "fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

This section contemplates that, normally, the Commission will ascertain the "fair value" of the properties at a point somewhere between the original cost, less depreciation, and the cost of replacement new, less depreciation. The Commission has the duty to weigh these evidences of "fair value" and may not disregard either, or brush either aside. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Balancing of Factors. — Having made the findings, properly supported, it is for the Commission, not the reviewing court, to determine, in its expert discretion and by the use of "balanced scales," the relative weights to be given these several factors in ascertaining the ultimate fact of "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

It is the clear intent of subsection (b)(1) that the Commission, in considering the indicators of "fair value" which themselves are supported by competent and substantial evidence, shall use its own expert judgment as to the credibility of the evidence in the record and as to the weight to be given to it. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Quality and Adequacy of Service as Factor in Arriving at "Fair Value". — See notes under analysis line V.B.

Reasonable Original Cost Is But One Factor. — The establishment of the reasonable original cost of the property, as referred to in subsection (b)(1), is of significance only because reasonable original cost is one of several figures and factors which the statute requires the Commission to consider in arriving at fair value. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

But Original Cost Is an Item to Be Considered. — In fixing fair value, original cost is an item to be considered. State ex rel. Utilities Comm'n v. Public Serv. Co. of N.C., Inc., 257 N.C. 233, 125 S.E.2d 457 (1962).

Ordinarily, Price Actually Paid Is Considered Reasonable Original Cost. — Where a public utility's property has been purchased from a stranger, ordinarily the price actually paid by the utility would be considered its reasonable costs, though it would not be necessarily be so. Even in such a case the Commission may find that the management of the utility acted improvidently or carelessly and paid a price greater than reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Determining Reasonable Original Cost of Property Sold to Utility by Affiliated Corporation. — In determining the rate base, the fact that equipment or services are sold to the utility by an affiliated corporation does not alter the ultimate question for the Commission. That question is whether the prices paid by the utility are reasonable and, therefore, reflect the "reasonable original cost" of the properties. The only effect of the affiliation between the utility and its supplier is that such relationship calls for a close scrutiny by the Commission of the price paid by the utility. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

In cases in which a substantial portion of a utility's property was acquired by purchase from an affiliated company, it becomes obligatory upon the Commission to scrutinize the prices paid and, to the extent it finds such prices unreasonable, to make adjustments in the utility's figures accordingly. This is all the more true where the affiliated supplier so dominates the market that its pricing policies may not be sufficiently controlled by normal competition. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

For purposes of determining a utilities rate base, when considering a purchase made from an affiliated company, the bargaining is not at arm's length and when the transaction is called in question, the burden is upon the utility to show that the price it paid was reasonable. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Where the prices paid by a telephone company to an affiliated manufacturing company are the same as those which the manufacturing company charges other affiliated companies to which it makes a majority of its sales, the Utilities Commission could properly determine the reasonableness of the prices charged by the manufacturing company by comparing its rate of return on common equity with the rates of return experienced by other manufacturing companies operating in similar fields. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Fixing Fair Value at Original Cost Plus Six Percent. — In a telephone rate case, the Utilities Commission's finding of the fair value of the telephone company's property by first determining original cost and then increasing that figure by 6% was unsupported by competent, material and substantial evidence in the record and was arrived at by a method which failed to comply with the directives contained in subsection (b)(1). State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

"Replacement cost" and "fair value" are not synonymous. Nor is "fair value" an arithmetical average of original cost and replacement cost, less depreciation, nor is it to be ascertained by the application of any mathematical formula. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Neither original cost, depreciated, nor replacement cost, depreciated, is the measure of "fair value." They are indicators of "fair value" and their respective weights are to be determined by the Commission in its expert judgment. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

When Finding Replacement Cost Necessary. — While the consideration or weight to be given replacement cost, depreciated, in ascertaining "fair value" rests in the sound discretion of the Commission, the reviewing court cannot satisfactorily determine whether the Commission considered or weighed this element at all, or merely gave it minimal consideration, unless the Commission set forth what it found this element to be. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Without a finding by the Commission of the replacement cost of a public utility's properties "used and useful in providing the service," the Commission's finding of "fair value" was affected by an error of law and, consequently, its finding of a fair rate of return on such "fair value" was so affected and was premature. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Discounting Replacement Cost for Depreciation. — In determining "fair value," the Commission may discount the replacement cost new by the same percentage as that indicated by the total accumulated depreciation in arriving at the replacement cost factor, or, if there is evidence to support such a finding, may discount replacement cost new by a greater or a smaller amount on account of depreciation, including obsolescence. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Improper Plant Engineering. — Neither the original cost nor the reproduction cost may properly be taken as the present fair value of telephone properties which were improperly engineered, have not been properly maintained, and are consequently in need of extensive rehabilitation. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The fact that a plant or a unit thereof is not well adapted to, or is inappropriate for, its present and/or reasonably to be anticipated future use tends materially to reduce its value below its reproduction new cost. One of the forms of inappropriateness is inappropriate engineering layout. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

The fair value of a new addition, when completed and in service, would almost certainly be found to be its total cost and, thereafter, would

be found by considering such cost and the reproduction, or trended, cost, including interest during construction. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Unnecessary Additions. — A utility may not justify an increase in its rates for service to its present customers by evidence of its present intent to build additions to its plant not reasonably considered necessary for adequate service, including proper reserve capacity, by the end of the time needed for the completion of such additions. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Method of Taking Inflation and Rising Cost of Plant Additions into Account. — An accepted method of taking inflation and a rising cost of plant additions into account in rate making is to fix rates for service sufficient, presently, to bring to the company a rate of return, on its present rate base, slightly in excess of that which is necessary to meet the foregoing test of reasonableness. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Trended Cost Evidence Deserves Weight. — In these times of increased construction costs and decreased dollar value, trended cost evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. The objections to such evidence apparently came from jurisdictions where the base rate is fixed at "book value" or "original cost" rather than present value. Of course, the book value or original cost can be ascertained with exactness from the books and records. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

In these times of increased construction costs and decreased dollar value, trended costs evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

When Necessary to Fix Present Value and Replacement Is Expensive. — Trended cost is useful only when it becomes necessary to fix the present value of facilities constructed when the cost was low and replacement has become expensive. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Although Such Evidence Is Not Conclusive. — The trended cost takes into account the type of facility, its age, its original and replacement cost, terrain, location, its probable useful life, and other factors. Such evidence is not conclusive but it does appear to be a useful guide in determining value of facilities. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

It is for the Commission to determine what weight to give to the evidence in a record as to replacement cost. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Usually Less Than Reconstruction Cost. — Ordinarily, the fair value of a utility's property is found to be less than the reconstruction cost of the property. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

And Cannot Exceed Present Cost of Constructing Substitute. — The present "fair value" of a utility system of generating plants, transmission lines and distribution lines cannot exceed the present cost of constructing a substitute system of modern design, capable of generating and distributing the same quantity of power at less operating expense. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

"Fair value" does not cover money stupidly, extravagantly, or corruptly spent and if a utility has been seriously overbuilt, or its promoters have been seriously overpaid, the law does not intend that its customers shall be saddled with the payment of interest on the money thrown away. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

But a utility may not inflate its rate base by extravagance in purchasing equipment or constructing its plant. In this connection, it is immaterial whether such extravagance be due to careless improvidence or to willful payment of exorbitant prices to an affiliate. On the other hand, the management of the business of a public utility, including the fixing of the prices which it pays for the construction and equipment of its plant and for its maintenance and operation, rests with its board of directors in the absence of clear mismanagement or abuse of discretion. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Excess of Fair Value over Total Capital of Company. — The excess of "fair value" over the actual total capital of the company (debt capital, plus capital stock, plus actual surplus) is to be added to the equity component of the capital structure for the purpose of fixing rates under this section. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Excess of Fair Value over Original Cost Less Depreciation to Be Included in Rate Base. — This section contemplates that the excess of "fair value," ascertained by the Commission, over and above the original cost, less depreciation, shall be included in the rate base of the utility, just as if it were a realized profit invested in additional property used and useful in rendering service to the public. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Only Properties Used and Useful in Rendering Service Considered. — In a proceeding by a power company for an increase in the cash

fares on its city bus system, the Commission was correct in considering the value only of the properties used and useful in connection with the operation of the bus system without regard to the value of the electric properties of the power company. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

This section clearly contemplates that only that property of the utility which is devoted to the public use for which the utility has been granted a franchise is to be considered, both in arriving at the fair value rate base and in projecting probable future revenues and expenses. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Question Whether Property Is "Used and Useful" Is One of Fact. — The question of whether specific property is presently "used and useful" in rendering service is one of fact to be determined by the Commission upon competent and substantial evidence. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The utility's own funds reasonably invested in such materials and supplies and its cash funds reasonably so held for payment of operating expenses, as they become payable, fall within the meaning of the term "property used and useful in providing the service," and are a proper addition to the rate base on which the utility must be permitted to earn a fair rate of return. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Property Not Presently Used to Its Full Capacity. — The fact that a transmission line, a building or a telephone company's central office equipment is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently "used and useful" in rendering service. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

While central office equipment might have provided at the end of the test period capacity in excess of the amount needed at that moment, there being no question raised that it was not in operation at that time, it was at that time property both used and useful by the utility in providing services to the public, therefore the Commission had no authority to deduct any portion of its costs in arriving at the reasonable original cost of the property for consideration by it in making its ultimate determination of fair value. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

The question for determination in connection with an alleged overbuilding of a utility plant is whether the properties in question can be deemed "used and useful" in rendering the service, as of the end of the test period. If not, they may not properly be included in the rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Property Held for Future Use. — A telephone company, with central office equipment sufficient to serve any reasonably anticipated increase in customers, may not properly add to its rate base additional units of central office equipment merely because, in the long future, it hopes to have customers who will use it. This is especially true where the supplier of such equipment is an affiliated corporation, controlled by the same holding company which controls the telephone company. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

There is no merit in the contention that exclusion from the rate base of the value of property held by a public utility for future use amounts to confiscation of its property. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

Value of Franchise Does Not Enter into Computation. — By § 62-110 the State has granted to the utility company a legal monopoly upon a service vital to the economic well-being and the domestic life of the people of a large territory. This franchise is a property right of great value. Normally, when the grantee sells its business to another company, the monopolistic franchise commands a substantial price, over and above the exchange value of the physical properties transferred with it. Thus, the value of the franchise enters into and affects the market price of the utility's stock. It does not, however, enter into the computation of the utility's rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Plant under Construction Excluded from Rate Base. — There is no unfairness to the utility company in excluding plant under construction from the rate base. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

A telephone plant under construction at the end of the test period is not property "used and useful" within the meaning of this section and is not to be included in the rate base. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

A generating plant of a power company, half-completed at the end of the test period, or a half-completed line of telephone wire, cannot be deemed property "used in providing the service" "as of the end of the test period used in the hearing." Neither can it be deemed property "useful" in rendering the service at that time. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

When an addition to plant begins to serve the public, the utility is entitled then to begin to earn a fair return on that portion of its total investment, just as it does on the remainder of the

plant, but it is not entitled to earn a return on its investment in the plant addition before the plant addition is completed and begins to serve the public. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

It was error for the Commission to make a pro forma adjustment to revenues, by adding to the actual revenue earned in the test period the item called "interest charged to construction," since the plant under construction was not in operation at the end of the test period. State ex rel. Utilities Comm'n v. Morgan, 27 N.C. 235, 179 S.E.2d 419 (1971).

It was error for the Commission to include in the rate base of a public utility the value of plant under construction at the end of the test period. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Since plant under construction at the end of the test period contributed nothing whatever to the revenues produced during that test period, to add the value of such plant, still under construction, to the rate base, without a pro forma adjustment to operating revenues and operating revenue deductions, would, necessarily, depress the rate of return, and this would be unfair to the ratepayers. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Added upon Completion. — When the addition to plant is completed and put into service, the entire cost of it, including the cost of capital incurred in construction, is added to the rate base of the company. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Overcharge to Investment Does Not Directly Affect Rate Base. — Only those purchases for operating materials and supplies, including current maintenance, are chargeable to operating expense, and purchases for plant construction go into an account for investment in plant, not to operating expense, so, an overcharge, if any, to investment in plant does not affect the net operating income. While such overcharge would improperly add to the account for original cost of the plant, which is an item to be considered in computing the rate base, it actually would not affect the rate base directly, since the rate base is the fair value of the plant, not the cost of it. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The credibility of the evidence and the weight to be given it in the determination of the "fair value" of the properties are for the Commission, not for a court, to determine. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 398, 206 S.E.2d 283 (1974).

It is not the meaning of subsection (b)(1) that, in the absence of expert opinion testimony as to the weight to be given the respective indicators of "fair value," the Commission must give them equal weight and find "fair value" by the mere striking of an arithmetic average of the indicators. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

This section does require expert testimony as to the weight which the Commissioner should give to original cost and to replacement cost factors in carrying out its mandate to "consider" these indicators of "fair value." State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

The Commission is not required to accept expert witness' opinion as to the weight to be given the original cost and replacement cost increments of fair value, even though there be no contrary expert testimony. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Declaration That Commission Followed No Formula in Finding Fair Value. — A finding of "fair value" by the Commission is not rendered immune to judicial review by the Commission's declaration that, in reaching such finding, it followed no formula. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The mere recital by the Commission that it has considered all of the factors prescribed by this section in arriving at its ascertainment of "fair value" does not preclude the reviewing court from setting aside the finding of "fair value" where the record discloses that the Commission in fact failed to do so. State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

"Minimal Consideration" Inadequate. — The Commission may not brush aside one of the prescribed indicators of original cost and replacement cost by giving it "minimal consideration." State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Balance on Review. — While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

A reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Having made findings of the original cost less depreciation and replacement cost less depreciation, the weight to be given those figures in reaching the ultimate finding of fair value is to be determined by the Commission, not by the reviewing court. State ex rel. Utilities Comm'n

v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

A reviewing court may not properly disturb an order of the Commission merely because it would have given a different weight to each of the indicators of "fair value." State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

There was no reversible error in the Commission's determination that the fair value of the power company's properties, exclusive of the allowance for working capital, should be determined by giving a weighting of one third to replacement cost, depreciated, and two-thirds weighting to original cost, depreciated. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

When Commission's Finding of Fair Value May Be Set Aside for Errors of Law. — The determination of the weight to be given each factor in its ascertainment of "fair value" is for the Commission, not the reviewing court. But if it is clear from the record that the Commission reached its finding of "fair value" by disregarding or giving minimal consideration to one of the enumerated factors, its finding of the ultimate fact of "fair value" may be set aside by the court on the ground of error of law in such ascertainment. Similarly, the finding of "fair value" may be set aside by the reviewing court if it clearly appears that the Commission has made its determination thereof by giving weight to a factor as to which there is no substantial evidence in the record. It is likewise where the order of the Commission shows that it reached its determination of "fair value" by considering unspecified facts other than original cost and replacement cost depreciated. The mere recital by the Commission that it has considered all of the factors prescribed by this section in arriving at its ascertainment of "fair value" does not preclude the court from setting aside the finding of the "fair value" where the record discloses any of these errors of law. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

C. Operating Expenses and Working Capital.

Reasonable Operating Expenses Must Be Ascertained. — In fixing rates to be charged by the public utility, the Commission is directed to ascertain the public utility's reasonable operating expenses, among other things. State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Cost of collecting past-due accounts is an operating expense. State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

Error to Add Interest Charged to Construction to Operating Revenue. — It was error for the Commission to add to the company's operating revenue for the test period interest charged to construction during the test period. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Depreciation Defined. — Broadly speaking, depreciation is the loss not restored by current maintenance which is due to all the factors causing the ultimate retirement of the property. While property remains in the plant, the estimated depreciation rate is applied to the book cost and the resulting amounts are charged currently as expenses of operation. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Depreciation Deductions. — For rate-making purposes a public utility is allowed to deduct annually as an operating expense so much of its capital investment as is actually consumed during the current year in rendering the service required of it. But the cost represents the amount of the investment, and it is the actual cost, not theretofore recouped by depreciation deductions, that must constitute the base for this allowance. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

In establishing rates a public utility is entitled to deduct each year as an operating expense only such depreciation as represents the investment currently consumed and not provided against by maintenance. Thus the integrity of the investment is maintained, and this is all the utility has a right to demand. The rate should be fixed, as near as may be, so that it will extend over the usable life of the property being depreciated. Otherwise the allowance will be unjust either to the utility or to the public. State ex rel. Utilities Comm'n v. State, 239, N.C. 333, 80 S.E.2d 133 (1954).

The rate of depreciation allowed by the federal government for income tax purposes is not necessarily the proper rate to be allowed for rate-making purposes. Indeed, for rate-making purposes it would ordinarily be excessive, especially in respect to buildings and like permanent improvements. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Using Property Which Has Been Fully Depreciated for Other Purposes. — It would be unfair to a utility not to take into consideration the present fair value of property now in use but which has been fully depreciated for other purposes. On the other hand, if the rate of depreciation allowed for rate-making purposes is in excess of the investment currently consumed, over and above maintenance costs, it is unfair to the public, for then the company is permitted to recover annually a part of its investment which is not currently consumed. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Transactions between Utilities and Affiliated Supply Companies. — It is the duty

of the Commission to look closely at transactions between utility operating companies and affiliated supply companies to be sure that the public is not required to pay rates based on excessive costs resulting from excessive profits earned by an unregulated supplier. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

The financial condition of a public utility and the demand for its bonds and securities which affect its capacity to compete, on the open market, for additional equity and debt capital are ordinarily material considerations in fixing rates. But these factors are of little moment where the applicant has available at all times a fund provided by its parent company from which it may borrow at will for needed improvements or enlargements. What it has to pay for its borrowings from this fund is of more importance. These are some of the "other facts" the statute requires the Commission to consider. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Capital Investment Determined as of Time Rates Are Effective. — Where a utility is currently investing large amounts of capital in expansion, the Utility Commission should determine the capital invested as of the time the rates fixed by it are to be effective, rather than the average net investment of the utility for the entire test year, since the rates fixed are prospective. State ex rel. North Carolina Util. Comm'n v. Piedmont Natural Gas Co., 254 N.C. 536, 119 S.E.2d 469 (1961).

Same — Current Rather than Cost Value of Capital Investment. — An instruction that the current rather than the cost value of capital investment shall be used as the basis for estimating depreciation allowances is incorrect. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Large Sum of Money on Hand for Working Capital. — When, in fixing rates which will produce a fair return on the investment of a utility, it is made to appear that it has on hand continuously a large sum of money it is using as working capital and to pay current bills for materials and supplies, that is a fact which must be taken into consideration. And if the fund on hand is sufficent, no additional sum should be allowed at the expense of the public. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Where a public utility uses for operating capital, moneys collected by it in taxes for the federal government which it is not required to pay to the federal government until a later date, the Utilities Commission should take such capital into consideration in fixing rates, which action is neither a condemnation nor a condonement of the practice. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Advance Billing Not Creditable to Working Capital. — In determining the local rates for a telephone company, the amounts paid to the company by its customers as a result of the company's practice of billing the customers one month in advance is not creditable to the company's working capital requirements. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Income Produced by Increase of Facilities. — In fixing the rate for a telephone company, the Utilities Commission must take into consideration the net income to be produced by the increase in the number of telephones in service at the end of any test period adopted by the Commission. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

D. Rate of Return.

Commission to Determine Fair Rate of Return. — It is for the Commission, not for the Supreme Court, to determine what is a fair rate of return. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

As to a "just and reasonable" rate, see Smyth v. Ames, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898); State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

Reasonableness of Rate of Return Depends on Whether Property Is Fairly Valued. — Whether a 4%, 5%, or 6% return is just and reasonable depends very largely on whether the Commission has placed a fair value on the property of the utility which is used and useful in producing its revenue. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Less Than Fair Rate of Return Requires Commission to Raise Rates. — If the rate of return derived from the previously established rates during the test period, adjusted pro forma, was less than a fair rate of return, this section requires the Commission to raise the company's rates for services, assuming that the quality of service is adequate. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

There is no fixed "fair rate of return" applicable to all utility companies, or to a single utility company at all times. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

A public utility corporation is entitled to a just and reasonable rate of return based upon the fair value of the properties used and useful in rendering the service for which the rate is established. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

A power company is entitled under this section to earn the same rate of return on the fair value

of the plant as it is entitled to earn on the retained earnings which it has reinvested in its plant. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Finding That New Rate of Return Is Fair Is Tantamount to Finding That Existing Rates Were Inadequate. — The finding that a new rate represented a fair rate of return on the fair value of a company's utility property is tantamount to a finding that the existing rates were inadequate. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Fair Rate of Return Test. — In this State the test of a fair rate of return is that laid down by the Supreme Court of the United States in the Bluefield Waterworks & Imp. Co. v. Public Serv. Comm'n, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923); that is, if the company continues to earn such a rate of return, will it be able to attract on reasonable terms the capital it needs for the expansion of its service to the public? State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

A "fair rate of return" is one sufficient to enable the utility to attract, on reasonable terms, capital necessary to enable it to render adequate service. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Under this section a fair rate of return on the fair value of the properties used in rendering the service clearly contemplates the allowance of a greater dollar return than would be allowed if the rate base were the original cost, depreciated, of the same properties, asssuming that the value of the properties has been enhanced by inflation. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

No Change in Rates May Be Justified. — If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was fair, no change in the rates for service is justified. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Rate Reduction May Be Required. — If the rate of return derived from the previously established rates for service during the test period, adjusted pro forma, was in excess of a fair rate of return, the statute requires the Commission to reduce the rates for service. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

The court may not substitute its judgment for that of the Commission even when it is of the opinion that the rate of return authorized by the Commission is inadequate. State ex rel. Utilities Comm'n v. Duke Power Co., 21 N.C. App. 89, 203 S.E.2d 404 (1974).

Anticipated Rate of Return. — Adjusted revenue deductions are subtracted from adjusted revenues to determine what net operating income the company may anticipate under the previously established rates, in a period of the same length as the test period, during which all presently known conditions prevail. Such net operating income, divided by the rate base, gives the rate of return which the company may anticipate, on its properties used in rendering its service, under the previously established rates for service, in a period of the same length as the test period, throughout which all presently known conditions prevail. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Previous findings are not res judicata, even as to what was a fair rate of return on common equity capital as of the dates of those former orders, and such findings do not prevent the Commission from finding a lower return on common equity capital fair in a later case, even though the tide of inflation has continued to rise. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Its former allowance of a rate of return is not res judicata barring the Commission from fixing a lesser rate in a subsequent proceeding. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

The Utilities Commission is not compelled to provide a 6% rate of return to a public utility. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

The Commission must consider and weigh testimony of expert witnesses, on the question of the fair rate of return, in the light of its own adjustment, for rate-making purposes, of the utility's actual capital structure by its determination of the "fair value" of its properties. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

IV. TEST PERIOD.

Meaning of Subsection (c). — The clear meaning of subsection (c) is that the company's property which is "used and useful in providing the service rendered to the public" is to be determined "as of the end of the test period." State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Subsection (c) clearly provides that the Commission is to include in the probable future revenues of the company only those revenues based on the plant and equipment in operation at the end of the test period. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

The basic, underlying theory of using the company's operating experience in a test period, recently ended, in fixing rates to be charged by it for its service in the near future is that rates for service, in effect throughout the test period, will, in the near future, produce the same rate of return on the company's property, used in rendering such service, as was produced by them on such property in the test period, adjusted for known changes in conditions. State

ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

The factors used in fixing rates are to be determined as of the end of the test period. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

Rates Fixed on Basis of Substantial Period of Time. — It is impossible to fix rates which will give the utility each day a fair return, and no more, upon its plant in service on that day. The best that can be done, both from the standpoint of the company and from the standpoint of the persons served, is to fix rates on the basis of a substantial period of time. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Test Period Fixed to Estimate Revenues and Operating Expenses. — For the purpose of making the required estimates of the public utility's revenues and operating expenses, the customary and proper procedure is for the Commission to fix a test period of 12 months, ending, as close as practicable, before the opening of the hearing. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

Adjustments for Abnormalities and Changes in Conditions. — The actual experience of the company during the test period, both as to revenues produced by the previously established rates and as to operating expenses, is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate pro forma adjustments are made for abnormalities which existed in the test period and for changes in conditions occurring during the test period and, therefore, not in operation throughout its entirety. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974); State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Operating revenue deductions (operating expenses, depreciation, taxes and all other proper deductions from revenue) for expenditures actually made in the test period are adjusted, pro forma, for changes in conditions during the test period, such as an increase in the wage rate, so that the result reflects what would have been the total of such deductions had the conditions, prevailing at the end of the test period, prevailed throughout it. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Pro forma adjustments to revenue are made to reflect what the revenues would have been in the test period, which is usually 12 months, had present conditions prevailed throughout that period, so that the result shows what revenues will be produced in 12 months by application of the previously established rates for service conditions existing at the end of the test period; i.e., at the date, nearest the present, for which data are available. State ex rel. Utilities Comm'n v. Morgan, 278 N.C. 235, 179 S.E.2d 419 (1971).

Value of Property Determined as of End of Trial Period. — The Commission is required under subsection (c) to determine the fair value of the utility's property as of the end of the trial period based on the plant and equipment in operation at that time. State ex rel. North Carolina Util. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966).

Not by Averaging over Period. — The value of plant and service must be determined as of a specific date — the end of the test period — and not by averaging a group of periods or months within a period. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

V. OTHER FACTS.

A. In General.

Other Facts Which Commission Should Take into Account. — The legislature properly understood that at times other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in this section, and it was contemplated that such facts be established by evidence, be found by the Commission, and be set forth in the record to the end the utility may have them reviewed by the courts. In this respect it is, of course, immaterial whether the party seeking judicial review be the utility or its adversary. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

"Other facts" which the Commission considers in determining the "fair value" of the utility's properties must be found and set forth in its order, so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as "relevant to the present fair value." State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Right to Consider "All Other Facts" Limited. — This section gives the Commission the right to consider "all other facts" that will enable it to determine what are reasonable and just rates, but this right is not a grant to roam at large in an unfenced field. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

The right of the Commission to consider "all other facts" is not a grant to roam at large in an unfenced field. State ex rel. Utilities Comm'n v. Public Serv. Co. of North Carolina, Inc., 257 N.C. 233, 125 S.E.2d 457 (1962).

Facts to Be Established by Evidence and Set Forth in Record. — The Legislature properly understood that, at times, other facts may exist, bearing on value and rates, which the Commission should take into account in addition to those specifically detailed in this section; however, it was contemplated that such facts be established

by evidence, be found by the Commission, and be set forth in the record to the end the utility might have them reviewed by the courts. State ex rel. Utilities Comm'n v. Public Serv. Co. of North Carolina, Inc., 257 N.C. 233, 125 S.E.2d 457 (1962).

B. Quality and Adequacy of Service.

Commission Must Consider Quality of Service. — Subsection (d) of this section authorizes the Commission to consider quality of service as a factor in determining what constitutes just and reasonable rates to be charged by a utility. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Serious inadequacy of service, found by the Commission upon substantial evidence, is one of the facts which the Commission is required by this section to take into account in making a determination of rates. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

Evidence of service deficiencies provide other material facts of record which the Commission is required to consider in making its determination as to what are just and reasonable rates for the quality of service which the applicant utility is providing its customers. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

And Show Effect. — The Commission may not lawfully ignore the duty imposed upon it by this section to consider the quality of service by reason of the company's poor service, nor does it discharge that duty by a mere statement that it has considered the matter, without showing the effect given to it. Such finding or conclusion is necessary to enable a reviewing court to determine whether the duty imposed by statute has been performed. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Customer Should Not Be Required to Pay for Inefficiency. — If a utility fails to provide adequate service on account of inefficient management, rates should not be permitted which would require the customer to pay for this inefficiency. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Commission Not Required to Ignore Inadequate Service. — It is not reasonable to construe subsection (b) of this section to require the Commission to shut its eyes to "poor" and "substandard" service resulting from a company's willful or negligent failure to maintain its properties or to heed complaints from its subscribers when the Commission is called upon by the company to permit it to increase its rates for its inadequate service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

But Commission May Grant Rate Increase Notwithstanding a Finding That Service Was Poor. — In a hearing upon application by a telephone company for a rate increase in its franchise area, the Utilities Commission is authorized to grant the company an increase in the rates charged to its customers notwithstanding a finding by the Commission that the quality of service rendered by the company was poor and substandard. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

The Commission is not forbidden to grant a rate increase to a company whose service is inadequate, even though the inadequacy be due to a willful or negligent failure by the company to perform its duty. State ex rel Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

As an Appropriate Step in Improvement of Service. — Assuming adequate findings of fact, supported by competent, substantial evidence, there is nothing in the provisions of this Chapter which makes it unlawful for the Commission, in the exercise of its sound administrative discretion, to conclude than an increase in rates is warranted, notwithstanding existing service inadequacy due to the company's neglect of its properties, and that such increase is an appropriate step in the improvement of the service. State ex rel. Utilities Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

Where Inadequate Service Due to Defective, etc., Equipment. — If the inadequate service is attributable to defective or inadequate or poorly designed equipment or construction or obsolete equipment, then the Commission is justified in reducing the present fair value of the utilities' properties. In such a case, this is not a penalty, and a reduction of the rate arrived at by way of penalty for inadequate service is justified. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

And Where Due to Inefficient Personnel. — If the reduction from fair value of the utilities' properties is because of inadequate service by reason of inefficient personnel and human error, then the reduction amounts to a penalty, and a further penalty for inadequate service by reduction of rate is not justified by statute or by decided cases. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

Subtraction for Consistently Poor Service. — Consistently poor service, attributable to defective or inadequate or poorly designed equipment or construction, justifies a subtraction from both the original cost and the reproduction cost of the existing plant before weighing these factors in ascertaining the present "fair value" of the properties. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705

(1972); State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

Subtraction for Inadequacy of Plant. — The Commission may subtract from both original cost new and replacement cost new an appropriate allowance for the inadequacy of the plant, if any, due to faulty engineering, faulty maintenance or other circumstance. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

Subtraction of Appropriate Amount for Excess Plant Margins. — The Commission may subtract from original cost and from replacement cost an appropriate amount for excess plant margins. State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

The Commission must, however, make a specific finding showing the effect it gave the relevant factor of consistently poor service, if it made a deduction from the original cost and reproduction cost of the existing plant on that account. State ex rel. Utilities Comm'n v. General Tel. Co., 21 N.C. App. 408, 204 S.E.2d 529 (1974).

If the Commission found the quality of utility's service to fall short of the requirement in § 62-131 that it be adequate, efficient and reasonable, then the Commission should make specific findings showing the effect of any such inadequacy upon its decision under this section fixing rates which are fair both to the public utility and to the consumer. State ex rel. Utilities Comm'n v. General Tel. Co., 12 N.C. App. 598, 184 S.E.2d 526 (1971).

C. Intrastate Rates.

Rates Based on Domestic Business. — The reasonableness of the rates to be fixed by the State must be decided with reference exclusively to what is just and reasonable in respect of domestic business. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

When a company operates in two or more states, the operations are treated as separate businesses for the purpose of rate regulation. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission is empowered and directed to make reasonable and just rates as applied to the distribution and sale of power in this State and not otherwise, and such power cannot be directly controlled or weakened by conditions existent in other states, either from the action or nonaction of official bodies there, or the dealings between private parties. To hold otherwise would, in its practical operation, be to withdraw or nullify the powers that this section professes to confer and should not for a moment be entertained. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Rate of Return in Other State. — An inadequate return in Virginia would not of itself justify a rate increase in North Carolina, nor would a high rate of return in Virginia justify less than a fair and reasonable rate in North Carolina. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

The Utilities Commission of this State does not have the right to fix less than a reasonable or fair rate of return on a telephone company's investment in North Carolina because the utilities commission in Virginia may have fixed rates in Virginia which, in the opinion of the Utilities Commission in this State, gives the company a reasonable return on its entire properties when its Virginia and North Carolina revenues are combined. State ex rel. Utilities Comm'n v. Lee Tel. Co., 263 N.C. 702, 140 S.E.2d 319 (1965).

Increasing Intrastate Rates to Conform with Interstate Rates Allowed by Interstate Commerce Commission. — Order of Utilities Commission increasing intrastate rates of State carriers so that such rates would conform with an increase in interstate rates allowed by Interstate Commerce Commission was invalid where order was unsupported by proof of the fair value of the properties of the carriers used and useful in conducting their intrastate business, separate and apart from their interstate business. State ex rel. Utilities Comm'n v. State, 243 N.C. 12, 89 S.E.2d 727 (1955).

In fixing intrastate rates for a telephone company operating in several states, the Utilities Commission should take into consideration the net return such utility earns on its properties in such other states to the extent of not requiring customers in North Carolina, in order to maintain the utility's financial condition, to pay a substantially higher rate than permitted in other states. A substantial differential might be considered some evidence that the rates charged in this State are unreasonable and unjust to the local public. State ex rel. Utilities Comm'n v. State, 239 N.C. 333, 80 S.E.2d 133 (1954).

§ 62-133.1. Small water and sewer utility rates. — (a) In fixing the rates for any water or sewer utility, the Commission may fix such rates on the ratio of the operating expenses to the operating revenues, such ratio to be determined by the Commission, unless the utility requests that such rates be fixed under G.S. 62-133(b). Nothing in this subsection shall be held to extinguish any remedy or right not inconsistent herewith. This subsection shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that

in cases of conflict between such other provisions, this section shall prevail for water and sewer utilities.

(b) A water or sewer utility may enter into uniform contracts with nonusers of its utility service within a specific subdivision or development for the payment by such nonusers to the utility of a fee or charge for placing or maintaining lines or other facilities or otherwise making and keeping such utility's service available to such nonusers; or such a utility may, by contract of assignment, receive the benefits and assume the obligations of uniform contracts entered into between the developers of subdivisions and the purchasers of lots in such subdivisions whereby such developer has contracted to make utility service available to lots in such subdivision and purchasers of such lots have contracted to pay a fee or charge for the availability of such utility service; provided, however, that the maximum nonuser rate shall be as established by contract, except that the contractual charge to nonusers of the utility service can never exceed the lawfully established minimum rate to user customers of the utility service. (1973, c. 956, s. 2.)

§ 62-134. Change of rates; notice; suspension and investigation. — (a) Unless the Commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this Chapter, except after 30 days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice, which may include notice by publication, of the proposed changes to other interested persons as the Commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Commission, for good cause shown in writing, may allow changes in rates without requiring the 30 days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

(b) Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective.

(c) At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable.

(d) Notwithstanding the provisions of this Article, any public utility engaged solely in distributing electricity to retail customers, which electricity has been purchased at wholesale rates from another public utility, an electric membership corporation or a municipality, may in its discretion, and without the necessity of public hearings as in this section is otherwise provided, elect to adopt the same retail rates to customers charged by the public utility, electric membership corporation or municipality from whom the wholesale power is purchased for the same service, unless the North Carolina Utility Commission finds upon a hearing, either on its own initiative or upon complaint, that the rate of return

earned by such utility upon the basis of such rates is unjust and unreasonable. In such a proceeding the burden of proof shall be upon the electrical distribution company. (1933, c. 307, s. 7; 1939, c. 365, s. 3; 1941, c. 97; 1945, c. 725; 1947, c. 1008, s. 24; 1949, c. 1132, s. 22; 1959, c. 422; 1963, c. 1165, s. 1; 1971, c. 551; 1973, c. 1444.)

Editor's Note. — The 1973 amendment added subsection (d).

Petition Determined on Basis of Facts Existing When Increase Effective. — The Utilities Commission must determine a petition for an increase in telephone rates on the basis of the facts existing at the time such increase is effective. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

And Commission Cannot Consider Subsequent Events. — The Utilities Commission cannot consider events occurring subsequent to the date certain rates went into effect, to ascertain what were proper rates on that date. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

New Rate on Changed Conditions Relates to Date of Change. — If a subsequent change in conditions warrants a new rate, such new rate must relate to the date of change. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

And Parties Must Be Given Hearing on Effect of Change. — The parties must be accorded an opportunity to be heard with respect to the effect, if any, a subsequent change in conditions had on the rate structure, and a denial of such opportunity would be a deprivation of due process. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Transfer of Exchanges during Pendency of Petition. — Where a telephone company, during the pendency of its petition for an increase in rates, transfers part of its exchanges to a subsidiary, the Utilities Commission, in the exercise of its discretion, may make the subsidiary a formal party and treat the original petition as a joint petition for a uniform system of rates; or it may make the subsidiary a party and fix proper rates for the subsidiary's exchanges and for the original petitioner's exchanges. State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

Language of Subsection (b) Is Permissive. — While the language of subsection (b) gives the Commission authority to suspend changes in rates subject to the time limitation imposed, it does not require that it do so. The language is permissive, not mandatory. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Suspension of Rates May Be Withdrawn or Modified. — Nothing in this section indicates a legislative intent that once the Commission exercises its discretionary power and suspends rates, it thereby necessarily exhausts its authority in that regard so as thereafter to be precluded from withdrawing or modifying the suspension. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

The authority to suspend rates for not more than 270 days clearly includes the power to suspend them for some lesser period. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Suspension Procedure When New or Revised Rate Filed with Commission. — It is entirely consistent with the statutory procedure contemplated by this section that upon the filing with it by a utility of a new or revised rate, the Commission, if it does exercise its discretion to suspend such rate, shall (1) act promptly and suspend the rate for up to the maximum period it is permitted to do so; (2) hold a preliminary hearing, if the Commission should deem this desirable, to receive additional evidence and information; and (3) in the clearer light furnished by the additional information so acquired, reconsider its original order and either modify it or cancel it altogether. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

The Utilities Commission had authority to enter an interim order allowing a power company's initially requested rate increase to go into effect pending final determination of the case, subject to the refund with interest of any portion of the increase ultimately determined to be excessive. State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972).

Applied in State ex rel. North Carolina Util. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utilities Comm'n v. Morgan, 16 N.C. App. 453, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972); State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

§ 62-135. Temporary rates under bond. — (a) Notwithstanding an order of suspension of an increase in rates, any public utility except a common carrier may, subject to the provisions of subsections (b), (c) and (d) hereof, put such suspended rate or rates into effect upon the expiration of six months after the date when such rate or rates would have become effective, if not so suspended, by notifying the Commission and its consumers of its action in making such increase not less than 10 days prior to the day when it shall be placed in effect; provided, however, that utilities engaged in the distribution of utility commodities bought at wholesale by the utility for distribution to consumers may put such suspended rate or rates, to the extent occasioned by changes in the wholesale rate of such utility commodity, into effect at the expiration of 30 days after the date when such rate or rates would become effective if not so suspended; provided that no rate or rates shall be left in effect longer than one year unless the Commission shall have rendered its decision upon the reasonableness thereof within such period. This section to become effective July 1, 1963.

(b) No rate or rates placed in effect pursuant to this section shall result in an increase of more than twenty percent (20%) on any single rate classification of the public utility.

(c) No rate or rates shall be placed in effect pursuant to this section until the public utility has filed with the Commission a bond in a reasonable amount approved by the Commission, with sureties approved by the Commission, or an undertaking approved by the Commission, conditioned upon the refund in a manner to be prescribed by order of the Commission, to the persons entitled thereto of the amount of the excess and interest at the rate of six percent (6%) per annum from the date that such rates were put into effect, if the rate or rates so put into effect are finally determined to be excessive.

(d) If the rate or rates so put into effect are finally determined to be excessive, the public utility shall make refund of the excess plus interest to its customers within 30 days after such final determination, and the Commission shall set forth in its final order the terms and conditions for such refund. If such refund is not paid in accordance with such order, any persons entitled to such refund may sue therefor, either jointly or severally, and be entitled to recover, in addition to the amount of the refund, all court costs and reasonable attorney fees for the plaintiff, to be fixed by the court. (1933, c. 307, s. 7; 1959, c. 422; 1963, c. 1165, s. 1.)

Cross Reference. — See Editor's note to § 62-1.

Purpose. — This section was enacted for the purpose of minimizing the effect of the unavoidable time lag between the filing of an application by a utility company for an increase in its rates for service and the entry of an order of the Commission finding such increase proper. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

This section is a direct exercise of the police power of the State by the legislature itself. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

It prevails over a private contract in conflict therewith. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Prior contracts between a power company and the municipalities do not bar the power company from putting different rates into effect pursuant to this section, pending the final determination by the Commission. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

But Power Company May Not at Will Disregard Such Contract. — The mere existence in the Commission of authority to increase the rates previously specified in a municipal contract does not authorize a power company at its own will to disregard such contract and to charge the other party thereto a higher rate. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Conditions for Putting Proposed Rates into Effect. — This section authorizes the utility to put its proposed rates into effect after the passage of six months from the filing of its application, if no order has been entered by the Commission determining the validity of the proposed rates and if the utility company files its undertaking, approved by the Commission, for a refund of any portion of such rates ulti-

mately disapproved by the Commission. State ex rel. Utilities Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

Consumer Not Entitled to Temporary Order Restraining Rate Increase. — Where a public service company has filed bond with the Utilities Commission and obtained authority from the Commission to put into effect increase in rates in the territory served by it, a municipal corporation is not entitled to a temporary order restraining the service company from putting the rates into effect within the municipality upon the assertion that the increase in rates was contrary to contractual provisions in the franchise granted the public service company by the city, since adequate and efficient remedy is afforded the city and its inhabitants by suit upon the bond in the event the increase in rate was not justified in law, and therefore the municipality could not suffer irreparable injury. City of Durham v. Public Serv. Co. of N.C., Inc., 257 N.C. 546, 126 S.E.2d 315 (1962).

§ 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers. — (a) Whenever the Commission, after a hearing had after reasonable notice upon its own motion or upon complaint of anyone directly interested, finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force, and shall fix the same by order.

(b) All municipalities in the State are deemed to be directly interested in the rates and service of public utilities operating in such municipalities, and may institute or participate in proceedings before the Commission involving such rates or service. Any municipality may institute proceedings before the Commission to eliminate unfair and unreasonable discrimination in rates or service by any public utility between such complainant or its inhabitants and any other municipality or its inhabitants, and the Commission shall, upon complaint, after hearing afforded to the public utility affected and to all municipalities affected, have authority to remove such discrimination.

(c) If any refund is made to a distributing company operating as a public utility in North Carolina of charges paid to the company from which the distributing company obtains the energy, service or commodity distributed, the Commission may, if practicable, in cases where the charges have been included in rates paid by the customers of the distributing company, and where the company had a reasonable return exclusive of the refund, require said distributing company to distribute said refund among said customers in proportion to their payment of the charges refunded. (Ex. Sess. 1913, c. 20, s. 7; C. S., s. 1083; 1933, c. 134, s. 8; c. 307, s. 8; 1937, c. 401; 1941, c. 97; 1963, c. 1165, s. 1.)

Commission to Investigate Rates upon Request. — The Commission may investigate rates upon the request of any person directly interested. It may hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission, and establish such rates as it may deem just. The authority conferred upon the Commission is plenary. Corporation Comm'n ex rel. Raleigh Granite Co. v. Atlantic Coast Line R.R., 187 N.C. 424, 121 S.E. 767 (1924).

The Commission may not fix rates retroactively so as to make them collectible for past service. State ex rel. Utilities Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 580 (1972).

"Complaint Proceeding". — A hearing which involves a single rate or a small part of the rate structure of a public utility is called a "complaint proceeding." It differs from a general rate case in that it deals with an emergency or change of circumstances which does not affect the entire rate structure of the utility and may be resolved without involving the procedure outlined in § 62-133, and does not justify the expense and loss of time involved in such procedure. State ex rel. Utilities Comm'n v. Carolina Power & Light Co., 250 N.C. 421, 109 S.E.2d 253 (1959).

General Rate Case. — A proceeding in which a utility seeks an increase in rates for classes of customers providing its major source of revenue in order to provide funds assertedly necessary for continued operation is a general rate case and not a complaint proceeding, even though the increase is not requested for all classes of customers. State ex rel. Utilities Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

Cited in Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974).

§ 62-137. Scope of rate case. — In setting a hearing on rates upon its own motion, upon complaint, or upon application of a public utility, the Commission shall declare the scope of the hearing by determining whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return. (1963, c. 1165, s. 1.)

Applied in State ex rel. Utilities Comm'n v Morgan, 16 N.C. App. 445, 192 S.E.2d 842 (1972); State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

Cited in State ex rel. Utilities Comm'n v. Beatties Ford Util., Inc., 21 N.C. App. 213, 203 S.E.2d 649 (1974).

§ 62-138. Utilities to file rates, service regulations and service contracts with Commission; publication. — (a) Under such rules as the Commission may prescribe, every public utility:

(1) Shall file with the Commission all schedules of rates, service regulations and forms of service contracts, used or to be used within the jurisdiction of the Commission; and

(2) Shall keep copies of such schedules, service regulations and contracts open to public inspection.

(b) Every regular route common carrier of general commodities and every common carrier of passengers shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of property or passengers in intrastate commerce and all services in connection therewith between points on its own routes and between points on its own routes and points on the routes of other such common carriers, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates.

(c) Every irregular route common carrier shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of property in intrastate commerce between points within the area of its authorized operation, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates between points within the area of its own authorized operation and points on the line or route of such other common carriers.

(d) The schedules required by this section shall be published, filed, and posted in such form and manner and shall contain such information as the Commission may prescribe; and the Commission is authorized to reject any schedule filed with it which is not in compliance with this section. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) No public utility, unless otherwise provided by this Chapter, shall engage in service to the public unless its rates for such service have been filed and published in accordance with the provisions of this section.

(f) Under such rules as the Commission may prescribe, every electric membership corporation operating within this State shall file with the Commission, for information purposes, all rates, schedules of rates, charges, service regulations, and forms of service contracts, used or to be used within the State, and shall keep copies of such schedules, rates, charges, service regulations, and contracts open to public inspection. (1899, c. 164, s. 7; Rev., s. 1109; 1907, c. 217, s. 5; C. S., s. 1074; 1933, c. 134, s. 8; c. 307, s. 4; 1941, c. 97;

1947, c. 1008, s. 25; 1949, c. 1132, s. 23; 1959, c. 209; 1963, c. 1165, s. 1; 1965, c. 287, s. 7.)

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

The contractual obligation to provide water service to a recreational subdivision as well as the actual delivery thereof directly affect a utility's ability to function as a utility. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Landowners in a recreational subdivision who pay availability charges are "consumers" or stand in a consumer-like relationship to the utility providing water service. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

§ 62-139. Rates varying from schedule prohibited; refunding overcharge; penalty. — (a) No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this Article, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules.

(b) Any public utility in the State which shall willfully charge a rate for any public utility service in excess of that prescribed in the schedules of such public utility applicable thereto then filed under this Article, and which shall omit to refund the same within 30 days after written notice and demand of the person overcharged, unless relieved by the Commission for good cause shown, shall be liable to him for double the amount of such overcharge, plus a penalty of ten dollars ($10.00) per day for each day's delay after 30 days from such notice or date of denial or relief by the Commission, whichever is later. Such overcharge and penalty shall be recoverable in any court of competent jurisdiction. (1903, c. 590, ss. 1, 2; Rev., ss. 2642, 2643, 2644; Ex. Sess. 1913, c. 20, ss. 5, 12; C. S., ss. 1082, 1086, 3514; 1933, c. 134, s. 8; c. 307, s. 5; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to charging higher rates after rates reestablished upon reconsideration, see § 62-132. As to venue of action against railroad, see § 1-81.

Constitutionality. — Former § 60-110, prohibiting freight charges in excess of printed tariffs, was not unconstitutional as in violation of the Fourteenth Amendment to the federal Constitution, or the commerce clause of said Constitution, and the acts passed in pursuance thereof. Efland v. Southern Ry., 146 N.C. 135, 59 S.E. 355 (1907); Raleigh Iron Works v. Southern Ry., 148 N.C. 469, 62 S.E. 595 (1908). But see Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

Interstate Shipments. — Under the Interstate Commerce Act, as amended, Congress, in the exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and former § 60-110 was inoperative as to such shipments. Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

For earlier cases holding contra, see Thurston v. Southern Ry., 165 N.C. 598, 81 S.E. 785 (1914); Macon County Supply Co. v. Tallulah Falls R.R., 166 N.C. 82, 82 S.E. 13 (1914).

Assuring Service on Equal Basis Fundamental. — A fundamental basis for the regulation of public utilities is to assure that once monopoly powers have been granted, the utility will provide all of its customers similarly situated with service on a reasonably equal basis. State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Telephone Company Proscribed from Furnishing Free Service to Municipalities. — The Utilities Commission properly proscribes a telephone company from furnishing service to certain municipalities within its territory free or at a reduced rate, and contractual agreements of a telephone company to do so in consideration for franchise rights to use the streets, alleys and roads in such municipalities for its pole line and underground conduits, are void, since such concessions constitute discrimination against other customers similarly situated. State ex rel.

North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

At termination of contract between city and electric company, city officials were doubtful whether it would be advantageous to adopt new schedule of electric company and elected to take current on basis from month to month. It was held that the electric company was not exacting an unlawful rate by billing the city for current on rates contained in the old contract rather than under the new schedule. City of High Point v. Duke Power Co., 34 F. Supp. 339 (M.D.N.C. 1940).

Freight Rates Need Not Be Same for Both Directions. — In shipments to a great distance, special circumstances, such as flow of traffic, may justify a higher rate between two points in one direction than in the opposite; and in action for the recovery of the penalty for excessive freight rates, it is error for the judgment below in effect to charge the jury that such tariff rate published between the two points for freight moving in an opposite direction to that of the shipment in question was conclusive, and that they should be governed in their verdict as to the overcharge accordingly. James H. Scull & Co. v. Atlantic Coast Line R.R., 144 N.C. 180, 56 S.E. 876 (1907).

Recovery of Excess Caused by Error in Tariff Distance Table. — Where carriers charged rates in accordance with the published tariffs on file but because of error in the tariff distance table the charges were excessive, the shippers could recover the excess charged by petition before the Utilities Commission, the remedy by civil action under former §§ 60-110, 62-138 and 62-139 to recover overcharges and penalties being the proper remedy only when the charges were collected in excess of the published tariffs. State ex rel. North Carolina Util. Comm'n v. Norfolk S. Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

Freight Charge on Undelivered Shipment. — Where the defendant collected freight charges, for an entire shipment, as invoiced and originally billed, and the sum of 96 cents was paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge, and failure to refund such overcharge after the 60 days allowed for investigation rendered the defendant liable for the statutory penalty. Cottrell v. Railroad, 141 N.C. 383, 54 S.E. 288 (1906).

Penalty Enforceable though Charges Small. — The penalty fixed by former § 60-110 to enforce the duty of a carrier in regard to proper charges for transporting freight and refund of overcharges, which penalty could not in any event exceed $100, was enforceable for a default established against defendant, though the particular transportation charges might appear disproportionately small. It is on failure to return small amounts wrongfully overcharged that penalties are especially required. In large matters the claimant can better afford the cost of litigation. Efland v. Southern Ry., 146 N.C. 129, 59 S.E. 359 (1907).

Burden of Proving Overcharge. — The burden is upon the plaintiff to show that a freight rate charged and collected by a carrier was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the statutory penalty; and where the shipment has been routed over one line of connecting carriers and the tariff filed by the carrier over another route is shown, it affords no evidence as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit should be granted. Blalock Hdwe. Co. v. Seaboard Air Line Ry., 170 N.C. 395, 86 S.E. 1025 (1915).

Agent as Party Aggrieved. — Where under agreement with his principal the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggrieved, and may maintain his action to recover the excess, and also the penalty when settlement has not been made within 60 days, when he has filed written demand supported by the original freight bill and the original or duplicate bill of lading, etc. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

What Demand Must Specify. — Where the carrier has demanded and received an unlawful freight charge for a shipment, and the party aggrieved has made written demand of the carrier for payment of the overcharge, as required by the statute, it is not necessary, in order to maintain an action for the penalty imposed upon the carrier failing to settle in 60 (now 30) days, that the written demand specify the penalty, or that demand therefor be made in the justice's court or alleged in the complaint filed on appeal therefrom. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

Same — Separate Demands in Same Envelope. — The mere fact that the plaintiff enclosed separate written demands in the same envelope, and gave an aggregate amount thereof, in a letter accompanying them, does not affect the demands, being specific, when the overcharges were separate and distinct, the demand made specifically as to each, accompanied separately with the paid freight bill and duplicate bill of lading, and each demand was complete in itself; and such is a compliance with the provisions of the statute. Efland v. Southern Ry., 146 N.C. 129, 59 S.E. 359 (1907).

§ 62-140. Discrimination prohibited. — (a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section.

(b) The Commission shall make reasonable and just rules and regulations:

(1) To prevent discrimination in the rates or services of public utilities.

(2) To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or misleading or deceiving the public in any manner as to rates charged for the services of public utilities.

(c) No public utility shall offer or pay any compensation or consideration or furnish any equipment to secure the installation or adoption of the use of such utility service except upon filing of a schedule of such compensation or consideration or equipment to be furnished and approved thereof by the Commission, and offering such compensation, consideration or equipment to all persons within the same classification using or applying for such public utility service; provided, in considering the reasonableness of any such schedule filed by a public utility the Commission shall consider, among other things, evidence of consideration or compensation paid by any competitor, regulated or nonregulated, of the public utility to secure the installation or adoption of the use of such competitor's service. Provided, further, that nothing herein shall prohibit a public utility from carrying out any contractual commitment in existence at the time of the enactment hereof, so long as such program does not extend beyond December 31, 1963. For the purpose of this subsection, "public utility" shall include any electric membership corporation operating within this State, and the terms "utility service" and "public utility service" shall include the service rendered by any such electric membership corporation. (1899, c. 164, s. 2, subsecs. 3, 5; Rev., s. 1095; 1913, c. 127, s. 6; C. S., s. 1054; 1933, c. 134, s. 8; c. 307, s. 6; 1941, c. 97; 1963, c. 1165, s. 1; 1965, c. 287, s. 8.)

Editor's Note. — See 11 N.C.L. Rev. 246.

Subsection (a) is similar to § 3 of the Interstate Commerce Act. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N. C. 366, 146 S.E.2d 511 (1966).

Common Law. — Former § 60-5, making discrimination in charges by common carriers a misdemeanor, was declaratory of the common law and secured to every person the right to participate in the use of the facilities furnished, or which it is its duty to furnish, by a common carrier upon terms of equality, in regard to price, and otherwise, and free from unlawful discrimination. Lumber Co. v. Railroad, 141 N.C. 171, 53 S.E. 823 (1906).

The duty now imposed by this section upon privately owned distributors and sellers of electric power not to discriminate in service or rates is merely a development of the common-law obligation of equal and undiscriminating service. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

The obligation of a public service corporation to serve impartially and without unjust discrimination is fundamental. It is not essential that consumers who are charged different rates for service should be competitors in order to invoke this principle. There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953); State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

What Constitutes Unlawful Discrimination. — Discrimination in freight tariffs by railroad companies, means to charge shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886). As to long and short hauls, see § 62-141.

A common carrier is guilty of unlawful discrimination by the principles of the common law, and the terms of the statute, when it charges one person for service rendered a larger sum than is charged another person for like service under substantially similar conditions. Lumber Co. v. Railroad, 141 N.C. 171, 53 S.E. 823 (1906).

A carrier cannot rightfully charge one shipper $2.50 per 1,000 feet for hauling his logs if it, at the same time, for the same service, under substantially similar circumstances, carried logs for other persons at $2.10 per 1,000 feet in consider-

ation of the shipment of the manufactured products over its railroad. Lumber Co. v. Railroad, 141 N.C. 171, 53 S.E. 823 (1906).

There must be no unreasonable discrimination between those receiving the same kind and degree of service. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

But Rates May Differ under Varying Conditions. — The charging of different rates for service rendered under varying conditions and circumstances is not unlawful. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Provided Differences in Service or Conditions Are Substantial. — There must be substantial differences in service or conditions to justify difference in rates. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Any Substantial Ground for Distinguishing between Customers Is Material Factor. — Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material factor in the determination of rates. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Discriminatory Embargoes. — A common carrier cannot place an embargo on its customer or patron so as to discriminate against him or those dealing with him. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

Authority to Allow Use of Availability Charge. — The Utilities Commission has jurisdiction and authority to allow the use of an availability charge in a rate schedule for a recreational subdivision, should any be deserved. State ex rel. Utilities Comm'n v. Carolina Forest Util., Inc., 21 N.C. App. 146, 203 S.E.2d 410 (1974).

Rates for Shipments from Different Origins Need Not Be Equal. — Subsection (a) of this section does not require an equality of rates where the shipments are from different points of origin to the same destination even though the distances be equal or approximately so. State ex rel. Utilities Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

Difference in Service among Customers in the Same Municipality. — The fact that a power company which is a "secondary supplier" directly serves seven customers within a municipality pursuant to the provisions of § 160A-332 but does not directly serve other customers within the municipality does not constitute an "unreasonable preference or advantage" within the meaning of this section. State ex rel. Utilities Comm'n v. Hunt Mfg. Co., 16 N.C. App. 335, 192 S.E.2d 16 (1972).

Different Rate Schedules for Municipalities and Industrial Users of Electrical Energy. — The Commission in determining whether there is a justifiable basis for establishment of different rate schedules for municipalities engaged in resale of electrical energy and industrial users must consider the use characteristics and the load factors as well as the amount of electrical energy purchased under the respective schedules. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

The Commission was justified in placing municipalities engaged in resale of electrical energy, and industrial users, under different schedules based upon a difference in the load factor. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

Right of City to Refuse Service Is Same as Private Company's. — The right of a municipal corporation operating a plant for the distribution and sale of electricity to its inhabitants to refuse to serve is neither greater nor less than that of a privately owned electric power company to do so. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

City May Not Deprive Inhabitant of Service to Compel Obedience to Police Regulations. — A city may not deprive an inhabitant, otherwise entitled thereto, of light, water, or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise enforceable those regulations may be. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

Furnishing free service for municipal purposes in compliance with franchise provisions constitutes an unjust and illegal discrimination. State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Rates charged REA cooperatives were not available to municipalities engaged in resale of electrical energy due to the following factors: (1) The cooperatives were required to extend their lines through sparsely settled rural areas with resulting line losses, and (2) the cooperatives were created and operated on a nonprofit basis pursuant to the established public policy of State and federal government. State ex rel. North Carolina Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

An attempted justification of rate differentials by a classification of power furnished as "secondary" and "primary" was held insupportable on the facts. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Giving Preference to Parent Corporation. — A power company which is a subsidiary of one of its commercial customers may not give a preference to its parent corporation, but must give equal treatment to all its customers similarly situated. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

A railraod carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured products by the same line less for the same service than it charges a shipper who makes no such agreement. Lumber Co. v. Railroad, 136 N.C. 479, 48 S.E. 813 (1904).

Party Entitled to Injunctive Relief. — Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party, and that the shippers would be the real parties in interest, not the contract truck carriers. Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

Recovery of Excess Charges. — Where a higher freight charge was paid than that charged other shippers, the payment was not to be considered voluntary, and the excess could be recovered back upon account for money had and received, and it was not necessary that at the time of payment there should have been any protest. Lumber Co. v. Railroad, 141 N.C. 171, 53 S.E. 823 (1906).

Question for Decision of Court. — Where the Utilities Commission concluded upon undisputed facts that there was no unlawful discrimination by a power company in the rates charged its commercial customers, whether the conclusion was supported by competent, material and substantial evidence in view of the entire record was held to present a question of law for the decision of the court. State ex rel. Utilities Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

Allegations. — There are discriminations which require more explicit allegations, as for instance, illegal rebates upon freight charges and the like, but as the common carrier for hire, the allegation that it gave a person named undue preference by transporting him free ex vi termini alleges discrimination. State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899).

Quoted in State ex rel. Utilities Comm'n v. North Carolina Consumers Council, Inc., 18 N.C. App. 717, 198 S.E.2d 98 (1973).

§ 62-141. Long and short hauls. — (a) Except when expressly permitted by the Commission, it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Chapter to charge and receive as great compensation for a shorter as for a longer distance.

(b) Upon application to the Commission, common carriers may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section. (1899, c. 164, s. 14; Rev., s. 1107; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1; C. S., s. 1072; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-142. Contracts as to rates. — All contracts and agreements between public utilities as to rates shall be submitted to the Commission for inspection that it may be seen whether or not they are a violation of law or the rules and regulations of the Commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing public utilities shall be submitted to the Commission for inspection and approval insofar as they affect the rules and regulations made by the Commission to secure to all persons doing business with such utilities just and reasonable rates. The Commission may make such rules and regulations, as to such contracts and agreements as the public interest may require. (1899, c. 164, s. 6; Rev., s. 1108; C. S., s. 1073; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-143. Schedule of rates to be evidence. — The schedule of rates fixed by statute or under this Article, in suits brought against any public utility involving the rates of a public utility or unjust discrimination in relation thereto, shall be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable. Any such schedule when certified by a clerk of the

Commission as a true copy of a schedule on file with the Commission shall be received in all courts as prima facie evidence of such schedule without further proof, and, if the clerk certifies that said schedule has been approved by the Commission, as prima facie evidence of such approval. (1899, c. 164, s. 7; Rev., s. 1112; C. S., s. 1077; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-144. Free transportation. — (a) All common carriers under the supervision of the Commission shall furnish free transportation to the members of the Commission, and, upon written authority of the Commission, such carriers shall also furnish free transportation to such persons as the Commission may designate in its employ or in the employ of the Department of Motor Vehicles for the inspection of equipment and supervision of safe operating conditions and of traffic upon the highways of the State.

(b) Except as provided in subsection (a), no common carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, commission agents, employees and retired employees, and members of their immediate families: Provided, that common carriers under this Article may exchange free transportation within the limits of this section and may accept as a passenger a totally blind person accompanied by a guide at the usual and ordinary fare charged to one person under such reasonable regulations as may have been established by the carrier and approved by the Commission.

(c) Any person except those permitted by law accepting free transportation shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court.

(d) Nothing in this section shall prohibit the carriage, storage or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable or educational purposes, or the use of passes for journeys wholly within this State which have been or may be issued for interstate journeys under the authority of the United States Interstate Commerce Commission. (1899, c. 164, s. 22; c. 642; 1901, c. 652; c. 679, s. 2; 1905, c. 312; Rev., s. 1105; Ex. Sess. 1908, c. 144, s. 4; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C. S., ss. 1069, 1070, 3492; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1132, s. 27; 1953, c. 1279; 1963, c. 1165, s. 1.)

Unlawful Transportation. — The transportation, by a common carrier, of any person except of the classes specified without charge, is unlawful, the offense being the actual free transportation and not the issuance of the free pass. State v. Southern Ry., 122 N.C. 1052, 30 S.E. 133 (1898).

A gratuitous passenger is not in pari delicto with the common carrier. McNeill v. Railroad, 135 N.C. 682, 47 S.E. 765 (1904).

Injury While Riding on Pass Illegally Issued. — The rights, privileges and protection attaching to the relation of the passenger are imposed by law upon common carriers upon consideration of the public policy, independent of contract, and arise from the nature of their public employment. Hence, one injured while riding on a pass illegally issued may recover from the railroad. McNeill v. Railroad, 135 N.C. 682, 47 S.E. 765 (1904).

Construction of Penal Statute. — In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally, and by private individuals and officials, will not be considered. State v. Southern Ry., 122 N.C. 1052, 30 S.E. 133 (1898).

§ 62-145. Rates between points connected by more than one route. — When there is more than one route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by the Commission for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the

shorter route. (Ex. Sess. 1913, c. 20, s. 11; C. S., s. 1085; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Mileage is calculated over the shortest rail line between the point of origin and the point of delivery. State ex rel. North Carolina Util. Comm'n v. Norfolk Southern Ry., 249 N.C. 477, 106 S.E.2d 681 (1959).

§ 62-146. Rates and service of motor common carriers. — (a) It shall be the duty of every common carrier by motor vehicle to provide safe and adequate service, equipment, and facilities for transportation in intrastate commerce and to establish, observe and enforce just and reasonable regulations and practices relating thereto, and, in the case of property carriers, relating to the manner and method of presenting, marking, packing and delivering property for transportation in intrastate commerce.

(b) Except under special conditions and for good cause shown, a common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle; and such common carrier may establish, with the prior approval of the Commission, such routes, joint rates, charges and classifications with any irregular route common carrier by motor vehicle, or any common carrier by rail, express, or water.

(c) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through rates with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, and the carrying of personal, sample and excess baggage.

(d) In case of joint rates between common carriers, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein, which shall not unduly prefer or prejudice any of such participating carriers. Upon investigation and for good cause, the Commission may, in its discretion, prohibit the establishment of joint rates or service.

(e) Any person may make complaint in writing to the Commission that any rate, classification, rule, regulations, or practice in effect or proposed to be put into effect, is or will be in violation of this Article. Whenever, after hearing, upon complaint or in an investigation or its own initiative, the Commission shall be of the opinion that any individual or joint rate demanded, charged, or collected by any common carrier or carriers by motor vehicle, or by any such common carrier or carriers in conjunction with any other common carrier or carriers, for transportation of property in intrastate commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate or the minimum or maximum, or the minimum and maximum rate thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective, and in the case of passenger carriers, the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes, and joint rates, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maximum or

minimum, or maximum and minimum to be charged, and the terms and conditions under which such through routes shall be operated.

(f) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of the opinion that the divisions of joint rates applicable to the transportation of property in intrastate commerce between a common carrier by motor vehicle and another carrier are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers; and in cases where the joint rate or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers in accordance with the order from the date of filing the complaint or entry of order of investigation or such other dates subsequent thereto as the Commission finds justified, and in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

(g) In any proceeding to determine the justness or reasonableness of any rate of any common carrier by motor vehicle, there shall not be taken into consideration or allowed as evidence any elements of value of the property of such carrier, good will, earning power, or the certificate under which such carrier is operating, and such rates shall be fixed and approved, subject to the provisions of subsection (h) hereof, on the basis of the operating ratios of such carriers, being the ratio of their operating expenses to their operating revenues, at a ratio to be determined by the Commission; and in applying for and receiving a certificate under this Chapter any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of every transferee of such certificate or of any part thereof.

(h) In the exercise of its power to prescribe just and reasonable rates and charges for the transportation of property in intrastate commerce by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon movement of traffic by the carrier or carriers for which rates are prescribed; to the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers under honest, economical, and efficient management to provide such service.

(i) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. This section shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that in cases of conflict between such other provisions and this section, this section shall prevail for motor carriers. (1947, c. 1008, s. 24; 1949, c. 1132, s. 22; 1963, c. 1165, s. 1.)

Subsection (c) of this section encourages cooperation and agreements between common carriers respecting their service to the public. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Authority to transport general commodities includes authority to transport meats and packing house products. State ex rel. Utilities Comm'n v. Forbes Transf. Co., 259 N.C. 688, 131 S.E.2d 452 (1963).

Duty to Establish Joint Rates and Divide Revenues. — Motor carriers of freight in intrastate commerce who exchange freight in the course of delivery are not only given authority

but are required to establish joint rates, and provide for the division of revenues derived from such shipments by contract, subject only to the limitation that the contract shall not unduly prefer or prejudice any of the participating carriers. State ex rel. Utilities Comm'n v. Thurston Motor Lines, 240 N.C. 166, 81 S.E.2d 404 (1954).

Authority of Commission to Interfere with Division of Revenue from Interchanged Freight. — The Utilities Commission is given authority to intervene and vacate a contract for division of revenue from interchanged freight between two intrastate motor carriers only upon its finding after hearing the contractual agreement between the carriers for the division of revenue from such shipments is, or will be, unjust, unreasonable and inequitable, or unduly preferential or prejudicial as between the contracting carriers, and when an order is entered by the Commission without such jurisdictional finding, the cause must be remanded. A finding merely that the Commission does not accept the contractual practice of the carriers as being equitable is insufficient. And the provision of subsection (d), giving the Commission discretionary power to prohibit the establishment of joint rates, is inapplicable. State ex rel. Utilities Comm'n v. Thurston Motor Lines, 240 N.C. 166, 81 S.E.2d 404 (1954).

Mileage alone is not a sufficient basis for the determination of intrastate rates by the Utilities Commission, but the Commission must consider all factors involved in rate making, including competition from interstate carriers, the different modes of transportation, the topography and volume of business as affecting costs, etc. State ex rel. Utilities Comm'n v. North Carolina Motor Carriers Ass'n, 253 N.C. 432, 117 S.E.2d 271 (1960).

"Operating Ratios". — The operating ratios for the movement of tobacco in intrastate traffic cannot be determined with mathematical exactitude. But the carriers can no doubt approximate the rateable proportion of their operating ratios from tobacco movements in intrastate traffic and offer evidence of other facts and circumstances in respect thereto sufficient in probative force to enable the Commission to make findings of fact and to issue such orders as the findings of fact may warrant. State ex rel. North Carolina Util. Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968).

An operating ratio of 100% means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses. State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

An operating ratio of 100% means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses. When the operating ratio exceeds 100%, it means that the expenses exceed the revenues. The lower the operating ratio, the more profitable the operation is to the carrier. State ex rel. North Carolina Util. Comm'n v. Attorney Gen., 2 N.C. App. 657, 163 S.E.2d 638 (1968).

Basis for Determination of Ratios. — A determination of intrastate operating ratios must be based on revenues and expenses incurred in North Carolina alone, and where ratios do not reflect an actual separation of intrastate and interstate revenues and expenses, a rate increase based thereon cannot be sustained. State ex rel. Utilities Comm'n v. Motor Carriers' Traffic Ass'n, 16 N.C. App. 515, 192 S.E.2d 580 (1972).

Carriers have legal right to contract inter se, and the law encourages cooperation and agreements between them respecting their service to the public. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

§ 62-147. Rates of motor contract carriers. — (a) It shall be the duty of every contract carrier to establish and observe reasonable minimum rates for any service rendered or to be rendered in the transportation of property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates. It shall be the duty of every contract carrier to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates of such carrier actually maintained and charged for the transportation of property in intrastate commerce, and any rule, regulation, or practice affecting such rates and the value of the service thereunder. No such contract carrier, unless otherwise provided by this Article, shall engage in transportation in intrastate commerce unless the minimum rates for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this Article. No reduction shall be made in any such rate either directly or by means of any change in any rule, regulation or practice affecting such rate or the value of service thereunder, except after 30 days' notice of the proposed change filed in

the aforesaid form and manner, but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the rates filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum rates so filed or prescribed; provided, that any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the policy declared in this Chapter.

(b) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate, or the value of the service thereunder, contravenes the policy declared in this Chapter, or is in contravention of any provision of this Chapter, the Commission may prescribe such just and reasonable minimum rate, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this Chapter. Such minimum rate, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this Chapter, which the Commission may find to be undue or inconsistent with the public interest and the policy declared in this Chapter, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(c) Whenever there shall be filed with the Commission by any such contract carrier any schedule stating a rate for a new service or a reduced rate, directly or by means of any rule, regulation, or practice, for transportation in intrastate commerce, the Commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, or such rule, regulation, or practice, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change in any rate or rule, regulation, or practice shall go into effect at the end of such period. After hearing, whether completed before or after the rate, or rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it has become effective.

(d) At any hearing before the Commission under this paragraph, the burden of proof shall be upon the carrier to show that the changed rate, rule, regulation

or practice, or the proposed changed rate, rule, regulation or practice, is just and reasonable.

(e) If any provision of this section is in conflict with any other provision of this Chapter, the provisions of this section shall prevail. (1947, c. 1008, s. 26; 1949, c. 1132, s. 24; 1963, c. 1165, s. 1.)

The word "tariff," used in connection with the rates of a common carrier, does not have any special legal significance that would differentiate it in effect from the word "rates," used in this section in connection with a contract carrier. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

§ 62-148. Rates on leased or controlled utility. — If any public utility operating in the State other than a motor carrier is owned, controlled or operated by lease or other agreement by any other public utility doing business in the State, its rates may, in the discretion of the Commission, be determined for such public utility by the rates prescribed for the public utility which owns, controls or operates it. (Ex. Sess. 1908, c. 144, s. 2; C. S., s. 3490; 1963, c. 1165, s. 1.)

§ 62-149. Unused tickets to be redeemed. — Whenever any ticket is sold and is not wholly used by the purchaser, it shall be the duty of the carrier selling such ticket to redeem it or the unused portion thereof at the price paid for it, or in such manner and at such price as the Commission shall prescribe by regulation. (1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418; Rev., s. 2627; C. S., s. 3503; 1963, c. 1165, s. 1.)

§ 62-150. Ticket may be refused intoxicated person; penalty for prohibited entry. — The ticket agent of any common carrier of passengers shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, driver or other person in charge of any conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such conveyance. If any intoxicated person, after being forbidden by the conductor, driver or other person having charge of any such conveyance for the use of the traveling public, shall enter such conveyance, he shall be guilty of a misdemeanor. (1885, c. 358, ss. 1, 2, 3; Rev., ss. 2625, 2626, 3757; C. S., s. 3504; 1963, c. 1165, s. 1.)

When Exemplary Damages Allowed. — In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult. Story v. Norfolk & S.R.R., 133 N.C. 59, 45 S.E. 349 (1903).

§ 62-151. Passenger refusing to pay fare or violating rules may be ejected. — If any passenger shall refuse to pay his fare, or be or become intoxicated, or violate the rules of a common carrier, it shall be lawful for the conductor or driver of the train or bus, or other conveyance, and servants of the carrier, on stopping the conveyance, to put him and his baggage out of the conveyance, using no unnecessary force. (1871-2, c. 138, s. 34; Code, s. 1962; Rev., s. 2629; C. S., s. 3507; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, s. 11; 1963, c. 1165, s. 1.)

Cross Reference. — As to action for damages for wrongful ejection, see also note to § 62-233.

Permission to Ride in Express Car. — Where a party shipped horses by express with an agreement that he should ride in the same car, he cannot ride in the passenger coach without paying his fare. Teeter v. Southern Express Co., 172 N.C. 616, 90 S.E. 761 (1961).

Ejecting Person from Baggage Car. — A person who gets on a blind baggage car, though he has a ticket, and does not tell the conductor that he has it, and the conductor does not see it, is not

entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Railroad, 135 N.C. 264, 47 S.E. 758 (1904).

Mileage Book Holder Must Comply with Terms. — The holder of a mileage book must comply with its terms if reasonable opportunity is given, or he may be ejected. Mason v. Seaboard Air Line Ry., 159 N.C. 183, 75 S.E. 25 (1912); McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

Ejection of Party Refusing to Show Mileage Book. — When a purchaser of a mileage book from a railroad company is riding on an exchange ticket and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Mason v. Seaboard Air Line Ry., 159 N.C. 183, 75 S.E. 25 (1912).

Evidence of Drunkenness Inadmissible. — In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff was not admissible, where the answer simply denied the wrongful ejection alleged in the complaint. Raynor v. Wilmington Seacoast R.R., 129 N.C. 195, 39 S.E. 821 (1901).

Ejection Caused by Failure of Conductor to Return Ticket. — Where the conductor failed to return a ticket to a passenger to be used on another train, and the passenger was ejected therefrom for lack of the ticket, the railroad is liable for all damages attending the ejection. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Reliance on Agent's Statements. — The purchaser of a ticket may rely upon the statements of the railroad agent as to trains, connection, validity of ticket, etc., and if the passenger is ejected as a result of the agent's mistake the railroad is liable. Hallman v. Southern Ry., 169 N.C. 127, 85 S.E. 298 (1915); Creech v. Atlantic Coast Line R.R., 174 N.C. 61, 93 S.E. 453 (1917).

Carrier Not Liable for Unusual Results. — A conductor requiring an intoxicated man to leave the train for nonpayment of fare did not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893).

As to requirement of former statute that passenger be ejected near usual stopping place or dwelling house, see Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893); Bullock v. Atlantic Coast Line R.R., 152 N.C. 66, 67 S.E. 60 (1910); McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

§ 62-152. Carriers to establish joint rates. — Any railroad is authorized and directed to enter into arrangements for the establishment of joint rates and through routes with common carriers by water and with other railroads for the transportation of persons and property transported wholly within the State of North Carolina, and it may, with approval of the Commission, establish such joint rates with common carriers by motor vehicle under the provisions of G.S. 62-146. (1931, c. 195; 1963, c. 1165, s. 1.)

§ 62-153. Contracts of public utilities with certain companies and for services. — (a) All public utilities shall file with the Commission copies of contracts with any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency, and when requested by the Commission, copies of contracts with any person selling service of any kind. The Commission may disapprove, after hearing, any such contract if it is found to be unjust or unreasonable, and made for the purpose or with the effect of concealing, transferring or dissipating the earnings of the public utility. Such contracts so disapproved by the Commission shall be void and shall not be carried out by the public utility which is a party thereto, nor shall any payments be made thereunder. Provided, however, that in the case of motor carriers of passengers this subsection shall apply only to such contracts as the Commission shall request such carriers to file.

(b) No public utility shall pay any fees, commissions or compensation of any description whatsoever to any affiliated or subsidiary holding, managing, operating, constructing, engineering, financing or purchasing company or agency for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the Commission and obtaining its approval. Provided, however, that this subsection shall not apply to motor

carriers of passengers. (1931, c. 455; 1933, c. 134, s. 8; c. 307, s. 17; 1941, c. 97; 1963, c. 1165, s. 1.)

Affiliate Company Cannot Be Used to Transmit Unreasonable Profits to Parent Company. — The Commission cannot permit parent holding companies to use affiliate companies as a device for transmitting an unreasonable level of profits to such parent holding company from goods or services supplied the operating company by way of an affiliate company. State ex rel. Utilities Comm'n v. Morgan, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Stated in State ex rel. Utilities Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972).

§ 62-154. Surplus power rates. — The Commission is authorized to investigate the sale of surplus electric power and the rates made for such energy, and to prescribe reasonable rules and rates for such sales. (1963, c. 1165, s. 1.)

§§ 62-155 to 62-159: Reserved for future codification purposes.

ARTICLE 8.

Securities Regulation.

§ 62-160. Permission to pledge assets. — No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the Commission and by order obtain its permission so to do. (1933, c. 307, s. 17; 1963, c. 1165, s. 1.)

§ 62-161. Assumption of certain liabilities and obligations to be approved by Commission; refinancing of public utility securities. — (a) No public utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by such utility, and after investigation by the Commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the Commission by order authorizes such issue or assumption.

(b) The Commission shall make such order only if it finds that such issue or assumption is (i) for some lawful object within the corporate purposes of the public utility, (ii) is compatible with the public interest, (iii) is necessary or appropriate for or consistent with the proper performance by such utility of its service to the public and will not impair its ability to perform that service, and (iv) is reasonably necessary and appropriate for such purpose.

(c) Any such order of the Commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the public utility making such application.

(d) If a public utility shall apply to the Commission for the refinancing of its outstanding shares of stock by exchanging or redeeming such outstanding shares, the exchange or redemption of such shares of any dividend rate or rates, class or classes, may be made in whole or in part, in the manner and to the extent approved by the Commission, notwithstanding any provisions of law applicable to corporations in general: Provided, that the proposed transactions are found by the Commission to be in the public interest and in the interest of consumers and investors, and provided that any redemption shall be at a price or prices,

not less than par, and at a time or times, stated or provided for in the utility's charter or stock certificates. (1933, c. 307, s. 18; 1945, c. 656; 1963, c. 1165, s. 1.)

Common Capital Stock of Corporation Is Security. — The common capital stock of a corporation is a security within the meaning of that term as used in this section and § 62-162. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

Cited in State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

§ 62-162. Commission may approve in whole or in part or refuse approval. — The Commission, by its order, may grant or deny the application provided for in the preceding section [G.S. 62-161] as made, or may grant it in part or deny it in part or may grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which any securities so authorized or the proceeds thereof may be applied; subject always to the requirements of the foregoing section [G.S. 62-161]. (1933, c. 307, s. 19; 1963, c. 1165, s. 1.)

Common Capital Stock as Security. — See note to § 62-161.

Commission Has Authority to Control Issuance and Sale of Capital Stock. — In view of the language used by the legislature in conferring power of the Utilities Commission to supervise and control the issue and sale of securities by a public utility, the Commission had the authority not only to veto the sale of unissued common stock of a utility at par but also to impose the condition that such stock should be sold at a price not less than $125.00 per share. State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

§ 62-163. Contents of application for permission. — Every application for authority for such issue or assumption shall be made in such form and contain such matters as the Commission may prescribe. Every such application and every certificate of notification hereinafter provided for shall be made under oath, signed and filed on behalf of the public utility by its president, a vice-president, auditor, comptroller, or other executive officer duly designated for that purpose by such utility. (1933, c. 307, s. 20; 1963, c. 1165, s. 1.)

§ 62-164. Applications to receive immediate attention; continuances. — All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the Commission's docket and disposed of promptly, and all such applications shall be disposed of in 30 days after the same are filed with the Commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is continued beyond 30 days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. (1933, c. 307, s. 21; 1963, c. 1165, s. 1.)

§ 62-165. Notifying Commission as to disposition of securities. — Whenever any securities set forth and described in any such application for authority or certificate of notification as pledged or held unencumbered in the treasury of the utility shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of, by the utility, such utility shall, within 10 days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission. (1933, c. 307, s. 22; 1963, c. 1165, s. 1.)

§ 62-166. No guarantee on part of State. — Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the State of North Carolina. (1933, c. 307, s. 23; 1963, c. 1165, s. 1.)

§ 62-167. Article not applicable to note issues and renewals; notice to Commission. — The provisions of the foregoing sections shall not apply to notes issued by a utility for proper purposes and not in violation of law, payable at a period of not more than two years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two years from date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes, and shall not apply to renewals thereof from time to time not exceeding in the aggregate six years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two years from the date thereof, shall, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities or another kind of any term or character or from the proceeds thereof without the approval of the Commission. Within 10 days after the making of any such notes, so payable at periods of not more than two years from the date thereof, the utility issuing the same shall file with the Commission a certificate of notification, in such form as may be determined and prescribed by the Commission. (1933, c. 307, ss. 24, 25; 1963, c. 1165, s. 1.)

§ 62-168. Not applicable to debentures of court receivers. — Nothing contained in this Article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtained in receivership proceedings in courts of equity. (1933, c. 307, s. 25; 1963, c. 1165, s. 1.)

§ 62-169. Periodical or special reports. — The Commission shall require periodical or special reports from each public utility issuing any security, including such notes payable at periods of not more than two years from the date thereof, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds. (1933, c. 307, s. 26; 1963, c. 1165, s. 1.)

§ 62-170. Failure to obtain approval not to invalidate securities or obligations; noncompliance with Article, etc. — (a) Securities issued and obligations and liabilities assumed by a public utility, for which the authorization of the Commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption.

(b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this Article or rule or regulation of the Commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto.

(c) A copy of any order made and entered by the Commission and certified by a clerk of the Commission approving the issuance of any securities or the assumption of any obligation or liability by a public utility shall be sufficient evidence of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order.

(d) Any public utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the Commission with respect thereto, contrary to the provisions of this Article, shall be liable to a penalty of not more

than ten thousand dollars ($10,000), but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the Commission with respect thereto shall likewise be in general terms. (1933, c. 307, s. 27; 1963, c. 1165, s. 1.)

§ 62-171. Commission may act jointly with agency of another state where public utility operates. — If a commission or other agency or agencies is empowered by another state to regulate and control the amount and character of securities to be issued by any public utility within such other state, then the Utilities Commission of the State of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this State, and shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the State of North Carolina if said issue is separately approved by the Utilities Commission of the State of North Carolina. (1933, c. 134, s. 8; c. 307, s. 28; 1941, c. 97; 1963, c. 1165, s. 1.)

§§ 62-172 to 62-179: Reserved for future codification purposes.

ARTICLE 9.

Acquisition and Condemnation of Property.

§ 62-180. Use of railroads and public highways. — Any person operating electric power, telegraph or telephone lines or authorized by law to establish such lines, has the right to construct, maintain and operate such lines along any railroad or public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder unreasonably the usual travel on such railroad or highway. (1874-5, c. 203, s. 2; Code, s. 2007; 1899, c. 64, s. 1; 1903, c. 562; Rev., s. 1571; C. S., s. 1695; 1939, c. 228, s. 1; 1963, c. 1165, s. 1.)

Cross Reference. — As to power of county to condemn property already devoted to public use and owned by a public service corporation, see § 153A-160.

Constitutionality. — The provisions of former §§ 56-1 to 56-10, empowering electric power or lighting companies, etc., to comdemn lands for the erection of poles, establishment of offices, and other appropriate purposes, were constitutional and valid. Wissler v. Yadkin River Power Co., 158 N.C. 465, 74 S.E. 460 (1912).

Foreign Companies. — The right to construct and operate telegraph lines along any railroad or other public highway in the State, and to obtain the right-of-way therefor by a condemnatory proceeding, was expressly conferred upon any telegraph company incorporated by this or by any other state. North Carolina & R. & D.R.R. v. Carolina Cent. Ry., 83 N.C. 489 (1880); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

No Rights over Private Land. — Former § 56-1 applied to constructing lines along the highway and not to constructing the lines over private land. Wade v. Carolina Tel. & Tel. Co., 147 N.C. 219, 60 S.E. 987 (1908).

An Additional Burden. — A telegraph line along a railroad and on the right-of-way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902); Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903); Query v. Postal Tel. Cable Co., 178 N.C. 639, 101 S.E. 390 (1919). The same rule applies to electric light wires placed along the street. Brown v. Electric Co., 138 N.C. 533, 51 S.E. 62 (1905). But the construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied. Hester v. Traction Co., 138 N.C. 288, 50 S.E. 411 (1905).

§ 62-181. Electric and hydroelectric power companies may appropriate highways; conditions. — Every electric power or hydroelectric power corporation, person, firm or copartnership which may exercise the right of eminent domain under the Chapter Eminent Domain, where in the development of electric or hydroelectric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the public road authorities having supervision of such public highway, shall have power to appropriate said public highway for the development of electric or hydroelectric power: Provided, that said electric power or hydroelectric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the public road authorities having supervision of such public highway: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road. (1911, c. 114; C. S., s. 1696; 1939, c. 228, s. 2; 1963, c. 1165, s. 1.)

Cross Reference. — As to what corporations, etc., may exercise the right of eminent domain, see § 40-2.

Change in Section of Highway. — Where a hydroelectric power company has appropriated a section of a public highway and built another section in lieu thereof, the provision of the statute that the company pay all damages assessed as provided by law does not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. Crowell v. Tallassee Power Co., 200 N.C. 208, 156 S.E. 493 (1931).

§ 62-182. Acquisition of right-of-way by contract. — Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right-of-way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation. (1874-5, c. 203, s. 3; Code, s. 2008; 1899, c. 64; 1903, c. 562, ss. 1, 2; Rev., s. 1572; C. S., s. 1697; 1963, c. 1165, s. 1.)

Cross Reference. — As to recording deeds of easement, see § 47-27.

Owner Must Grant Easement. — A railroad company, not being the owner of the soil, cannot grant an easement to a telegraph company. Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903). See also Narron v. Wilmington & W.R.R., 122 N.C. 856, 29 S.E. 356 (1898).

How Easement Acquired. — A telegraph company can acquire an easement in lands for construction and maintenance of its lines by grant, or pursuant to statute, or by adverse and continuous use for the period of 20 years. Teeter v. Postal Tel. Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

§ 62-183. Grant of eminent domain; exception as to mills and water powers. — Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right-of-way over the lands, privileges and easements of other persons and corporations, including rights-of-way for the construction, maintenance, and operation of pipelines for transporting fuel to their power plants; and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or powerhouses, with the right to divert the water from such ponds or reservoirs, and conduct the same by flume, ditch, conduit, waterway or pipeline, or in any other manner, to the point of use for the generation of power at its said

powerhouses, returning said water to its proper channel after being so used. Nothing in this section authorizes interference with any mill or power plant actually in process of construction or in operation; or the taking of water powers, developed or undeveloped, with the land adjacent thereto necessary for their development: Provided, however, that if the court, upon filing of the petition by such electric power or lighting company, shall find that any mill, excepting cotton mills now in operation, whether operated by water power or otherwise, together with the lands and easements adjacent thereto or used on connection therewith, or that any water power, developed or undeveloped, with land adjacent thereto necessary for its development, excepting any water power, right or property of any person, firm or corporation engaged in the actual service of the general public where such water power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public, is necessary for the development of any hydroelectric power plant which is to be operated for the purpose of generating electric power for sale to the general public, and that said electric power or lighting company is unable to agree for the purchase of such property with the owners thereof, and that the failure to acquire such property will affect the ability of such electric power or lighting company to supply power to the general public, and that the taking of such mill or water power will be greatly more to the benefit of the public than the continued existence of such mill or the continuation of the existing ownership of such water power, then the court, upon such finding, shall make an order authorizing the condemnation of such property and easements in all respects as in the cases of other property referred to in this section. Any provisions in conflict with this Chapter in any special charters granted before January 31, 1907, in respect to the exercise of the right of eminent domain are repealed. (1874-5, c. 203, s. 4; Code, s. 2009; 1899, c. 64; 1903, c. 562; Rev., s. 1573; 1907, c. 74; C. S., s. 1698; 1921, c. 115; 1923, c. 60; 1925, c. 175; 1957, c. 1046; 1963, c. 1165, s. 1.)

Cross Reference. — As to the right of eminent domain in general, see § 40-1 et seq.

Editor's Note. — As to former statutes prohibiting or restricting interference with mills, power plants and water powers, see 1 N.C.L. Rev. 290; 3 N.C.L. Rev. 144.

The General Assembly originally exempted "water powers, developed or undeveloped with the necessary land adjacent thereto for their development" for the purpose of preventing the acquisition of all of the water powers by one or more of the great aggregations of capital. Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 169 N.C. 471, 86 S.E. 296 (1915).

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Right Granted for Public Benefit. — The power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. Wissler v. Yadkin River Power Co., 158 N.C. 465, 74 S.E. 460 (1912).

Limitation of Right of Eminent Domain. — The statute limits the right of eminent domain and any special power claimed by the charter must clearly appear. Yadkin River Power Co. v. Whitney Co., 150 N.C. 31, 63 S.E. 188 (1908). See Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 169 N.C. 471, 86 S.E. 296 (1915).

The right of eminent domain is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Thomason v. Railroad, 142 N.C. 318, 55 S.E. 205 (1906); Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

Effect of Federal Statute. — See Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Quasi-Public Corporations Also Conducting Business of Private Character. — Where a charter is granted a corporation, conferring quasi-public as well as private condemned lands when so empowered, in powers, the corporation may proceed to pursuance of its business of a quasi-public nature, and this will not be denied it because it was authorized to conduct a business of a private character. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N.C. 248, 88 S.E. 349 (1916).

Compensation Essential. — Private property may not be taken for public use, directly or indirectly, without just compensation. Phillips v.

Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902). See §§ 40-16, 40-17 as to fixing compensation.

Conflict of Claims. — Where the claims of two companies conflict, the prior right belongs to that company which first defines and marks its route. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N.C. 248, 88 S.E. 349 (1916).

Effect of Subsequent Charter. — Where a legislative charter has been granted since a statute was passed, the powers given therein are not subject to the restriction of the statute. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N.C. 248, 88 S.E. 349 (1916).

Extent of Rights Usually Determined by Companies. — The extent of the rights to be acquired is primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive or manifest abuse of their discretion. Carolina Cent. Ry. v. Love, 81 N.C. 434 (1879), cited and distinguished, Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

Burden of Proof on Defendant. — Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provision of the statute excepting them. Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 171 N.C. 314, 88 S.E. 245 (1916).

Land Used in Developing Power. — A public service corporation, owning lands on one bank of stream, cannot condemn across the stream and take the water rights held in the stream by another public service corporation, when it appears that the defendant holds its lands across the stream to supply power to operate its electric light and power plant, with which it is supplying such light and power to its patrons. Blue Ridge Interurban R.R. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913); Blue Ridge Interurban Ry. v. Hendersonville Light & Power Co., 169 N.C. 471, 86 S.E. 296 (1915).

Applied in Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1949).

§ 62-184. Dwelling house of owner, etc., may be taken under certain cases. — The dwelling house, yard, kitchen, garden or burial ground of the owner may be taken under G.S. 62-183 when the company alleges, and upon the proceedings to condemn makes it appear to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five percent (75%) of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; or when the Commission, upon the petition filed by the company, shall, after due inquiry, so authorize. Nothing in this section repeals any part or feature of any private charter, but any firm or corporation acting under a private charter may operate under or adopt any feature of this section. (1907, c. 74; 1917, c. 108; C. S., s. 1699; 1933, c. 134, ss. 7, 8; 1963, c. 1165, s. 1.)

§ 62-185. Condemnation on petition; parties' interests only taken; no survey required. — When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right-of-way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it is lawful for such company, first giving security for costs, to file its petition before the superior court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right-of-way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right-of-way be made a party defendant.

Only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right-of-way of a railroad or railway company sought to be condemned extends into or through more counties

than one, the whole right and controversy may be heard and determined in one county into or through which such right-of-way extends.

It is not necessary for the petitioner to make any survey of or over the right-of-way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors. (1874-5, c. 203, s. 5; Code, s. 2010; 1899, c. 64, s. 2; 1903, c. 562; Rev., s. 1574; C. S., s. 1700; 1963, c. 1165, s. 1.)

Telegraph, etc., Company Alone Can File Petition. — The telegraph, etc., company alone has the right to file the petition in condemnation proceedings. The landowner is not given such right. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Condemnation Not Confined to Right-of-Way. — The power of condemnation is not confined to a right-of-way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

No Entry Until Damage Paid. — A telegraph company seeking to condemn a right-of-way for its line cannot be authorized to enter into possession and construct its line until the damages have been assessed and paid into court. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Permanent Damage Awarded. — Permanent damages may be awarded a landowner who was injured by telegraph poles placed on his land. And the company then acquires an easement. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902); Lamberth v. Southern Power Co., 152 N.C. 371, 67 S.E. 921 (1910).

Subsequent Purchaser May Recover Damages. — A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and right to maintain its line thereon. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Limitation of City Authority. — Authority granted by a city to the defendant electric company to remove a shade tree in front of the plaintiff's home in order to put up its poles and wires does not justify the act of the defendant in removing the tree; the city has no power to deprive the plaintiff of his own property for such purpose without compensation. Brown v. Electric Co., 138 N.C. 533, 51 S.E. 62 (1905).

When Jury Trial Necessary. — While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question as to whether the character of the lands is such as to be embraced within the right conferred, or within an exception to that right under the terms of a statute. Blue Ridge Interurban R.R. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913).

Condemnation of Railroad Right-of-Way. — The words "right-of-way" are not used as synonymous with "easement," but, as applied to railroads, they include in their meaning the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owns only an easement therein or the title in fee. Postal Tel. Cable Co. v. Southern Ry., 90 F. 30 (W.D.N.C. 1898).

Same — Petition Need Not State Railroad Company's Tenure. — It is not necessary that a petition asking for the condemnation of a right-of-way over the right-of-way of a railroad should state by what tenure the railroad company holds. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Same — Proceeding Does Not Affect Landowner Not a Party. — Condemnation proceeding by a telegraph company against a railroad company to condemn the right-of-way, to which the landowner is not a party, gives no rights against the landowner, but gives rights only against the parties before the court. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Limitation of Federal Statute. — The federal statute authorizing telegraph companies to construct their lines over and along any military or post roads of the United States does not give such companies the right to build their lines over the right-of-way of a railroad or other private property without the consent of the owner, or the condemnation of the right-of-way over such property in accordance with the laws of the state where situated. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Judgment Necessary to Give Vested Right under Prior Act. — In order to acquire a vested right under a statute to condemn lands, which has subsequently been repealed, it is necessary to show a finality by judgment in the proceedings before the later act has become effective; and where it appears that the summons was served in time, but that the prosecution bond, made a prerequisite by § 1-109, was not, no vested right in the former statute can be acquired by the further prosecution of the condemnation proceedings. Blue Ridge Interurban R.R. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913).

§ 62-186. Copy of petition to be served. — A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least 10 days prior to the presentation of the same to the said court. (1874-5, c. 203, s. 6; Code, s. 2011; 1899, c. 64, s. 3; Rev., s. 1575; C. S., s. 1701; 1963, c. 1165, s. 1.)

Cross Reference. — As to failure to serve prosecution bond, see note to § 62-185.

§ 62-187. Proceedings as under eminent domain. — The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Article 2 entitled Condemnation Proceedings of the Chapter entitled Eminent Domain. (Code, s. 2012; 1899, c. 64; 1903, c. 562; Rev., s. 1576; C. S., s. 1702; 1963, c. 1165, s. 1.)

Cross Reference. — As to eminent domain in general, see § 40-1 et seq.

Editor's Note. — "Court or judge" has been substituted for "court of judge" near the middle of this section.

This section refers to proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to the proceedings after the parties are all before the court. Hence § 40-12, as to filing and service, does not apply. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

Amendments to Eminent Domain Statute. — An earlier form of this section provided that eminent domain proceedings on the part of telegraph companies "shall be as prescribed in this chapter for condemning lands to the use of railroad companies." It was held that this provision incorporated into the telegraph statute the provisions of the railroad statute referred to, only as they existed at the time of the enactment, and not as thereafter amended. Postal Tel. Cable Co. v. Southern Ry., 89 F. 190 (W.D.N.C. 1898).

Applied in Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966); Duke Power Co. v. Parker, 18 N.C. App. 242, 196 S.E.2d 553 (1973).

§ 62-188. Commissioners to inspect premises. — In considering the question of damages when the interest sought is over an easement, privilege or right-of-way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory. (1874-5, c. 203, s. 9; Code, s. 2013; Rev., s. 1577; C. S., s. 1703; 1963, c. 1165, s. 1.)

§ 62-189. Powers granted corporations under Chapter exercisable by persons, firms or copartnerships. — All the rights, powers and obligations given, extended to, or that may be exercised by any corporation or incorporated company under this Chapter shall be extended to and likewise be exercised and are hereby granted unto all persons, firms or copartnerships engaged in or authorized by law to engage in the business herein described. Such persons, firms, copartnerships and corporations engaging in such business shall be subject to the provisions and requirements of the public laws which are applicable to others engaged in the same kind of business. (1939, c. 228, s. 3; 1963, c. 1165, s. 1.)

§ 62-190. Right of eminent domain conferred upon pipeline companies; other rights. — Any pipeline company transporting or conveying natural gas, gasoline, crude oil, coal in suspension, or other fluid substances by pipeline for the public for compensation, and incorporated under the laws of the State, or

foreign corporations domesticated under the laws of North Carolina, may exercise the right of eminent domain under the provisions of the Chapter, Eminent Domain, and for the purpose of constructing and maintaining its pipelines and other works shall have all the rights and powers given railroads and other corporations by this Chapter and acts amendatory thereof. Nothing herein shall prohibit any such pipeline company granted the right of eminent domain under the laws of this State from extending its pipelines from within this State into another state for the purpose of transporting natural gas or coal in suspension into this State, nor to prohibit any such pipeline company from conveying or transporting natural gas, gasoline, crude oil, coal in suspension, or other fluid substances from within this State into another state. All such pipeline companies shall be deemed public utilities and shall be subject to regulation under the provisions of this Chapter. (1937, c. 280; 1951, c. 1002, s. 3; 1957, c. 1045, s. 2; 1963, c. 1165, s. 1.)

Cross References. — As to definition of "public utility" including pipeline company, see § 62-3(23)a5. As to eminent domain in general, see § 40-1 et seq.

Editor's Note. — See 15 N.C.L. Rev. 364.

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Determining Market Value. — In determining market value where a gas company has taken land for a pipeline, consideration of future uses to which the property is adapted and which are precluded by the taking, should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or speculative value should not be considered. Public Serv. Co. v. Kiser, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

Measure of Damages. — The measures of damages to which the landowners were entitled for the taking of the easement by a gas company was the difference in the fair market value of the land immediately before the taking as compared to the fair market value of the land immediately after the taking. Public Serv. Co. v. Kiser, 9 N.C. App. 202, 175 S.E.2d 686 (1970).

§ 62-191. Flume companies exercising right of eminent domain become common carriers. — All flume companies availing themselves of the right of eminent domain under the provisions of the Chapter Eminent Domain shall become common carriers of freight, for the purpose for which they are adapted, and shall be under the direction, control and supervision of the Commission in the same manner and for the same purposes as is by law provided for other common carriers of freight. (1907, c. 39, s. 4; C. S., s. 3517; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Local Modification. — Duplin: 1911, c. 214.

Cross Reference. — As to eminent domain in general, see § 40-1 et seq.

§ 62-192. Map required for railroad condemnation. — (a) Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is to be located on the land sought to be condemned, and a profile showing the depth of the cuts and the height of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are to be located. This section shall not apply to street railways.

(b) Every railroad company shall, within a reasonable time after its road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and shall file the same in the office of the Commission. Every such map shall be drawn on a scale and on paper to be designated by the Commission, and shall be certified and signed by the president or engineer of such company. (1871-2, c. 138, ss. 24, 41; Code, ss. 1952, 1977; 1893,

c. 396, s. 2; 1901, c. 6, s. 3; Rev., ss. 2599, 2600; C. S., ss. 3471, 3472; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Subsection (a) Mandatory. — The conditions of subsection (a) of this section must be complied with before any company can construct any part of its road. Durham & N.R.R. v. Richmond & D.R.R., 106 N.C. 16, 10 S.E. 1041 (1890).

Same — Defect May Be Cured by Amendment. — The failure to serve a map and profile with the summons in condemnation proceedings may be cured by amendment. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

Purpose of Subsection (b). — By subsection (b) of this section railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission (now the Utilities Commission). But this is for the information of that body and is not required as a part of a correct and completed location. Fayetteville St. Ry. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906).

Survey Unnecessary When Old Roadbed Adopted. — Where the line of a railroad is clearly defined by the existence of an old roadbed which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent location, in such case a survey by engineers is not essential. Fayetteville St. Ry. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906).

Profile Must Show "Fills" and "Cuts". — The profile required to be filed by subsection (b) of this section must show whether there will be any "fills" or "cuts" on the land sought to be condemned. Kinston & C.R.R. v. Stroud, 132 N.C. 413, 43 S.E. 913 (1903).

Railroad Completed before Subsection (b) Passed. — Where the railroad was completed through the locus in quo prior to the passage of subsection (b) of this section, it was not necessary to the validity of the location that a map of the route should be filed. Purifoy v. Richmond & D.R.R., 108 N.C. 100, 12 S.E. 741 (1891).

§§ 62-193 to 62-199: Reserved for future codification purposes.

ARTICLE 10.

Transportation in General.

§ 62-200. Duty to transport freight within a reasonable time. — (a) It shall be unlawful for any common carrier of property doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in this State, unless otherwise agreed upon between the carrier and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the Commission.

(b) Any common carrier violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars ($15.00) for the first day and two dollars ($2.00) for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars ($10.00) for the first day and one dollar ($1.00) for each succeeding day, but the forfeiture shall not be collected for a period exceeding 30 days.

(c) In reckoning what is a reasonable time for such transportation, it shall be considered that such common carrier has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight by similar carriers between the receiving and shipping stations. The Commission is authorized to establish reasonable times for transportation by the various modes of carriage which shall be held to be prima facie reasonable, and a failure to transport within such times shall be held prima facie unreasonable. This section shall be construed to refer not only to delay in starting the freight from the station where it is received, but to require the delivery at its destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen or which were unavoidable, then upon the establishment of these facts

to the satisfaction of the court trying the cause, the defendant common carrier shall be relieved from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a common carrier under this section, the burden of proof shall be upon such carrier to show where the delay, if any, occurred. The penalties provided in this section shall be in addition to the damages recoverable for failure to transport within a reasonable time.

(d) This section shall not apply to motor carriers of passengers. (Code, s. 1964; 1899, c. 164, s. 2, subsecs. 2, 7; 1903, c. 444; c. 590, s. 3; c. 693; 1905, c. 545; Rev., ss. 1094, 2631, 2632; 1907, cc. 217, 461; C. S., ss. 1053, 3515, 3516; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross Reference. — As to venue of action against railroad, see § 1-81.

Editor's Note. — Under this section as it formerly stood, a penalty was imposed for unreasonable delay in the transportation of goods. Construing the statute in Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907), the court held that the term "transportation" did not include a delivery to consignee at the point of destination, and if goods shipped by a carrier had been properly placed at the point of destination, no penalty was incurred under this section for a negligent delay in delivery from the car or warehouse of the carrier. Subsequently the legislature amended the statute so as to include delays in delivery after transportation had ceased.

For a review of the history of legislative penalties for the refusal of railroads to transport freight, see Grocery Co. v. Railroad, 136 N.C. 396, 48 S.E. 801 (1904).

Constitutionality of Section. — This section is in the nature of a police regulation and is constitutional and valid. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908); Owens v. Hines, 178 N.C. 325, 100 S.E. 617 (1919).

It does not deny to the carrier the equal protection of the laws. Grocery Co. v. Railroad, 136 N.C. 396, 48 S.E. 801 (1904); Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

Does Not Apply to Interstate Shipments. — A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation under this section. Bivens Bros. v. Atlantic Coast Line R.R., 176 N.C. 414, 97 S.E. 215 (1918). See also Hickory Marble & Granite Co. v. Southern Ry., 147 N.C. 53, 60 S.E. 719 (1908).

Same — Although Both Terminal Points in State. — A penalty under this section cannot be recovered for the failure of a railroad company to transport freight within a reasonable time, when the initial and terminal points are within the State, but the shipment necessarily passes into another state in transitu. Such is interstate commerce and cannot be interfered with by the State. Shelby Ice & Fuel Co. v. Southern Ry., 147 N.C. 66, 60 S.E. 721 (1908).

Carrier's Common-Law Duty Unaltered. — This section does not supersede or alter the duty of carrier at common law, but merely enforces an admitted duty and superadds a penalty. Meredith v. Railroad, 137 N.C. 478, 50 S.E. 1 (1905).

Section Strictly Construed. — This is a penal statute, and must be strictly construed. Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907).

"Ordinary Time" a Question for Jury. — The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport, under this section, is a question of fact for the jury. Shelby Ice & Fuel Co. v. Southern Ry., 147 N.C. 66, 60 S.E. 721 (1908); Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908).

In an action for the recovery of a penalty under this section, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time; also, the amount of recovery. It is error for the trial court to instruct the jury, if they believe the evidence, to answer the issue in a certain way or in a sum certain. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908).

Same — No Fixed Rule. — This section does not fix a "hard and fast" rule in defining reasonable time. Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907).

Same — Burden of Proof. — When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was prima facie reasonable as fixed by the statute, the question of reasonable time is one for the jury to measure by the statutory standard, the burden of proof being upon the plaintiff. Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907).

Same — Evidence. — In an action to recover the penalty given by this section, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the goods within a reasonable time, which is defined to be the "ordinary time" required to transport and deliver. This may be shown by proving the distance over which the goods are to be transported and the time consumed therein. From this evidence

the jury may, as a matter of common knowledge and observation, draw the conclusion whether, in view of the usual speed of freight trains, the time consumed, the distance, and other conditions, the carrier has failed to transport and deliver within a reasonable time. Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907).

Same — Illustrations. — When there was evidence that the time in transporting a certain shipment from one station to another only 25 miles away, on the same railroad, was 12 days, the jury would be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and, in the absence of explanation by defendant, fix the amount of wrongful delay. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

When it was admitted that certain articles were received by defendant, to be transported and delivered to plaintiff, the party aggrieved, the place of shipment and destination both being in the State, 58 miles apart, with but one intermediate point between them, and that the articles were not delivered to plaintiff within 21 days, the delay was unreasonable. Watson v. Atlantic Coast Line R.R., 145 N.C. 236, 59 S.E. 55 (1907).

Delay of Two Days at Initial Point and 48 Hours at Intermediate Point — Former Law. — For cases construing a former provision making a delay of two days at the initial point and 48 hours at one intermediate point for each 100 miles prima facie reasonable, see Meredith v. Railroad, 137 N.C. 478, 50 S.E. 1 (1905); Davis & Hooks v. Atlantic Coast Line R.R., 145 N.C. 207, 59 S.E. 53 (1907); Watson v. Atlantic Coast Line R.R., 145 N.C. 236, 59 S.E. 55 (1907); Jenkins v. Southern Ry., 146 N.C. 178, 59 S.E. 663 (1907); Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908); Blue Ridge Collection Agency v. Southern Ry., 147 N.C. 593, 61 S.E. 462 (1908); Talley & Baughman, Inc. v. Atlantic Coast Line R.R., 198 N.C. 492, 152 S.E. 390 (1930).

When Transportation Ceases. — Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading. What particular parts of the carrier's tracks and freight yards may be used for such purposes must of necessity be left to its discretion, but the car must be reasonably accessible and placed for delivery before transportation is fully ended. Brooks Mfg. Co. v. Southern Ry., 152 N.C. 665, 68 S.E. 243 (1910).

Transportation does not cease when a carload is placed by the carrier within the yard limits of the point of destination. Wall-Huske Co. v. Southern Ry., 147 N.C. 407, 61 S.E. 277 (1908).

Negligent Default in Delivery. — This section extends the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. Mitchell v. Atlantic Coast Line R.R., 183 N.C. 162, 110 S.E. 859 (1922).

Delivery Does Not Have to Be on Private Tracks. — This section does not apply to a delivery on the private tracks of a consignee, but to avoid the penalty it is required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. Brooks Mfg. Co. v. Southern Ry., 152 N.C. 665, 68 S.E. 243 (1910).

Duty to Notify Consignee. — Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery. This principle applies to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. Acme Mfg. Co. v. Tucker & Nobles, 183 N.C. 303, 111 S.E. 525 (1922).

When Goods Travel over Several Lines. — When the initial carrier delivers goods to its connecting carrier, necessary for them to be by it further transported to their destination, and an unreasonable delay occurs, without evidence as to which carrier was responsible for the delay, the defendant, the initial carrier, is liable for the entire delay, the burden of proof being upon it as the party having the evidence peculiarly within its own knowledge or possession. Watson v. Atlantic Coast Line R.R., 145 N.C. 236, 59 S.E. 55 (1907).

Same — Parties to Action. — Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time, the burden being upon each defendant to show that it had not failed in its duty. Sellars Hosiery Mills v. Southern Ry., 174 N.C. 449, 93 S.E. 952 (1917).

Who Is "Party Aggrieved". — The plaintiff is entitled to recover the penalty as the "party aggrieved," under this section, for the defendant's wrongfully failing to transport freight within a reasonable time, where the facts show that, from the attendant circumstances or terms of the agreement, he is the one whose legal right is denied and who is alone interested in having the transportation properly made. Cardwell v. Southern Ry., 146 N.C. 218, 59 S.E. 673 (1907).

Same — Where Goods to Be Sold for Consignor's Benefit. — The plaintiff may maintain his action against the defendant railroad company, under this section, for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appears that plaintiff shipped the goods to be for his

benefit sold by the consignee, and that he (the plaintiff) was the one who alone acquired the right to demand the service to be rendered by the defendant, and was the party aggrieved. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under this section, and the proper party plaintiff. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Same — Goods Not to Be Paid for until Delivery. — When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor may maintain his action for delay in transitu, as the party aggrieved. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908).

When by the contract or agreement between a vendor and vendee of goods, the goods are to be "received, inspected and weighed" by the vendee before any part of the purchase price is payable, the title does not vest in the vendee, and the vendor is the "party aggrieved" within the meaning of this section. Elliott v. Southern Ry., 155 N.C. 235, 71 S.E. 339 (1911).

Same — Notice Immaterial. — When it is shown that the plaintiff is the "party aggrieved," under this section, it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. Rollins v. Seaboard Air Line Ry., 146 N.C. 153, 59 S.E. 671 (1907).

The real "party aggrieved" is entitled to recover the penalty, under this section, irrespective of the question of knowledge of or notice to the defendant. Cardwell v. Southern Ry., 146 N.C. 218, 59 S.E. 673 (1907).

Action Not Brought "on Relation of State". — Under this section, the action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, failure to bring the action in such form would be a mere informality, which could be remedied by amendment. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Joinder of Actions. — An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay given by this section, do not merge into each other. They arise on contract and may be joined in the same action. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Burden of Proof as to Destruction of Goods. — The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by this section because the goods were burned, stolen or destroyed. That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were burned, stolen or destroyed. Robertson v. Atlantic Coast Line R.R., 148 N.C. 323, 62 S.E. 413 (1908).

When Bill of Lading Not Presumptive Evidence. — When it was the consignor's duty to load a car for shipment, which had been placed at its mill by the carrier, and the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading is not presumptive evidence of the receipt of the contents of the car, and the question is an open one for the jury in a suit by the consignee for the penalty for failure to deliver under this section. Peele & Copeland v. Atlantic Coast Line R.R., 149 N.C. 390, 63 S.E. 66 (1908).

Sufficiency of Evidence on Motion for Nonsuit. — Where a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing, and remained in the carrier's warehouse beyond the statutory reasonable time, a motion for nonsuit was properly denied. Mitchell v. Atlantic Coast Line R.R., 183 N.C. 162, 110 S.E. 859 (1922).

Issues. — An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty under this section, is objectionable. Davis v. Southern Ry., 147 N.C. 68, 60 S.E. 722 (1908).

Verdict Incomplete. — Where it is established by the jury that a consignment of goods was carried to the delivering point by the carrier, which failed to deliver to the consignee, or to notify him, and the goods were lost while in its possession, the verdict is incomplete where there was no issue submitted as to whether the carrier, which is a party to the action, was in default in not delivering the goods to the consignee. Acme Mfg. Co. v. Tucker & Nobles, 183 N.C. 303, 111 S.E. 525 (1922).

Applied in Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907).

§ 62-201. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same. — All common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the North Carolina Utilities

Commission in the case of intrastate shipments, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, such common carrier shall deliver the freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to liability for actual damages plus a penalty of fifty dollars ($50.00) for each such failure or refusal, to be recovered by any consignee aggrieved by a suit in a court of competent jurisdiction. Provided, however, that this section shall not apply to motor carriers of passengers. (1905, c. 330, s. 1; Rev., s. 2633; C. S., s. 3518; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Cross References. — As to rates of public utilities, see § 62-130 et seq. As to venue of action against railroad, see § 1-81.

Constitutionality of Section. — The penalty for failure of a common carrier to deliver freight, as prescribed by this section, shipped from beyond the State, after it has been unloaded from its cars and while in the depot, is constitutional and not a burden upon interstate commerce. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909); Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by the consignee, and, in the absence of a conflicting regulation by Congress, this section, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce. Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907).

Foreign Corporation Bound to Obey State Laws. — Where a railroad corporation chartered by another state leases a railroad chartered by this State, it is bound to observe and obey all laws of this State regulating the business of transportation. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Intrastate Rebilling of Interstate Shipment. — An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another therein, in an intrastate shipment, and upon the carrier's violating the provisions of this section, the penalty therein accrues. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Section Not Cumulative. — This section imposes only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for the same offense. Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907).

Consignee Must Produce Bill of Lading. — A consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Insufficient Notice to Consignee. — Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot is not of itself sufficient notice to the consignee. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Burden of Proving Reason for Refusal to Deliver. — Where the consignee brings his action to recover the value of a shipment of goods from the carrier, shows that the shipment was addressed to him, was prepaid, in the carrier's possession at destination, and a demand for delivery, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

No Liability for Unlawful Shipment. — A druggist who has not received a valid license to sell intoxicating liquors for the purposes and in the manner indicated, may not recover of the carrier the penalty provided by this section, for the failure to deliver such liquors to him for the purposes of sale, for such are unlawful and prohibited. Smith v. Southern Express Co., 166 N.C. 155, 82 S.E. 15 (1914).

Carrier Cannot Collect Storage for Illegal Detention. — A carrier cannot enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee. Hockfield v. Southern Ry., 150 N.C. 419, 64 S.E. 181 (1909).

Agent Ignorant of Amount of Charges. — It is no defense to an action to recover a penalty for refusing to deliver shipment upon tender of freight charges by the consignee, for the defendant company to show its agents did not know the correct amount of the charges because of the defendant's failure to file its schedule of rates. Harrill Bros. v. Southern Ry., 144 N.C. 532, 57 S.E. 383 (1907).

Rate When Smaller Cars Furnished. — Where a consignor requested two cars of a certain standard size and the carrier furnished four cars of a smaller size the rate for the shipment

must be the same. Yorke Furn. Co. v. Southern Ry., 162 N.C. 138, 78 S.E. 67 (1913).

Applied in Atlantic Coast Line R.R. v. West Paving Co., 228 N.C. 94, 44 S.E.2d 523 (1947).

§ 62-202. Baggage and freight to be carefully handled. — All common carriers shall handle with care all baggage and freight placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight while the same is under their control. Upon proof of injury to baggage or freight in the possession or under the control of any such carrier, it shall be presumed that the injury was caused by the negligence of the carrier. This section shall not apply to motor carriers of passengers. (1897, c. 46; Rev., s. 2624; C. S., s. 3523; 1963, c. 1165, s. 1.)

Cross Reference. — As to conveying livestock in a cruel manner, see § 14-363.

Delivery to Carrier Necessary to Fix Responsibility. — To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and in order to a valid delivery the general rule is that when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it. Williams v. Southern Ry., 155 N.C. 260, 71 S.E. 346 (1911).

Same — Estoppel. — The requisites of the general rule requiring delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. Williams v. Southern Ry., 155 N.C. 260, 71 S.E. 346 (1911).

Stipulations Limiting Liability. — Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charge paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. Cooper v. Norfolk S.R.R., 161 N.C. 400, 77 S.E. 339 (1913).

A common carrier cannot contract with a passenger against the loss of baggage by its negligence. Thomas v. Southern Ry., 131 N.C. 590, 42 S.E. 964 (1902).

Liability for Articles Not Properly Baggage. — While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. Trouser Co. v. Railroad, 139 N.C. 382, 51 S.E. 973 (1905).

When Liability as Carrier Ceases. — When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. Trouser Co. v. Railroad, 139 N.C. 382, 51 S.E. 973 (1905).

Liability When Passenger Not Carried. — When there is no partnership arrangements between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junctional point, without compensation. Kindley v. Seaboard Air Line Ry., 151 N.C. 207, 65 S.E. 897 (1909).

Baggage Not on Same Train. — The passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon the condition that the baggage accompany the passenger on the same train; and where without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence. Perry v. Seaboard Air Line Ry., 171 N.C. 158, 88 S.E. 156 (1916).

§ 62-203. Claims for loss or damage to goods; filing and adjustment. — (a) Every common carrier receiving property for transportation in intrastate commerce shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it, or

by any carrier participating in the haul when transported on a through bill of lading, and any such carrier delivering said property so received and transported shall be liable to the lawful holder of said bill of lading or to any party entitled to recover thereon for such loss, damage, or injury, notwithstanding any contract or agreement to the contrary; provided, however, the Commission may, by regulation or order, authorize or require any such common carrier to establish and maintain rates related to the value of shipments declared in writing by the shipper, or agreed upon as the release value of such shipments, such declaration or agreement to have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, in which case, any tariff filed pursuant to such regulation or order shall specifically refer thereto; provided further, that a rate shall be afforded the shipper covering the full value of the goods shipped; provided further, that nothing in this section shall deprive any lawful holder of such bill of lading of any remedy or right of action which such holder has under existing law; provided further, that the carrier issuing such bill of lading, or delivering such property so received and transported, shall be entitled to recover from the carrier on whose route the loss, damage, or injury shall have been sustained the amount it may be required to pay to the owners of such property.

(b) Every claim for loss of or damage to property while in possession of a common carrier, including every express company or person doing an express business within the State, shall be adjusted and paid within 90 days after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee or at the point of origin by the consignor, when it shall appear that the consignee was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

(c) In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars ($50.00) for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

(d) A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of a common carrier, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf. If such check be refused on demand, the common carrier shall pay to such passenger the sum of ten dollars ($10.00), to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the carrier.

(e) If a passenger, whose bag has been checked, shall produce the check and his baggage shall not be delivered to him, he may by an action recover the value of such baggage.

(f) Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint.

(g) This section shall not deprive any consignee or consignor of any other rights or remedies existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers.

(h) This section shall not apply to motor carriers of passengers and only subsection (a) of this section shall apply to motor carriers of property. (1871-2, c. 138, s. 36; Code, s. 1970; 1905, c. 330, ss. 2, 4, 5; Rev., ss. 2623, 2634, 2635; 1907, c. 983; 1911, c. 139; C. S., ss. 3510, 3524, 3525; 1947, c. 781; c. 1008, s. 27; 1963, c. 1165, s. 1.)

I. General Consideration.
II. Connecting Carriers.
III. Claim against Carriers.
IV. Actions.

I. GENERAL CONSIDERATION.

Subsections (b) and (c) Must Be Strictly Construed and Followed. — Subsections (b) and (c) of this section are a penal statute, and in order to recover, the plaintiff must bring his case strictly within their terms. Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925).

The penalty imposed by subsection (c) is to enforce obedience to the mandate of the law by punishment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning. B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

Common-Law Remedies. — The common-law remedies of shippers and passengers are not taken away by the provisions of this Chapter. Bell v. Norfolk S.R.R., 163 N.C. 180, 79 S.E. 42 (1913), and cases there cited.

Action May Be Brought in Contract or Tort. — A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains may bring an action on contract, or in tort, independent of the statute. Purcell v. Richmond & Danville R.R., 108 N.C. 414, 12 S.E. 954 (1891); Virginia-Carolina Peanut Co. v. Atlantic Coast Line R.R., 155 N.C. 148, 71 S.E. 71 (1911).

Parol Agreement to Ship Sufficient. — When a carrier has received goods for transportation over its own and a connecting line which were not delivered, and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession. Lyon v. Atlantic Coast Line R.R., 165 N.C. 143, 81 S.E. 1 (1914).

Carrier Cannot Contract against Own Negligence. — A common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899); Everett v. Railroad, 138 N.C. 68, 50 S.E. 557 (1905).

Owner Cannot Refuse Damaged Goods. — Damages to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless. He must accept the goods and sue for the damages upon the refusal of the carrier to pay them. Whittington v. Southern Ry., 172 N.C. 501, 90 S.E. 505 (1916).

II. CONNECTING CARRIERS.

Duty Assumed by Carrier. — Where a carrier accepts goods for transportation, in the absence of a special contract, it assumes the duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to the connecting carrier. Meredith v. Railroad, 137 N.C. 478, 50 S.E. 1 (1905).

Duration of Duty of Safe Carriage. — The duty of safe carriage attaches as the goods pass into the custody of each company and ceases only when they are safely delivered to its successor. Lindley v. Richmond & D.R.R., 88 N.C. 547 (1883).

Burden of Proof as to Safe Delivery. — On proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power. Meredith v. Railroad, 137 N.C. 478, 50 S.E. 1 (1905).

Admissibility of Evidence. — To show that the freight was in good condition when it was delivered by the defendant to a connecting line, evidence that it is the custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, is admissible. Knott v. Ra-

leigh & Gaston R.R., 98 N.C. 73, 3 S.E. 735 (1887).

Prima Facie Case. — Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a prima facie case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. Lyon v. Atlantic Coast Line R.R., 165 N.C. 143, 81 S.E. 1 (1914).

Presumption of Damage. — Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption. Morganton Mfg. Co. v. Ohio River & Charleston Ry., 121 N.C. 514, 28 S.E. 474 (1897); Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899); Gwyn Harper Mfg. Co. v. Carolina Cent. R.R., 128 N.C. 280, 38 S.E. 894 (1901).

Same — Goods Found Damaged at Destination. — When goods are shipped over several connecting lines of carriers and are found in a damaged condition at destination, there is a rebuttable presumption that the injury was negligently inflicted by the last carrier. Boss v. Atlantic Coast Line R.R., 156 N.C. 70, 72 S.E. 93 (1911). This is on the principle that as the carrier is peculiarly in a position to know the facts, the burden of proof should rest on it. Beville & Vanstory v. Atlantic Coast Line R.R., 159 N.C. 227, 74 S.E. 349 (1912).

Liability for Negligence of Connecting Carrier. — A railroad company whose line is one of several connecting roads between places from and to which freight is shipped, in the absence of a special contract, or proof of copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. Knott v. Raleigh & Gaston R.R., 98 N.C. 73, 3 S.E. 735 (1887).

But where two or more common carriers unite in forming an association creating a through line for the transportation of freight, payment of tariff charges to be made at the beginning or end of the transportation, with through bills of lading, the freight charges to be divided according to the respective mileage of the companies, they become a copartnership and each line is liable for any damage resulting from delay or otherwise on any part of the through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line. Rocky Mount Mills v. Wilmington & W.R.R., 119 N.C. 693, 25 S.E. 854 (1896).

Interstate Shipments. — The entire regulation of interstate commerce is under federal control, and the penalty provided for by subsection (c) of this section for failure of a carrier to pay a claim in the time prescribed does not apply to interstate shipments. See Morphis v. Southern Express Co., 167 N.C. 139, 83 S.E. 1 (1914). The federal laws make the initial carrier liable for damages to a shipment over connecting lines. However, this does not relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the State court from requiring the carriers to show which is responsible for the damage. See Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 100 (1916). And notice to damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier. Gilikin & Edwards v. Norfolk S.R.R., 174 N.C. 137, 93 S.E. 469 (1917).

Effect of Court Order Relieving Initial Carrier. — While the initial carrier may also be held liable for damages to a shipment made over connecting lines, a direction of the court relieving it from liability does not necessarily relieve the carrier whose negligence caused the damages. Gilikin & Edwards v. Norfolk S.R.R., 174 N.C. 137, 93 S.E. 469 (1917).

III. CLAIM AGAINST CARRIERS.

Filing of Claim Prerequisite to Penalty. — A consignor of a shipment of goods is required by subsection (b) of this section to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within 90 days, etc. Hamlet Grocery Co. v. Southern Ry., 170 N.C. 241, 87 S.E. 57 (1915).

In order to recover the penalty, the consignee must file his claim with the agent as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

Carrier May Regulate Time of Filing. — A stipulation in a bill of lading denying the carrier's liability for damages unless written notice of such claim be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is. Phillips v. Seaboard Air Line Ry., 172 N.C. 86, 89 S.E. 1057 (1916).

A stipulation that claims must be filed in four months is reasonable. Culbreth v. Atlantic Coast Line R.R., 169 N.C. 723, 86 S.E. 624 (1915). An allowance of 60 days is reasonable, but an allowance of 30 days is unreasonable. Gwyn Harper Mfg. Co. v. Carolina Cent. R.R., 128 N.C. 280, 38 S.E. 894 (1901).

Filing Claim by Mail. — The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of this section, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to

its manual delivery, but the same may be done through the agency of the United States mail. The delivery of the mail will be presumed. B.F. Eagles Co. v. East Carolina Ry., 184 N.C. 66, 113 S.E. 512 (1922).

Omission of Amount of Loss. — It is not required that a claimant state the amount of his loss in his claim for damages against a carrier. McRary v. Southern Ry., 174 N.C. 563, 94 S.E. 107 (1917).

Necessity of Written Demand. — A penal statute is to be strictly construed, and the provisions of subsections (b) and (c) of this section are not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word and does not afford the carrier the protection that a written demand would give. Thompson v. Southern Express Co., 147 N.C. 343, 61 S.E. 182 (1908). But failure to file a formal written demand is no bar to a recovery from the carrier of actual damages sustained. Hinkle, Craig & Co. v. Southern Ry., 126 N.C. 932, 36 S.E. 348 (1900); Kime v. Southern Ry., 153 N.C. 398, 69 S.E. 264 (1910).

Stipulations May Be Waived. — The stipulation in a livestock bill of lading requiring that notice in writing be given the carrier's agent at destination, of claim for damages to the animals shipped, before they are removed or mingled with other animals, may be waived by the carrier's agent at the delivering point. T.W. Newborn & Co. v. Louisville & N.R.R., 170 N.C. 205, 87 S.E. 37 (1915).

Connecting Carriers. — Where the second carrier in the connected line of shipment causes damages to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applicable here. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Interstate Shipments. — The federal statutes, while recognizing the right of the carrier to stipulate for the filing of claims within a reasonable period, provide that if the loss or damage is due to a delay in transit by negligence no notice shall be required as a condition precedent to recovery. Mann v. Fairfield & Elizabeth City Transp. Co., 176 N.C. 104, 96 S.E. 731 (1918).

IV. ACTIONS.

Who May Bring Action. — Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon their acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee refused to accept the damaged goods, and that the sale has been cancelled by consent, the consignor may maintain his action against the carrier for damages. Aydlett v. Norfolk S.R.R., 172 N.C. 47, 89 S.E. 1000 (1916).

Joinder of Causes of Action. — A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver and for the failure to settle the claim within the statutory period, may be united in the same action. Jeans v. Seaboard Air Line Ry., 164 N.C. 224, 80 S.E. 242 (1913).

Same — Issues Separate and Distinct. — In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by subsection (c) of this section, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. Hussey v. Atlantic Coast Line R.R., 183 N.C. 7, 110 S.E. 599 (1922).

As to venue of action against railroad, see § 1-81.

Prima Facie Case. — In an action against the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. Everett v. Railroad, 138 N.C. 68, 50 S.E. 557 (1905); Osborne v. Southern Ry., 175 N.C. 594, 96 S.E. 34 (1918).

Same — Limited Liability. — In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the excepted causes, and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R.R., 124 N.C. 236, 32 S.E. 671 (1899).

Plaintiff Must Prove Failure to Settle. — The burden is on plaintiff to show that the common carrier has failed to settle his claim in 90 days, etc., after written demand under the provisions of subsections (b) and (c) of this section, applying to intrastate shipments, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment is not sufficient. Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925).

Recovery Must Equal Claim. — In order to recover the penalty for failure to settle a claim for damages within 90 days, etc., the burden is on plaintiff to show that the amount of his recovery be at least equal to the amount of his written demand. Watkins v. American Ry. Express Co., 190 N.C. 605, 130 S.E. 305 (1925).

Settlement after Penalty Accrues. — The proviso that consignee must first recover the full amount claimed is only to protect the carrier against excessive demands and not to discourage settlements for losses, and the plaintiff's right to recover the penalty in such suits is not

lost by accepting settlement for damages for full amount claimed after the penalty had accrued. Rabon v. Atlantic Coast Line R.R., 149 N.C. 59, 62 S.E. 743 (1908).

Measure of Damages for Delay. — In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff which was engaged in equipping a cotton factory, where it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff, the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to workmen and such other costs and expenses incurred by plaintiff in consequence of the delay. Rocky Mount Mills v. Wilmington & W.R.R., 119 N.C. 693, 25 S.E. 854 (1896).

§ 62-204. Notice of claims, statute of limitations for loss, damage or injury to property. — Any claim for loss, damage or injury to property while in the possession of a common carrier shall be filed by the claimant with the carrier in writing within nine months after the same occurred, and the cause of action with respect thereto shall be deemed to have accrued at the expiration of 30 days after the date of such notice, and action for the recovery thereon may be commenced immediately thereafter or at any time within two years after notice in writing shall have been given to the claimant by the adverse party that the claim or any part thereof specified in such notice has been disallowed, and neither party shall by rule, regulation, contract, or otherwise, provide for a shorter time for filing such claims or for commencing actions thereon than the period set out in this section. Provided, however, that this section shall not apply to motor carriers of passengers. (1947, c. 1008, s. 21; 1963, c. 1165, s. 1.)

§ 62-205. Joinder of causes of action. — To expedite the settlement of claims between shippers and common carriers, a shipper may join in the same complaint against a common carrier any number of claims for overcharges, or a common carrier may join in the same complaint any number of claims against a shipper for undercharges, whether such claims arose at the same time or in the course of shipments at different times; provided, that each such claim shall be so identified that the same and the allegations with respect thereto may be distinguished from other claims so joined in the complaint, and in cases in which the right of subrogation may be invoked the judgment shall specify the amount of recovery, if any, on each such claim. For the purpose of jurisdiction under this section the aggregate amount set out in the complaint shall be deemed the sum in controversy. Provided, however, that this section shall not apply to motor carriers of passengers. (1947, c. 1008, s. 20; 1963, c. 1165, s. 1.)

§ 62-206. Carrier's right against prior carrier. — Any common carrier shall have all the rights and remedies herein provided for against a common carrier from which it received the freight in question. Provided, however, that this section shall not apply to motor carriers of passengers. (1905, c. 330, s. 3; Rev., s. 2636; C. S., s. 3526; 1963, c. 1165, s. 1.)

Cross Reference. — As to power of Utilities Commission to act as arbitrator in disputes between carriers, see § 62-40.

§ 62-207. Regulation of demurrage. — (a) The Commission shall make rules and fix, establish or allow rates governing demurrage and storage charges by common carriers and shall make rules governing railroad companies in the placing of cars for loading and unloading.

(b) No common carrier doing business in the State shall make any charge on account of demurrage while a car or other equipment, whether the same be refrigerated or not, is being loaded for shipment, until such car or such other equipment has remained at the place of loading for a period of time in excess

of that approved by the Commission as free time for such car or such other equipment.

(c) This section shall not apply to motor carriers of passengers. (1903, c. 342; Rev., s. 1100; Ex. Sess. 1913, c. 55; C. S., ss. 1057, 3527; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-208. Common carriers to settle promptly for cash-on-delivery shipments; penalty. — Every common carrier which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within 20 days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars ($25.00), where the value of the shipment is twenty-five dollars ($25.00) or less; and, where the value of the shipment is over twenty-five dollars ($25.00), a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars ($50.00) in any case: Provided, no penalty shall be collectible where the shipment, through no act of negligence of the common carrier is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall be cumulative and shall not be in derogation of any right the consignor may have under any other provision of law to recover of the common carrier damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same. Provided, however, that this section shall not apply to motor carriers of passengers. (1909, c. 866; C. S., s. 3530; 1963, c. 1165, s. 1.)

§ 62-209. Sale of unclaimed baggage or freight; notice; sale of rejected property; escheat. — (a) Any common carrier which has had in its possession on hand at any destination in this State any article whether baggage or freight, for a period of 60 days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said 60 days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered or certified mail, if known to such carrier, not less than 15 days before such sale shall be made; or if the name and address of the consignor and consignee cannot with reasonable diligence be ascertained by such carrier, notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general circulation published at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the State: Provided further, however, that if the nondelivery of said article is due to the consignee's and consignor's rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier's judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication.

(b) Where the article referred to in this section is live freight, or perishable freight, or freight of such low value as would not bring the accrued transportation and other charges if held for 60 days as provided in this section, the common carrier may, with or without advertisement, sell the same in such manner and at such time and place as will in its judgment best protect the interests of the carrier, the consignor and the consignee, and whenever practicable the consignor and consignee shall be notified of the proposed sale of such freight.

(c) The common carrier shall keep a record of the articles sold and of the prices obtained therefor, and shall, after deducting all charges and the expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within five years from the date

of the sale. If no person shall claim the surplus within five years, such surplus shall be paid to the University of North Carolina.

(d) This section shall not apply to motor carriers of passengers. (1871-2, c. 138, s. 50; Code, s. 1987; Rev., s. 2639; 1921, c. 124, ss. 1, 2, 3; C. S., s. 3534; 1963, c. 1165, s. 1.)

Cross Reference. — As to unclaimed personalty escheating to the University of North Carolina, see § 116A-4.

Editor's Note. — For decisions under former statute relating to sale of unclaimed freight, see Norfolk S.R.R. v. New Bern Iron Works & Supply Co., 172 N.C. 188, 90 S.E. 149 (1916); Holloman v. Southern Ry., 172 N.C. 372, 90 S.E. 292 (1916).

§ 62-210. Discrimination between connecting lines. — All common carriers subject to the provisions of this Chapter shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freight to and from their several lines and those connecting therewith, and shall not discriminate in their rates, routes and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. Common carriers shall obey all rules and regulations made by the Commission relating to trackage. Irregular route motor carriers shall interchange traffic only with the approval of the Commission. Provided, however, that this section shall not apply to motor carriers of passengers. (1899, c. 164, s. 21; Rev., s. 1088; C. S., s. 1107; 1933, c. 134, s. 8; 1935, c. 258; 1941, c. 97; 1963, c. 1165, s. 1.)

Editor's Note. — As to the practice of specifying in published tariffs particular routes formed with connecting carriers, see 13 N.C.L. Rev. 364.

Declaratory of Common Law. — A similar section in the act creating the former Railroad Commission was held, in Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892), to be merely declaratory of the common law, and not to enlarge its scope.

Commission May Require Trains to Make Connection. — The Commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company. Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904).

Express Facilities. — A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provides for itself or affords to any other express company. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

§ 62-211. Regulating shipment of flammable substances. — The Commission is authorized and empowered to adopt and promulgate rules for the shipment of flammable and explosive articles, cotton which has been partially consumed by fire, and such other like articles as in its opinion may render transportation dangerous. After the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier be liable for any penalty for refusal to receive such articles for shipment until all the rules prescribed by the Commission in regard to the shipment of the same shall be complied with. Provided, however, that this section shall not apply to motor carriers of passengers. (1907, c. 471, s. 1; C. S., s. 1056; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

The Commission is particularly authorized to regulate the carriage of inflammable articles as freight. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

§§ 62-212 to 62-219: Reserved for future codification purposes.

ARTICLE 11.

Railroads.

§ 62-220. Powers of railroad corporations. — Every railroad corporation shall have power:

(1) To Survey and Enter on Land. — To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

Cross Reference. — As to right of entry on land, see § 40-3.

Editor's Note. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Conflicting Locations. — As between two railroad companies the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. Fayetteville St. Ry. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906).

(2) To Condemn Land under Eminent Domain. — To appropriate land and rights therein by condemnation, as provided in the Chapter Eminent Domain.

Cross References. — As to condemnation by right of eminent domain, see § 40-2 et seq. As to amount of land which may be condemned, see § 40-29.

Editor's Note. — Since railroads are quasi-public corporations they are given by the State the power to take, by proper proceedings the necessary lands upon which to build their roads. Nor will the courts enjoin a railroad corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized. In Powers v. Hazelton, etc., R. Co., 33 Ohio St. 429 (1878), it was held that a landowner could not be permitted to prove, as a defense to condemnation proceedings instituted by a regularly organized railroad corporation, that the company was incorporated not for a public use, but for the private purposes of the corporators only, and that there was no public necessity for the road. See Wellington & Powellsville R.R. v. Cashie & C.R.R. & Lumber Co., 114 N.C. 690, 19 S.E. 646 (1894).

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

A railroad corporation has the power of eminent domain under §§ 40-2(1) and 40-5. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

When a railroad corporation obtains land in condemnation proceedings it procures merely an easement to be used only for railroad purposes. Condemnation is not to be used as a means of acquiring property for the benefit of the corporation. It has no right or authority to use or let the property for private or nonrailroad purposes. Such a right-of-way is an easement for railroad purposes and does not deprive the owner of the fee or its use for purposes not inconsistent with its use for railroad purposes. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Land May Be Taken from Another Railroad. — Land acquired by one railroad company under a legislative grant of the right of eminent domain, and not necessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina & R. & D.R.R. v. Carolina Cent. Ry., 83 N.C. 489 (1880).

(3) To Take Property by Grant. — To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the

real estate received by voluntary grant shall be held and used for the purposes of such grant only.

Editor's Note. — Railroads can acquire real estate only by statutory authority. In 1 Elliott on Rys., sec. 390, the general principle is stated as follows: "The rule is well established that a railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or it does not exist. It is, however, not necessary that the authority should be expressly conferred. It may be implied." See Wallace v. Moore, 178 N.C. 114, 100 S.E. 237 (1919).

Extending User of Right-of-Way. — While a railroad can use only the part of its right-of-way actually occupied, whenever the necessities of the company require it, it can extend its user of the right-of-way to the extent of the statutory right for additional tracks or other railroad purposes. Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Atlantic Coast Line R.R. v. Bunting, 168 N.C. 579, 84 S.E. 1009 (1915); Tighe v. Seaboard Air Line R.R., 176 N.C. 239, 97 S.E. 164 (1918).

(4) To Purchase and Hold Property. — To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, the stations and other accommodations necessary to accomplish the object of its incorporation.

Cross References. — As to adverse possession of property owned by a railroad, see § 1-44. As to presumption of abandonment of railroad right-of-way, see § 1-44.1.

A railroad corporation is without power to acquire and hold real estate except by statutory authority, either expressly conferred or necessarily implied from the powers contained in the charter or arising to it under the general laws. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

A conveyance of land for use as a railroad right-of-way by deed in regular form of bargain and sale, reciting a valuable consideration, is presumptively a deed of purchase within the meaning of this section and must be interpreted as an ordinary deed, so that when the granting clause is sufficient in form to convey the fee simple and the habendum and warranties are in harmony therewith, it conveys the fee and not a mere easement. McCotter v. Barnes, 247 N.C. 480, 101 S.E.2d 330 (1958).

(5) To Grade and Construct Road. — To lay out its road, not exceeding 100 feet in width, and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the Chapter Eminent Domain.

Cross Reference. — See § 40-29.

Change of Grade. — A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right-of-way. Brinkley v. Railroad, 135 N.C. 654, 47 S.E. 791 (1904).

(6) To Intersect with Highways and Waterways. — To construct its road across, along or upon any stream, watercourse, street, highway, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream, watercourse, street, highway or turnpike, thus intersected or touched, to its former state or to such state as not unnecessarily to impair its usefulness. Nothing in this Chapter shall be construed to authorize the erection of any bridge or any other construction across, in or over any stream or lake navigated by motor boats commensurate in size to sailboat, or sailboats or vessels, at the place where any bridge or other obstructions may be

proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any municipality without the assent of such municipality.

Cross References. — As to the power of the Utilities Commission to regulate crossings, see § 62-237. As to the duty of railroads to construct and maintain bridges which it has necessitated building, see §§ 136-75 and 136-78; as to duty to provide cattle guards, see § 62-226.

Editor's Note. — For note on misuse of railroad right-of-way, see 29 N.C.L. Rev. 312.

Duty to Public. — While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

Duty When Railroad Changes Grade of Street. — Where a railroad accepts the benefits or statutory authorization and changes the grade of a street or highway it must assume and comply with the burden imposed and restore the street to a useful condition. If, to meet the burden so imposed, it becomes necessary to go beyond the railroad right-of-way and change the grade of a street, thereby impairing access of an abutting property owner, compensation must be paid for the diminution in value resulting from the denial of access. Thompson v. Seaboard Air Line R.R., 248 N.C. 577, 104 S.E.2d 181 (1958).

Whole Street Cannot Be Appropriated. — In Seaboard Air Line Ry. v. City of Raleigh, 219 F. 573 (E.D.N.C. 1914), it is said: "It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road 'across, along, or upon' a street, always of much greater width than a railroad track and the crossties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power."

Assent of City an Essential Power. — The assent to the use of the street by a railroad company is often a most essential power, necessary to be used for the benefit of the people of the city. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

When Court Cannot Review Grant. — The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

(7) To Intersect with Other Railroads. — To cross, intersect, join and unite its railroad with any other railroad at any point on its route and upon the grounds of such other railroad, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any other railroad shall unite with the owners of such other railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by the Commission.

Cross Reference. — As to appointment of commissioners, see § 40-11 et seq.

Railroad Decides Necessity of Intersection. — Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants for a spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. Virginia & C.S.R.R. v. Seaboard Air Line R.R., 161 N.C. 531, 78 S.E. 68 (1913).

No Restriction of Right Except Voluntary. — A railroad company having the power of condemnation across the road of another company should exercise this right with regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience. But the courts can-

not restrict this right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. Virginia & C.S.R.R. v. Seaboard Air Line Ry., 165 N.C. 425, 81 S.E. 617 (1914).

Agreement or Condemnation Necessary for Entry. — Under this section one road cannot enter on the right-of-way of another for the purpose of connecting therewith without previous agreement, or condemnation proceedings. Richmond & D.R.R. v. Durham & N. Ry., 104 N.C. 658, 10 S.E. 659 (1889).

Parol Agreement Ineffectual. — A parol agreement to allow one railroad company to extend its track on the right-of-way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements. Richmond & D.S.R.R. v. Durham & N. Ry., 104 N.C. 658, 10 S.E. 659 (1889).

One railroad company will not be allowed to preclude competition by another in a particular area by arbitrarily refusing such other railroad reasonable use of its right-of-way and trackage. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Use of Common Trackage. — The right of each of two railroads to equal use of common trackage does not mean identical use, and where one of them constructs a spur from its independent line to serve a certain area adjacent to such line, but the common trackage is used by it in its operation serving such spur, the other has the right to construct and use a spur from the common trackage when this is the sole feasible means it has to serve industries in the same area, provided such operations will not impair the use of the common trackage by the other. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Railroad companies forming corporation to provide common trackage held entitled to equal use of such trackage. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Turnouts, Sidings and Switches. — In the absence of express statutory or charter authorization, the power to construct a railroad includes authority to construct such spur, industrial, switching and other auxiliary tracks as may be necessary to serve the public needs along or near the main line. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Railroads have authority under this section to provide "turnouts, sidings, and switches" to serve industrial plants along or near their main lines. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

(8) To Transport Persons and Property. — To take and convey persons and property on its railroad or by water by the power or force of steam, electricity, or by any other power, and to receive compensation therefor.

Cross References. — As to railroad's duty to transport, see § 62-234. As to power of Utilities Commission to prevent discrimination in service and charges, see § 62-140.

Charter May Confer Right to Lease. — The charter of a railroad company conferring the right to transport passengers and freight, and giving the power to "farm out" the right of transportation, authorizes the company to execute a valid lease of its property and franchises to another railroad company. Hill v. Railroad, 143 N.C. 539, 55 S.E. 854 (1906).

(9) To Erect Stations and Other Buildings. — To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

Cross Reference. — As to power of railroad companies to condemn land for union depots, see § 40-4.

(10) To Borrow Money, Issue Bonds and Execute Mortgages. — From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, to issue and dispose of its bonds for any amount so borrowed, to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing

thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

Cross Reference. — As to control of Utilities Commission over pledge of assets, issuing securities, etc., see § 62-160 et seq.

Corporation Has Power to Issue Bonds. — A railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, i.e., to make and issue its bonds. Commissioners of Craven v. Atlantic & N.C.R.R., 77 N.C. 289 (1877).

(11) To Lease Rails. — To lease iron rails to any person for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

(12) To Establish Hotels and Eating Houses. — To purchase, lease, hold, operate or maintain eating houses, hotels and restaurants for the accommodation of the traveling public along the line of its road. (1871-2, c. 138, s. 29; Code, s. 1957; 1887, c. 341; 1889, c. 518; Rev., ss. 2567, 2575; C. S., s. 3444; 1953, c. 675, ss. 6, 7; 1963, c. 1165, s. 1.)

§ 62-221. Engaging in unauthorized business. — (a) It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

(b) Any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in the discretion of the court. (Ex. Sess. 1924, c. 80; 1963, c. 1165, s. 1.)

§ 62-222. Agreements for through freight and travel. — The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads and the rolling stock of such corporations or companies on such terms as may be agreed upon by them. (1866-7, c. 105; Code, s. 1995; Rev., s. 2640; C. S., s. 3447; 1963, c. 1165, s. 1.)

§ 62-223. Intersection with highways. — Whenever the track of a railroad shall cross a highway or turnpike, such highway or turnpike may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway or turnpike desirable, then the railroad company may take such additional lands for the construction of the road, highway or turnpike on such new line as may be deemed requisite. Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the Chapter Eminent Domain, and duly made by such corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway or turnpike in such manner and by such tenure as the adjacent parts of the same highway or turnpike may be held for highway purposes. (1871-2, c. 138, s. 26; Code, s. 1954; Rev., s. 2568; C. S., s. 3448; 1963, c. 1165, s. 1.)

Cross References. — See § 62-220, subdivision (6), and § 62-224. As to the power of Utilities Commission to regulate crossings, see § 62-237. As to ascertaining the compensation for land taken, see § 40-11 et seq.

Editor's Note. — For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Stated in City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

§ 62-224. Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor. — (a) Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same.

(b) The notice may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by registered or certified mail addressed to either of such persons.

(c) If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within 30 days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense.

(d) This section shall in nowise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (R. C., c. 61, s. 30; 1874-5, c. 83; Code, s. 1710; Rev., s. 2569; 1915, c. 250, ss. 1, 2; C. S., ss. 3449, 3450; 1963, c. 1165, s. 1.)

Cross References. — As to the power of Utilities Commission to regulate crossings, see § 62-237. As to duty of railroad to maintain bridges, see § 136-75. As to duty of railroad to provide drawbridge, see § 136-78. As to venue in action against railroad, see § 1-81.

A railroad grade crossing is in itself a warning of danger. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Duty to Maintain Safe and Convenient Crossing. — While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900).

The duty of a railroad company with respect to the maintenance of a crossing over its track, where its track has been constructed over an established road, whether public or private, is well settled. The duty is prescribed by this section and has been recognized and enforced by the Supreme Court in numerous decisions. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Duty Not Restricted to Public Highway. — This section does not restrict the railroad's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any road used by the public as a mill and church road and in going to town. Goforth v. Southern Ry., 144 N.C. 569, 57 S.E. 209 (1907).

Same — Applies to Private Crossings. — An "established road or way" which a railroad company may not obstruct in crossing it with its tracks extends to those whose use is of a private nature, and not necessarily those dedicated to a public use, and in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. Tate v. Seaboard Air Line Ry., 168 N.C. 523, 84 S.E. 808 (1915).

Duty When Railroad Changes Grade of Street. — Where a railroad accepts the benefits of statutory authorization and changes the grade of a street or highway it must assume and comply with the burden imposed and restore the street to a useful condition. If, to meet the burden so imposed, it becomes necessary to go beyond the railroad right-of-way and change the grade of a street, thereby impairing access of an abutting property owner, compensation must be paid for the diminution in value resulting from the denial of access. Thompson v. Seaboard Air Line R.R., 248 N.C. 577, 104 S.E.2d 181 (1958).

"Negligent Construction" Defined. — By "negligent construction" is meant such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. Raper v. Wilmington & W.R.R., 126 N.C. 563, 36 S.E. 115 (1900). But the mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. Edwards v. Atlantic Coast Line R.R., 129 N.C. 78, 39 S.E. 730 (1901).

Duty of Traveler to Exercise Due Care. — A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Reciprocal Duty to Keep Proper Lookout and Exercise Care. — In approaching a grade crossing, both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Right to Assume That Crossing Is Safe. — One has the right to assume that a railroad company has discharged its duty to the public by keeping the crossing in safe condition. Tankard v. Roanoke R.R. & Lumber Co., 117 N.C. 558, 23 S.E. 46 (1895).

Yielding Right-of-Way. — Where a railroad track crosses a public highway, though a traveler and a railroad have equal rights to cross, the traveler must yield the right-of-way to the railroad company in the ordinary course of its business. Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

Highway Commission May Require Railroad to Widen Crossings. — Section 60-43, prior to its repeal and reenactment as this section, empowered the Highway Commission (now Board of Transportation), upon the widening of a highway, to require a railroad company to widen its highway crossings so as to conform to the increased width of the highway. Atlantic Coast Line R.R. v. State Highway Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966).

And Is Not Subject to Suit for Railroad's Costs in Widening. — The State Highway Commission (now Board of Transportation), is not subject to suit on the theory of unjust enrichment to recover costs incurred by a railroad company in widening its grade crossings pursuant to lawful order of the Highway Commission, there being no contention of any "taking" by the Commission, since there is no statutory provision authorizing suit in such instance, and the right to bring a common-law action against the Highway Commission where there is no statutory remedy is applicable solely where there has been a "taking" of property by the Commission. Atlantic Coast Line R.R. v. State Highway Comm'n, 268 N.C. 92, 150 S.E.2d 70 (1966).

Indictment. — An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing is fatally defective if it does not charge the manner of the misuse of the plank. State v. Roanoke R.R. & Lumber Co., 109 N.C. 860, 13 S.E. 719 (1891).

It is a fatal variance in an indictment for obstructing a highway at a railroad crossing, to prove that the defendant permitted for some time a dangerous hole to remain in the crossing. State v. Roanoke R.R. & Lumber Co., 109 N.C. 860, 13 S.E. 719 (1891).

When Injury Might Have Been Caused by Defective Crossing. — It is error for the trial court to sustain a motion of nonsuit on competent evidence from which the jury could have found that if defendant's crossing over a neighborhood road had not been negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding. Goforth v. Southern Ry., 144 N.C. 569, 57 S.E. 209 (1907).

Applied in Bundy v. Powell, 229 N.C. 707, 51 S.E.2d 307 (1949).

§ 62-225. Joint construction of railroads having same location. — Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon

shall be performed. (1871-2, c. 138, s. 46; Code, s. 1983; Rev., s. 2602; C. S., s. 3473; 1963, c. 1165, s. 1.)

§ 62-226. Cattle guards and private crossings; failure to erect and maintain misdemeanor. — Every company owning, operating or constructing any railroad passing through and over the enclosed land of any person shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from such enclosed land and shall also make and keep in constant repair crossings to any private road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a misdemeanor and fined in the discretion of the court. Any cattle guard approved by the Commission shall be deemed a good and sufficient guard under this section. (1883, c. 394, ss. 1, 2, 3; Code, s. 1975; Rev., ss. 2601, 3753; 1915, c. 127; C. S., s. 3454; 1933, s. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Applies to Town Lot. — The statute requiring railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the county. Shepard v. Railroad, 140 N.C. 391, 53 S.E. 137 (1906).

Adoption of Stock Law. — The adoption of the stock law did not abrogate this section in a locality. Shepard v. Railroad, 140 N.C. 391, 53 S.E. 137 (1906).

Joinder of Actions. — Where plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by defendant's ponding water back on plaintiff's land; the other to recover damages for a breach of duty on the part of defendant in not putting up sufficient cattle guards as required by this section, this was an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty. Hodges v. Wilmington & W.R.R., 105 N.C. 170, 10 S.E. 917 (1890).

§ 62-227. Change of route of railroad. — The directors of any railroad corporation may by a vote of two thirds of their whole number at any time alter or change the route, or any part of the route, of their road, if it shall appear to them that the line can be improved thereby, and they shall have the same right and power to acquire title to any lands required for the purpose of the company in such altered or changed route, as if the road had been located there in the first instance; but no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two thirds of the corporate authorities of such city or town. In case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. When any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the roadbed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this Chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route. (1871-2, c. 138, s. 25; Code, s. 1953; 1889, c. 391; 1893, c. 396, s. 3; Rev., s. 2573; C. S., s. 3455; 1963, c. 1165, s. 1.)

Authority Necessary to Change Route. — While a railroad company has no power to change its route without legislative authority, it is not necessary that this power should be given in the charter or a direct amendment thereto, but it may be given by charter or by special enactment or by the general railroad laws of the State. Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

Original Rights May Be Retained. — Variations in a route over which a railroad may run do not affect the identity of a corporate body

that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter is retained unimpaired. Cheraw & S.R.R. v. Commissioners of Anson, 88 N.C. 519 (1883).

When Commission Orders Change. — This section, requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Corporation Commission (now Utilities Commission), acting under express legislative authority and direction, requires the railroad to make the change for the convenience of the general public. Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

Right to Change Grade. — A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right-of-way. Brinkley v. Railroad, 135 N.C. 654, 47 S.E. 791 (1904).

§ 62-228. Obtaining temporary track across railroad. — Whenever any railroad line, track and right-of-way shall lie between any body of merchantable timber, quarry or other kind or class of heavy property requiring machinery for transportation and any body of navigable water over which such property could be floated or shipped, and the owner of such timber or property shall desire to transport such property to water for purposes of floating or shipping, such property owner shall have the right to file petition before the Commission for a right to cross such railroad with any other railroad track or tramway. The procedure for the hearing of the petition shall be the same as other proceedings of the Commission. The Commission shall hear the facts and if it be found reasonably necessary that the railroad track and right-of-way shall be crossed by a temporary railroad track, the Commission shall so order and prescribe the payment of the expense and the cost. (1931, c. 448; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-229. Shelter at division points required; failure to provide a misdemeanor. — (a) It shall be the duty of every person that may now or hereafter own, control, or operate any line of railroad in this State, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleets, hot sunshine, and other inclement weather: Provided, the Commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such order shall only be made after a hearing of which public notice shall have been given.

(b) Any person failing to comply with the requirements of this section shall be guilty of a misdemeanor, and for each offense shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). Each day of such failure shall constitute a separate offense. (1913, cc. 65, 117; C. S., s. 6557; 1933, c. 134; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-230. Maximum working hours and continuous service of employees; penalty; Commission to enforce. — (a) It shall be unlawful for any railroad company, its officers or agents, subject to this Article, to require or permit any employee, subject to this Article, to be or remain on duty for a longer period than 16 consecutive hours, and whenever any such employee of such railroad company shall have been continuously on duty for 16 hours he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; and no such employee who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue

or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a period longer than nine hours in any 24-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than 13 hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a 24-hour period or not exceeding three days in any week: Provided further, the Commission may, after a full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

(b) Any such railroad company, or any officer or agent thereof, requiring or permitting any employee to go, be or remain on duty in violation of this section shall be liable to a penalty of not to exceed five hundred dollars ($500.00) for each and every violation, to be recovered in suit or suits to be brought in the name of the State of North Carolina on relation of the Commission in the Superior Court of Wake County or of the county in which the violation of this Article occurred; and it shall be the duty of the said Commission to bring such suits upon satisfactory information lodged with it; but no such suit shall be brought after the expiration of one year from date of such violation; and it shall be the duty of said Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Article the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this Article shall not apply to any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the said employee left a terminal, and which could not have been foreseen: Provided further, that the provisions of this Article shall not apply to the crews of wrecking or relief trains.

(c) It shall be the duty of the Commission to execute and enforce the provisions of this Article, and all powers granted to the Commission are extended to it in the execution thereof. (1911, c. 112, ss. 2, 3, 4; C. S., ss. 6565, 6566, 6567; 1933, c. 134; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 47, s. 2.)

Editor's Note. — The 1973 amendment substituted "district attorneys" for "solicitors" near the end of the first sentence of subsection (b).

§ 62-231. Union depots required under certain conditions. — The Commission is empowered and directed to require, when practicable, and when the necessities of the case, in its judgment, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of erecting, constructing and maintaining such union passenger depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the Commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the Commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the Commission, are adequate and convenient and offer suitable

accommodations for the traveling public. (1903, c. 126; Rev., s. 1097; C. S., s. 1042; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross Reference. — As to power of railroads to condemn land for union station, see § 40-4.

Editor's Note. — For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Liberal Construction. — The statute in its principal purpose may be considered as remedial in its nature, and as to that feature will receive a liberal construction. Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

Section Valid Exercise of Legislative Power. — The power of the legislature to enact a statute of this character has been established by numerous and well-considered decisions, and is no longer open to question. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905); Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905); Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

Powers Given by Necessary Implication. — The statute authorizing the Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that end. Griffin v. Southern Ry., 150 N.C. 312, 64 S.E. 16 (1909).

When Union Stations May Be Required. — Under this section the Commission is empowered to direct the establishment of union stations under certain conditions. When these conditions are found to exist, then the two railroads may be compelled to unite in the erecting, constructing, and maintaining such union passenger depot commensurate with the business and revenues of such railroad companies on such terms, regulations, provisions and conditions as the Commission shall prescribe. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

The remedy was intended to apply to all the towns and cities in the State where, in the legal discretion of the Commission, the move is practicable, the convenience of the traveling public requires it, and the existing facilities, in the judgment of the Commission, are inadequate. Dewey v. Railroad, 142 N.C. 392, 55 S.E. 292 (1906).

Same — Must Be Practicable. — Whenever the Commission requires and orders a union station to be built, the only restriction in the statute is when "practicable." The other matters as to the security, accommodation, and convenience of the public are simply reasons addressed to the judgment of the Commission. When there is an appeal from its order, the sole query for a jury, under the statute, is whether the execution of the order is "practicable." The finding of the Commission that it is practicable is prima facie correct; and the burden is upon the defendant to show evidence to the contrary. State ex rel. Corporation Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

New Union Station. — The Commission has the power to require railroad companies subject to its jurisdiction, which have constructed or maintained a union passenger station in a city or town of the State, to construct or equip a new union passenger station in such city or town upon its finding that the present station is inadequate. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Jurisdiction Original — Exercised upon Own Motion or Petition of Interested Parties. — The jurisdiction of the Commission with respect to the construction of passenger stations is original, and may be exercised either upon its own motion or upon petition of interested parties. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Parties. — The Commission is not without jurisdiction of a proceeding with respect to the erection, construction, and maintenance of a new union passenger station in city or town, because one or more railroad companies entering such city or town are not made parties in the proceeding. The presence of two or more railroad companies as parties is sufficient. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Same — Lessor — Appeal. — Where three railroad companies use a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it is not jurisdictional before the Commission or the superior court on appeal that the lessor railroad be a party to the proceedings before the Commission to compel the railroads to build and maintain an adequate station, but it is not error for the trial judge to order that the lessor road be made a party and the cause proceeded with therein. State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Interstate and Intrastate Carriers. — The order of the Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction cannot be regarded as objectionable so far as it relates to the intrastate carrier, as a burden on interstate commerce, when it appears that the Commission was passing upon the petition of only a few cities or towns in the State separately and not as a part of a statewide scheme, and the expenditures required were in amount too small to affect such commerce. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

Same — Federal Transportation Act Prospective. — The Federal Transportation Act was held prospective in its enforcement, and did not relate back to a final order of the Commission, not appealed from, for the erection of a union station where the lines of an intrastate and interstate carrier crossed each other, the execution of which had been stayed by the Commission until after the passage of the federal statute solely for the advantage of the carriers at their request. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

§ 62-232. Construction of sidetracks. — The Commission is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the Commission authority to require railroad companies to construct sidetracks more than 500 feet in length. (1899, c. 164, s. 2, subsec. 15; Rev., s. 1097; C. S., s. 1044; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross Reference. — As to condemnation of land for industrial siding, see § 40-5.

Purpose of Section. — The General Assembly, while not prohibiting the carrier from continuing to establish sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the Commission to require the establishment of such sidings in proper cases. Corporation Comm'n v. Railroad, 140 N.C. 239, 52 S.E. 941 (1905).

Not Interference with Interstate Commerce. — The establishment of an industrial siding under the authority of the Commission is not an interference with interstate commerce. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910); Missouri Pac. Ry. v. Kansas ex rel. Taylor, 216 U.S. 262, 30 S. Ct. 330, 54 L. Ed. 472 (1910).

Restriction upon Power. — The Commission can require a railroad company to build a sidetrack to an industrial plant only upon the company's right-of-way or when the right-of-way is tendered. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910).

Restriction as to Revenue. — The power conferred upon the Commission to order a railroad company to build a sidetrack, is with the restriction that the revenue from such sidetrack shall be "sufficient within five years to pay the expenses of construction"; and the lower court having denied the authority of the Commission in this action, the presumption is in favor of its judgment, and it will be affirmed in the absence of evidence tending to show that the revenue will be sufficient according to the terms of the statute. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910).

Restriction as to Length. — The section confers upon the Commission the power to establish sidings under certain conditions, and restricts the exercise of such a right to 500 feet in length. Hales v. Atlantic Coast Line R.R., 172 N.C. 104, 90 S.E. 11 (1916).

Rights of Intervening Owners. — A railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use sidetracks to private industries off their right-of-way and over the lands of intervening owners against the will of such owners. When they have once permanently located their line, they are, as a rule, restricted to that and the right-of-way incident to it. Hales v. Atlantic Coast Line R.R., 172 N.C. 104, 90 S.E. 11 (1916).

Nonresident Railroad without Power of Eminent Domain. — The Commission cannot confer the power of eminent domain, and when the legislature has not conferred such power upon a nonresident railroad company respecting the construction of a sidetrack over the lands of others, an order of the Commission for the railroad to build such a track is void. Butler v. F.R. Penn Tobacco Co., 152 N.C. 416, 68 S.E. 12 (1910); State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 153 N.C. 559, 69 S.E. 621 (1910).

§ 62-233. Operation according to public schedule; certain trains and connections may be required. — (a) Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for

receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises.

(b) The Commission is empowered and directed to require, when practicable and when the necessities of the traveling public, in the judgment of the Commission, demand, that any railroad in this State shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, that no order under this section shall be made unless the business of the railroad justifies it. (1871-2, c. 138, s. 35; Code, s. 1963; Rev., s. 2611; 1907, c. 469, s. 3; C. S., ss. 1045, 3475; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

I. Subsection (a).
II. Subsection (b).

Cross References.

As to powers of Utilities Commission to prevent discrimination in transportation facilities, see § 62-140. As to rate regulation, see § 62-130 et seq. As to ejection of passenger refusing to pay fare or violating rules, see § 62-151.

I. SUBSECTION (a).

Reaffirmance of Common-Law Rule. — The requirement to furnish accommodations within a reasonable time is but a reaffirmance of the common law, leaving the courts to say what time is reasonable. Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Duty to Provide Transportation. — It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891).

Trains Need Not Stop at All Stations. — It is a reasonable regulation of a railroad that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel. Hutchinson v. Railroad, 140 N.C. 123, 52 S.E. 263 (1905).

Schedule Is Offer. — The printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has the right to be transported by the first train stopping at his destination. Coleman v. Railroad, 138 N.C. 351, 50 S.E. 690 (1905).

When Contract of Carriage Begins. — The contract of carriage by a common carrier begins when a passenger comes up on the carrier's premises or conveyance with the purpose of buying a ticket within a reasonable time or after having purchased a ticket; and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises. Hansley v. Jamesville & W.R.R., 115 N.C. 602, 20 S.E. 528 (1894).

Carrier May Demand Prepayment of Freight. — A common carrier has a right to demand the prepayment of charges for transporation before receiving freight for shipment to one individual, although it may have an established custom to accept shipments to its other patrons without such prepayment. Allen v. Cape Fear & Y.V.R.R., 100 N.C. 397, 6 S.E. 105 (1888).

A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though this is not required of others. It should appear, however, that a plaintiff had notice of such regulation. Randall v. Richmond & D.R.R., 108 N.C. 612, 13 S.E. 137 (1891).

Failure to Take Passenger Aboard. — Where plaintiff purchased a ticket from defendant's agent at a regular station before the time advertised for the arrival and departure of its train at that place, and was in readiness to get aboard, but the train ran by, making no effort to stop, although it had room in its cars for plaintiff, plaintiff was entitled to punitive damages, in the absence of sufficient excuse shown by defendant. Purcell v. Richmond & D.R.R., 108 N.C. 414, 112 S.E. 954 (1891).

Carrier under No Duty to Delay Trains. — A common carrier of passengers is under no obligation to delay the departure of its trains, or to look after the safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by the invitation or command of persons in charge of the trains, attempts to get on or off while the cars are in motion.

Browne v. Raleigh & G.R.R., 108 N.C. 34, 12 S.E. 958 (1891).

Duty to Stop Train at Passenger's Station. — A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop owing to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. Elliot v. Norfolk S. Ry., 166 N.C. 481, 82 S.E. 853 (1914).

Allowing Passenger to Board Train Which Does Not Stop at His Destination. — It is the duty of the railroad to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her. Hutchinson v. Railroad, 140 N.C. 123, 52 S.E. 263 (1905).

Stepping Off Moving Train at Conductor's Suggestion. — Where a train on which plaintiff was a passenger did not stop at the station to which he had paid his fare, and the conductor agreed that he would slow up the train at a safe place for plaintiff to alight, and the plaintiff consented to jump off and went upon the platform as the train slowed up, but seeing a "go ahead" signal from the rear, did not step for that reason; and then, feeling the increased motion of the train, he stepped off believing he was at a safe place and relying upon the conductor's promise to put him off at a safe place, and was injured, the evidence of the defendant's negligence was sufficient to be submitted to the jury. Cable v. Southern Ry., 122 N.C. 892, 29 S.E. 377 (1898).

Failure to Stop at Flag Station. — Where plaintiff went to a flag station on a railroad a reasonable time before the arrival of a train on which he intended to take passage and, by reason of absence of the agent and the failure of the engineer to see his signal, the train did not stop for him, the railroad is liable for the actual damages sustained by the plaintiff. Thomas v. Southern Ry., 122 N.C. 1005, 30 S.E. 343 (1898).

Same — When Punitive Damages Allowed. — It is only when the railway engineer actually sees the signal of an intended passenger at a flag station and willfully passes him by that punitive damages will be allowed in an action for damages, and the burden of showing the reckless disregard of plaintiff's rights is upon the latter. Thomas v. Southern Ry., 122 N.C. 1005, 30 S.E. 343 (1898).

Damages Where Passenger Carried by Station. — When a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. If it is done recklessly or willfully he is entitled to punitive damages. Hutchinson v. Railroad, 140 N.C. 123, 52 S.E. 263 (1905), overruling Smith v. Wilmington & W.R.R., 130 N.C. 304, 41 S.E. 481 (1902).

A railroad company is liable for nominal damages for its negligence in failing to stop its train and conveying a passenger beyond the destination to which he had paid his fare, it being a regular station on the line. Cable v. Southern Ry., 122 N.C. 892, 29 S.E. 377 (1898).

Ejected Passenger Has Right of Action. — A passenger, ejected from a train for failure to pay again fare which he had paid once upon purchasing a ticket, has a right of action. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Same — Passenger Need Not Pay Additional Fare to Prevent Ejection. — Where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not required to buy again his right to remain on the train to his destination. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Where Conductor Fails to Return Ticket. — Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, and the conductor on the first train neglected to return plaintiff's ticket, and, when the conductor of the second train asked for his fare, plaintiff, having no money, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff. Sawyer v. Norfolk S.R.R., 171 N.C. 13, 86 S.E. 166 (1915).

Passenger on Baggage Car. — A person who gets on a blind baggage car, having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Railroad, 135 N.C. 264, 47 S.E. 758 (1904).

Injury Caused by Misdirection of Agent. — The plaintiff, who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket, could recover for any injury proximately caused by being put out of the station into the cold weather while waiting for the next train. Coleman v. Railroad, 138 N.C. 351, 50 S.E. 690 (1905).

Action May Be Brought in Tort or Contract. — A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by this section may bring

an action on contract, or in tort, independent of the statute. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891).

Same—Damages. — If the tort is the result of simple negligence, damages will be restricted to such as are compensatory; but if it was willful, or committed with such circumstances as show gross negligence, punitive damages may be given. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891).

Where a railroad company, negligently and by reason of defective and inadequate equipment, failed to carry a passenger to whom it had sold an excursion ticket back to its starting point, but no personal injury or indignity was inflicted upon him, the passenger's right of action is ex contractu and not in tort, and hence exemplary or punitive damages cannot be recovered. Purcell v. Richmond & D.R.R., 108 N.C. 414, 12 S.E. 954 (1891), which was overruled in Hansley v. Jamesville & W.R.R., 115 N.C. 602, 20 S.E. 528 (1894), is reinstated, but the ground of the judgment is changed. Hansley v. Jamesville & W.R.R., 117 N.C. 565, 23 S.E. 443, 53 Am. St. Rep. 600, 32 L.R.A. 551 (1895).

If a train arrives after its schedule time, or misses connection, or delays a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for the loss of time and actual expenses. Coleman v. Railroad, 138 N.C. 351, 50 S.E. 690 (1905).

Basis of Exemplary Damages. — The true ground for allowing exemplary damages in an action against a railroad company for damages on account of its negligence is personal injury, or (in the absence of personal injury) insult, indignity, contempt, etc., to which the law imputes bad motive towards the plaintiff. Hansley v. Jamesville & D.R.R., 117 N.C. 565, 23 S.E. 443, 53 Am. St. Rep. 600, 32 L.R.A. 551 (1895).

II. SUBSECTION (b).

Connection Contemplated One of Trains as Well as Tracks. — The connection required by subsection (b) of this section is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track. Both are required to furnish facilities for traveling at all, and close connection of both to secure the convenience of the traveling public. Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904).

Running Additional Trains. — It is within the power of the Commission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the traveling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company. Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n, 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933 (1907).

Private Persons May Not Maintain Action to Force Continuing Operation. — Persons asserting unliquidated damages past and prospective resulting to them as consignees and consignors from the abandonment of the operation of a railroad may not in their individual capacities maintain an action to force continuing operation of the railroad by the appointment of a permanent operating receiver, since such damages, though possibly different in degree, are not different in kind from those sustained by the public generally, and since the power to require continuous operation in the public interest of the State is vested exclusively by statute in the Utilities Commission. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

§ 62-234. Commission may authorize operation of fast mail trains; discontinuance of passenger service. — The Commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall stop only at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train such railroad company shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday. The Commission shall have the power in any case in which the convenience and necessity of the traveling public do not require the running of passenger trains upon its railroad to authorize such railroad company to cease the operation of passenger trains as long as the convenience and necessity of the traveling public shall not require such operation. (1893, c. 97; Rev., s. 2614; C. S., s. 3481; 1933, c. 134, s. 8; c. 528; 1941, c. 97, s. 5; 1963, c. 1165, s. 1.)

Editor's Note. — For note on abandonments and partial discontinuances of passenger service by railroads, see 31 N.C.L. Rev. 137 (1952).

Power of Commission Discretionary. — The power conferred by this section and § 62-118 to authorize a discontinuance of an established service indicates the General Assembly intended that the Commission exercise this power in large measure according to its judgment and discretion. State ex rel. Utilities Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

§ 62-235. Commission to inspect railroads as to equipment and facilities, and to require repair. — The Commission is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the safety and convenience of the public and the railroad employees; and if any are found by it to be unsafe, it shall at once notify and require the railroad company to put the same in repair. (1907, c. 469, s. 3; C. S., s. 1046; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-236. To require installation and maintenance of block system and safety devices; automatic signals at railroad intersections. — (a) The Commission is empowered and directed to require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road unless at least eight trains each way per day are operated on that part.

(b) The Commission is empowered and directed to require, when public safety demands, where two or more railroads cross each other at a common grade, or any railroad crosses any stream or harbor by means of a bridge, to install and maintain such a system of interlocking or automatic signals as will render it safe for engines and trains to pass over such crossings or bridge without stopping, and to apportion the cost of installation and maintenance between said railroads as may be just and proper. (1907, c. 469, s. 1b; 1911, c. 197, s. 2; Ex. Sess. 1913, c. 63, s. 1; C. S., ss. 1047, 1049; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Lack of "Block System" as Negligence. — The lack of a "block system," when required, is held to be negligence per se. Gerringer v. North Carolina R.R., 146 N.C. 32, 59 S.E. 152 (1907), citing Stewart v. Railroad, 137 N.C. 687, 50 S.E. 312 (1905); Stewart v. Railroad, 141 N.C. 253, 53 S.E. 877 (1906).

§ 62-237. To regulate crossings and to abolish grade crossings. — The Commission may require the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State Highway System and designate who shall pay for the same by partitioning the cost of said work and the maintenance of such crossing among the railroads and municipalties interested in accordance with the formula provided for grade crossing alterations or eliminations on the State highway system in G.S. 136-20(b). (1899, c. 164, s. 2, subsec. 13; Rev., s. 1097; 1907, c. 469, s. 1c; 1911, c. 197, s. 1; C. S., ss. 1041, 1048; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to intersection with highways, see § 62-223. As to obstructing highways and maintaining defective crossings, see § 62-224. As to cattle guards and private crossings, see § 62-226. As to the power of the Board of Transportation to require the installation of signals and other safety devices, see § 136-20.

Editor's Note. — The General Assembly can make the abolition of grade crossings by railroads imperative instead of leaving it, as now, unexercised in the discretion of the Corporation (now Utilities) Commission, and can place the cost of doing so upon the corporation, whose duty it is to remove them. Northern Pac. Ry. v. Minnesota ex rel. City of Duluth, 208 U.S. 583, 28 S. Ct. 341, 52 L. Ed. 630 (1908), cited in Atlan-

tic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911). In the meantime, like any collision, or a derailment, the act itself is prima facie negligence on the part of the railroad company. Marcom v. Raleigh & A. Air Line R.R., 126 N.C. 200, 35 S.E. 423 (1900). This matter has heretofore been called to the public attention in Cooper v. Railroad, 140 N.C. 209, 52 S.E. 932 (1905); Gerringer v. North Carolina R.R., 146 N.C. 32, 59 S.E. 152 (1907); Wilson v. Railroad, 142 N.C. 333, 55 S.E. 257 (1910); Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914); McMillan v. Atlanta & C. Air Line Ry., 172 N.C. 853, 90 S.E. 683 (1916); Borden v. Southern Ry., 175 N.C. 177, 95 S.E. 146 (1918); Goff v. Atlantic Coast Line R.R., 179 N.C. 216, 102 S.E. 320 (1920).

Section Supplementary to Police Powers. — The statute authorizing the Commission to require railroads to raise or lower their tracks at a crossing is supplementary to and not in derogation of the exercise by the State, or an incorporated town authorized by it, of such police powers. Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911).

Commission Vested with Full Power. — The Corporation (now Utilities) Commission is vested with full and complete power to compel the raising or lowering of the track, to remove all danger to those using the public roads. Gerringer v. North Carolina R.R., 146 N.C. 32, 59 S.E. 152 (1907).

Authority is conferred by statute upon the Corporation (now Utilities) Commission to abolish grade crossings by a railroad company when by the operation of the railroad they become dangerous or inconvenient to the public traveling along the highways or private ways. Tate v. Seaboard Air Line Ry., 168 N.C. 523, 84 S.E. 808 (1915).

State Policy in Allocating Cost of Grade Crossing Improvements. — Although § 136-20 and this section may indicate a legislative trend in the field of allocating costs of grade crossing improvements, these statutes fall short of establishing a State policy applicable to factual situations other than those to which they relate in express and specific terms. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

Entire Expense on Railroad. — In New York & N.E.R.R. v. Bristol, 151 U.S. 556, 14 S. Ct. 437, 38 L. Ed. 269 (1893), it was held that the imposition upon a railroad company of the entire expense of a change of grade at a railroad crossing is not a violation of any constitutional right. Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911).

In Cleveland v. City Council, 102 Ga. 233, 29 S.E. 584, 43 L.R.A. 638 (1897), the court held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the county or the city, and where the public welfare demands a change of grade of the highway or street, the railroad company must, at its own expense, make such alterations in the grade of its crossings as will conform to the new grade. Atlantic Coast Line R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911).

When Section Does Not Apply. — This section does not apply where "the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State Highway System" is not involved. Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969).

§ 62-238. To require extension or contraction of railroad switching limits. — (a) The Commission may require, after notice and hearing to affected persons, the extension or contraction of the switching limits of any railroad or of any terminal or junction served by more than one railroad, in order to prevent discrimination or to serve the public convenience and necessity.

(b) The boundaries of switching limits which have been or may be established hereunder shall be boundaries to be observed by the railroad company, carrier or carriers whether or not the traffic moving into said boundaries or out of said boundaries is either interstate or intrastate in character.

(c) The failure or refusal of any railroad company, carrier or carriers to conform to or obey any decision, rule, regulation or order made by the Commission under the provisions of this section shall subject said railroad company, carrier or carriers refusing or failing to comply herewith to a penalty of five hundred dollars ($500.00); and each day that such failure or refusal to conform to or obey any decision, rule, regulation or order of the Commission shall subject said railroad company, carrier or carriers to a separate and distinct penalty of five hundred dollars ($500.00), the same to be certified to and prosecuted by the Attorney General. (1947, c. 1075, ss. 1-4; 1963, c. 1165, s. 1.)

§ 62-239. To fix rate of speed through municipalities; procedure. — (a) If a railroad company is of the opinion that an ordinance of a municipality through which a line of its railroad passes regulating the speed at which trains may run while passing through said municipality is unreasonable or oppressive, such railroad company may file its petition before the Commission, setting forth all the facts, and asking relief against such ordinance, and that the Commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, by registered or certified mail, to the mayor or chief officer of the town or municipality, together with a notice from the Commission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the municipality named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the Commission shall hear the petition, but any hearing granted by the Commission shall be had at the municipality where the conditions complained of are alleged to exist, or some member of the said Commission shall take evidence, both for the petition and against it, at such municipality, and report to the full Commission before any decision is made by the Commission.

(b) If the Commission finds that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall be taxed with the cost. If the Commission is of the opinion that the ordinance is unreasonable, it shall prescribe the maximum rates of speed for passing through such municipality. Thereafter, the railroad company may run its trains through such municipality at speeds not greater than those prescribed by the Commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

(c) If the judgment of the Commission is in favor of the petitioner, the Commission may make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. (1903, c. 552; Rev., ss. 1101, 1102, 1103; C. S., s. 1058; 1933, c. 134, s. 8; 1941, c. 97; 1957, c. 1152, s. 5; 1963, c. 1165, s. 1.)

Local Modification. — Cumberland, Rockingham, Union, Wayne: C. S. § 1058.

Regulation within Police Power of State. — In Gladson v. Minnesota, 166 U.S. 427, 17 S. Ct. 627, 41 L. Ed. 1064 (1897), the court said: "The state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction. It may prescribe the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the object of its incorporation, and the safety, good order, convenience and comfort of its passengers and of the public." Corporation Comm'n v. Railroad, 137 N.C. 1, 49 S.E. 191 (1904).

§ 62-240. Injury to passenger while in prohibited place. — If any passenger on any railroad is injured in any portion of a train where passengers are prohibited by notice conspicuously posted in its passenger cars, such railroad shall not be liable for the injury, provided the railroad has furnished sufficient room within its passenger cars for the proper accommodation of all passengers on the train. (1871-2, c. 138, s. 42; Code, s. 1978; Rev., s. 2628; C. S., s. 3509; 1963, c. 1165, s. 1.)

Effect of Posting Notice. — When this section has been complied with, a rule of a railroad company prohibiting passengers from going on the platform while the train is in motion is given the force and effect of a State law, barring a recovery for injuries sustained under such circumstances. Shaw v. Railroad, 143 N.C. 312, 55 S.E. 713 (1906).

Notice Need Be Only in English. — This section requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in

English, and the fact that such passenger cannot read that language is immaterial. Bane v. Norfolk S.R.R., 176 N.C. 247, 97 S.E. 11 (1918).

Riding on Platform Prima Facie Negligence. — It is prima facie negligence for a passenger to voluntarily ride on the platform of a rapidly moving train. Wagner v. Atlantic Coast Line R.R., 147 N.C. 315, 61 S.E. 171 (1908).

Section Not Applicable When Passenger Alighting. — This section is for the protection of passengers and should be reasonably construed, and has no application when the injury complained of was received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped. Kearney v. Seaboard Air Line Ry., 158 N.C. 521, 74 S.E. 593 (1912).

Person on Passenger Platform at Station. — One who is on the passenger platform of railroad company at its station with the purpose of becoming a passenger on its expected train is entitled to the protection due a passenger from dangerous conditions and usage there. Thomas v. Southern Ry., 173 N.C. 494, 92 S.E. 321 (1917).

§ 62-241. Negligence presumed from killing livestock. — When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company: Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued. (1856-7, c. 7; Code, s. 2326; Rev., s. 2645; C. S., s. 3482; 1963, c. 1165, s. 1.)

Cross Reference. — As to venue of an action against railroad, see § 1-81.

Editor's Note. — Several of the earlier cases, notably Doggett v. Richmond & D.R.R., 81 N.C. 459 (1879), and Durham v. Wilmington & W.R.R., 82 N.C. 352 (1880), stated that, where the facts are known and show there was no negligence on the part of the railroad, the presumption created by this section does not apply. But it would have been more accurate to say that the prima facie case here created is rebutted where the undisputed facts show there was no negligence on the part of the defendant, than to say the statute did not apply to such a case. There is no exception in the statute. It is in terms general and applies alike to all cases of killing stock by railroad. The rule is thus stated in the later cases. See Hardison v. Atlantic & N.C.R.R., 120 N.C. 492, 26 S.E. 630 (1897).

In some of the early decisions it was said that when livestock were injured by the engine or cars of a railroad company and an action thereon was brought within six months, this section raised a presumption of negligence and cast upon the defendant the burden of rebutting such presumption. Carlton v. Wilmington & W.R.R., 104 N.C. 365, 10 S.E. 516 (1889); Bethea v. Raleigh & A.R.R., 106 N.C. 279, 10 S.E. 1045 (1890). But it is now the established rule, as settled by the later and prevailing cases, that "prima facie evidence of negligence" means no more than evidence sufficient to carry the case to the jury, and to justify, but not compel, a verdict as for a negligent wrong. See Ferrell v. Norfolk S.R.R., 190 N.C. 126, 129 S.E. 155 (1925).

Section Applies When Facts Known. — The presumption of negligence in killing livestock, when the action is brought within six months, applies where the facts are known. Hanford v. Southern Ry., 167 N.C. 277, 83 S.E. 470 (1914).

Applies When Stock under Control of Person. — The statutory presumption of negligence for killing livestock, when the action is brought within six months, is not rebutted by showing that the livestock were under the control of a person at the time. Randall v. Richmond & D.R.R., 104 N.C. 410, 10 S.E. 691 (1889).

Same — When Animal Hitched to Vehicle. — The statutory presumption of negligence of a railroad company in killing livestock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Hanford v. Southern Ry., 167 N.C. 277, 83 S.E. 470 (1914).

Where it is proven or admitted that cattle have been killed by the train of a railroad company within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing, where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed. Randall v. Richmond & D.R.R., 107 N.C. 748, 12 S.E. 605 (1890).

Does Not Apply to Fowl. — No presumption of negligence against a railroad company is raised by the mere fact of killing fowl, etc., upon its track in the operation of its trains. This section makes it prima facie evidence of negligence in respect only to "cattle or other livestock," which does not include geese or other fowl within its terms. James v. Atlantic Coast Line R.R., 166 N.C. 572, 82 S.E. 1026 (1914).

Does Not Apply to Dogs. — The killing of a dog by a street railway is not prima facie evi-

dence of negligence. Moore v. Electric Co., 136 N.C. 554, 48 S.E. 822 (1904).

When Horses Run into Trestle. — In an action against a railroad company for damages for injuries to horses, where the evidence showed that the horses were injured by running into a trestle, and that the train was 100 yards from the trestle when they were injured, and stopped 100 feet from the trestle, this section did not apply. Ramsbottom v. Railroad, 138 N.C. 38, 50 S.E. 448 (1905).

Plaintiff Must Prove Case. — Where a railroad train runs into, kills or injures livestock, and the owner brings his action for damages within the statutory six months, the prima facie case of negligence raised by the statute is sufficient to take the case to the jury, but does not change the burden of proving the issue of negligence from the plaintiff. Ferrell v. Norfolk S.R.R., 190 N.C. 126, 129 S.E. 155 (1925).

How Presumption Rebutted. — In an action against a railroad company for killing certain mules of the plaintiff, where negligence is established by force of this section, it can only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to save them. Pippen & Gannon v. Wilmington C. & A.R.R., 75 N.C. 54 (1876).

This rule can only be rebutted by showing that the agents of the railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. Battle v. W. & W.R.R., 66 N.C. 343 (1872).

Same — Presumption Not Repelled. — Where plaintiff's horse had been injured on a railroad by the running of a train against it, and it was doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on track, the prima facie case of negligence made by this section was not repelled. Clark v. Western N.C.R.R., 60 N.C. 109 (1863).

Same — Instructions. — Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. Baker v. Roanoke & T.R.R.R., 133 N.C. 31, 45 S.E. 347 (1903).

When Owner Permits Cattle to Stray on Railroad Tracks. — If the owner of cattle permits them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was being carelessly run, or by the exercise of proper care after the animals were discovered the injury could have been avoided or prevented. Doggett v. Richmond & D.R.R., 81 N.C. 459 (1879).

Effect of Local Stock Law. — The prima facie evidence of negligence on the part of a railroad company in a suit for damages for killing stock is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. Roberts v. Richmond & D.R.R., 88 N.C. 560 (1883).

No Duty to Cut Down Weeds. — A railroad company is not negligent in failing to cut down bushes or weeds on the right-of-way beyond the portion over which it is exercising actual control for corporate purposes, though a horse is killed as a result of the engineer's inability to see him on account of the weeds. Ward v. Wilmington & W.R.R., 109 N.C. 358, 13 S.E. 926 (1891).

Measure of Damages. — The measure of damages when a cow is killed by a train is the difference in the value of the cow and that of the beef. Roberts v. Richmond & D.R.R., 88 N.C. 560 (1883).

When Judge May Direct Verdict. — This section applies to all cases of killing stock by a railroad, and while the presumption of negligence arising from the killing may be rebutted, it is only where the undisputed facts show there was no negligence that the trial judge should direct a verdict for the defendant. Hardison v. Atlantic & N.C.R.R., 120 N.C. 492, 26 S.E. 630 (1897).

Defendant Not Entitled to Nonsuit. — Where a plaintiff makes a prima facie case by suing for the killing of a cow within six months, the defendant is not entitled to nonsuit on the ground that such prima facie case is rebutted by the evidence of the defendant. Davis v. Railroad, 134 N.C. 300, 46 S.E. 515 (1904).

Applied in Aycock v. W. & W.R.R., 51 N.C. 231 (1858); Wilson v. Norfolk & S.R.R., 90 N.C. 69 (1884); Snowden v. Norfolk & S.R.R., 95 N.C. 93 (1886); Carlton v. Wilmington & W.R.R., 104 N.C. 365, 10 S.E. 516 (1889); Coburn v. Atlantic Coast Line R.R., 227 N.C. 695, 44 S.E.2d 200 (1947).

§ 62-242. Liability of railroads for injuries to employees; fellow-servant rule; defective machinery; contributory negligence; assumption of risk; contracts void. — (a) Any servant or employee of any railroad company operating in this State who shall suffer injury to his person or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances

of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void.

(b) Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in the case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(c) In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(d) In any action brought against any common carrier under or by virtue of any of the provisions of this section to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence.

(e) Any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by this section, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this section, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought.

(f) The provisions of this section relating to liability for damages shall also apply to logging roads and tramroads.

(g) The term "common carrier" as used in this section shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier. The term "employee" or "servant" as used in this section shall include any person carried on the payroll of such railroad company and required to be on its property regardless of whether such person is receiving compensation at the time or not. (1897 (Pr.), c. 56; Rev., s. 2646; 1913, c. 6, ss. 1, 2, 3, 4, 5; 1915, c. 256; 1919, c. 275; C. S., ss. 3464, 3465, 3466, 3467, 3468, 3469, 3470; 1947, c. 916; 1963, c. 1165, s. 1.)

I. General Consideration.
II. Fellow-Servant Rule.
III. Assumption of Risk.
IV. Contributory Negligence.
V. Contracts and Rules Exempting from Liability.
VI. Logging Roads and Tramroads.

Cross References.

As to venue of an action against railroad, see § 1-81. As to action for death by wrongful act generally, see § 28-173.

I. GENERAL CONSIDERATION.

Editor's Note. — The statutes now combined in this section, regulating the liability of railroads for injuries to employees, were enacted prior to the adoption of the Workmen's Compensation Act, §§ 97-1 to 97-122. Section 97-13 expressly provides that the Workmen's Compensation Act is not applicable to railroads or railroad employees and that this section is not repealed. According to § 97-13, however, the exemption as to railroads does not apply to electric street railroads and their employees.

In Hobbs v. Atlantic & N.C.R.R., 107 N.C. 1, 12 S.E. 124 (1890), it was held that a railroad company was not liable for injury to its servants, resulting from the negligence of a fellow servant. In that case the attention of the legislature was called to the fact that many of the states had by legislative enactment abrogated the fellow-servant rule in so far as it applied to railroad employees. In 1897 such a statute (now subsection (a) of this section) was passed, and its constitutionality was sustained in Hancock v. Norfolk & W. Ry., 124 N.C. 222, 32 S.E. 679 (1899).

In Mott v. Southern Ry., 131 N.C. 234, 42 S.E. 601 (1902), it was sought to curtail and restrict the statute so that it should apply only to employees engaged in operating trains, but the court held the contrary and said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained by 'any servant or employee of any railway company . . . . . in the course of his services or employment with said company.' The plaintiff was an employee and was injured in the course of his employment."

However, to come within the provisions of subsection (a) a railroad must be "operating" and not "under construction." See Nicholson v. Railroad, 138 N.C. 516, 51 S.E. 40 (1905); Bailey v. Meadows Co., 152 N.C. 603, 68 S.E. 11 (1910).

The statute that is now subsection (b) of this section was passed after Congress had passed a similar statute applicable to employees engaged in interstate commerce. It is not as broad as subsection (a), for it applies only to common carriers by railroad, while subsection (a) applies to all railroads. See Williams v. Kinston Mfg. Co., 175 N.C. 226, 95 S.E. 366 (1918). But see subsection (f), making both subsections applicable to logging roads and tramroads.

Subsection (b) of this section applies only to employees engaged exclusively in intrastate commerce. There is a federal statute similar in its provisions which applies to employees engaged in interstate commerce. See 45 U.S.C. § 51. Rights accruing under the latter statute may be enforced in the state courts as well as the federal courts.

There is a distinction between the State and federal statute as to the basis of the damages assessed. Under the State statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. Ward v. North Carolina R.R., 161 N.C. 179, 176 S.E. 717 (1912). Under the United States statute the damages are based upon the pecuniary loss sustained by the beneficiary. North Carolina R.R. v. Zachary, 232 U.S. 248, 34 S. Ct. 305, 58 L. Ed. 591 (1914).

There is also a distinction as to the beneficiary. Under the State statute the jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. Under the United States statute, the jury must find as to each plaintiff what pecuniary benefit each plaintiff had reason to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained such pecuniary loss. The personal representatives sue for the benefit of the next of kin. See Horton v. Seaboard Air Line R.R., 175 N.C. 472, 95 S.E. 883 (1918).

Under § 28-173 none of the amount recovered in action for death by wrongful act belongs to the estate of the deceased and none of it is liable for the payment of his debts.

"Common Carrier" Defined. — A common carrier is one who, by virtue of his calling, undertakes for compensation to transfer personal property from one place to another for all persons who choose to employ him. Williams v. Kinston Mfg. Co., 175 N.C. 226, 95 S.E. 366 (1918).

This section applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N.C. 525, 168 S.E. 833 (1933).

Statute Applicable. — The federal and state courts have concurrent jurisdiction and the question of which statute will apply depends upon whether or not the employee was engaged in interstate commerce. Renn v. Seaboard Air Line Ry., 170 N.C. 128, 86 S.E. 964 (1915); West v. Atlantic Coast Line R.R., 174 N.C. 125, 93 S.E. 479 (1917). See also Capps v. Atlantic Coast Line R.R., 178 N.C. 558, 101 S.E. 216 (1919).

When Interstate Question Immaterial. — In an action brought by a switchman of the defendant's train crew to recover damages for alleged negligence of the defendant in providing an improper coupler on a train made up and ready to start for a destination beyond the State, the question whether the train was an interstate one, or the plaintiff was at the time engaged in interstate commerce, is not material, since the enactment of this section, which, in this respect, is substantially identical with the federal statute. Sears v. Atlantic Coast Line R.R., 169 N.C. 446, 86 S.E. 176 (1915).

As to the time within which the action must be brought, under the federal act, see Belch v. Seaboard Air Line R.R., 176 N.C. 22, 96 S.E. 640 (1918); King v. Norfolk-Southern R.R., 176 N.C. 301, 97 S.E. 29 (1918).

Effect of Nonsuit in Action under Federal Act. — A judgment as of nonsuit upon the merits of an action brought by the administratrix of an injured employee of a railroad company under the Federal Employers' Liability Act will not operate as a bar to the same cause brought under the laws of this State, §§ 60-66, 60-67, the law and facts applicable to the first not being identical with those applicable to the second. Fuquay v. A. & W. Ry., 199 N.C. 499, 155 S.E. 167 (1930).

Applied in Byers v. Boice Hardwood Co., 201 N.C. 75, 159 S.E. 3 (1931); Bateman v. Brooks, 204 N.C. 176, 167 S.E. 627 (1933); Graham v. Atlantic Coast Line R.R., 240 N.C. 338, 82 S.E.2d 346 (1954).

II. FELLOW-SERVANT RULE.

Abrogation of Fellow-Servant Rule. — Subsection (a) of this section is an unconditional abrogation of the kindred doctrines of fellow servant and assumption of risk as applied to railroad companies. Coley v. North Carolina R.R., 129 N.C. 407, 40 S.E. 195 (1901).

The law relating to the doctrine of fellow servants has been abrogated in regard to its application to those employed by railroad companies operating in this State. Robinson v. J.B. Ivey & Co., 193 N.C. 805, 138 S.E. 173 (1927).

Subsection (a) Applies to Any Department of Railroad. — The provisions of subsection (a) of this section apply to an injury negligently inflicted by a fellow servant in any department of a railroad being operated. Buckner v. Madison County R.R., 164 N.C. 201, 80 S.E. 225 (1913).

It Applies to Manufacturing Company Operating Spur Track.—Subsection (a) of this section applies to a manufacturing corporation which owns and operates a spur track on its grounds as incidental to its main business, with respect to servants employed in such service. Hairston v. Leather Co., 143 N.C. 512, 55 S.E. 847 (1906); United States Leather Co. v. Howell, 151 F. 444 (4th Cir. 1907).

But Not to Railroad under Construction. — Subsection (a) of this section does not apply to an employee engaged in building a trestle for the extension of a railroad, at a point some miles from the track on which trains are being operated. Nicholson v. Railroad, 138 N.C. 516, 51 S.E. 40 (1905); Bailey v. Meadows Co., 152 N.C. 603, 68 S.E. 11 (1910).

Street Railways. — Before the enactment of the Workmen's Compensation Act, subsection (a) of this section was held to apply to street railways. Hemphill v. Lumber Co., 141 N.C. 487, 54 S.E. 420 (1906); Brookshire v. Asheville Elec. Co., 152 N.C. 669, 68 S.E. 215 (1910). See § 97-13 and Editor's Note to this section.

Subsection (a) Operates on All Employees. — Subsection (a) of this section operates on all employees of the company, whether in superior, equal, or subordinate positions. Fitzgerald v. Railroad, 141 N.C. 530, 54 S.E. 391 (1906); Bloxham v. Stave & Timber Corp., 172 N.C. 37, 89 S.E. 1013 (1916).

Regardless of Kind of Employment. — The provisions of subsection (a) do not require that the servant, at the time of the injury, should be engaged in the running or operation of a train, but apply to any other kind of service, whether more or less dangerous. Mincey v. Atlantic Coast Line R.R., 161 N.C. 467, 77 S.E. 673 (1913).

And Must Be Read into Contract of Service. — Where a contract of service with the defendant railroad was made in this State, the provisions of subsection (a) of this section must be read into the contract, and there being no evidence that the service was to be performed altogether in another state, it would seem that the relative rights and disabilities of the parties are fixed by the terms of the contract. Miller v. Railroad, 141 N.C. 45, 53 S.E. 726 (1906).

Injury When Duty Delegated to Another. — Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it is liable for any injury to its own employee caused by negligence of the employees of the lumber company in loading the car. Britt v. Carolina & N.R.R., 144 N.C. 242, 56 S.E. 910 (1907).

Injury in Loading Logs. — Where a tram railroad was engaged in loading logs and a fellow servant of the plaintiff, acting in the scope of his employment in loading the logs, negligently caused one of the logs to drop upon the plaintiff and injure him, the employer was liable in damages for the negligent injury proximately caused. Lilley v. Interstate Cooperage Co., 194 N.C. 250, 139 S.E. 369 (1927).

Injury by Falling Tree. — Subsection (a) of this section applied where an employee was injured by a tree falling upon him as he was riding on the car of defendant's logging road in the performance of his duties, a change of wind having deflected the tree from its expected course, so that it struck the tops of smaller trees and thence fell upon the plaintiff, for the engineer should reasonably have seen the danger in time to have stopped the train and avoided the injury, after the course of the falling tree had been unexpectedly deflected. Bloxham v. Stave & Timber Corp., 172 N.C. 37, 89 S.E. 1013 (1916).

Defective Ladder. — Where two employees of a railroad company were instructed to do certain work requiring the use of a ladder, and a discarded ladder, which proved defective, was selected from several supplied by the company, the others being sound, and one of the employees sustained a fall because of the defect and sued for damages therefor, subsection (a) of this section applied. Mincey v. Atlantic Coast Line R.R., 161 N.C. 467, 77 S.E. 673 (1913).

Flagman at Crossing. — Where the plaintiff was employed by a railroad to warn pedestrians of approaching trains at a public crossing and to signal the engineer, and the plaintiff was injured

by the defendant's negligence when he had crossed the platform on a train and was on the lowest step of the car for the performance of his duty on the other side, the evidence was sufficient upon the question of employment to sustain a verdict in plaintiff's favor. West v. Atlantic Coast Line R.R., 174 N.C. 125, 93 S.E. 479 (1917).

Engineer Injured by Assistant's Negligence. — It is the duty of a railroad company to furnish its engineer a competent person to assist him in fixing his locomotive, when such assistance is necessary from the character of the work being done; and the company is liable in damages when the assistant fails to exercise ordinary care to prevent an injury, such failure being the proximate cause of the injury. Horton v. Seaboard Air Line Ry., 145 N.C. 132, 58 S.E. 993 (1907).

Employee Negligently Shot by Fellow Servant. — Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage room, removed a pistol which he knew to be loaded, took it in his hand, and in a careless manner opened another drawer to the desk, and in doing so caused the pistol to fire, and killed his assistant, his negligent acts were attributable to the company employing him. Moore v. Southern R.R., 165 N.C. 439, 81 S.E. 603 (1914).

Accident in Doing Work of a Simple Nature. — The plaintiff was employed by a railroad to replace the crossties under the rails of the road. While a tie was being depressed into position by his fellow servant his hand was caught between the end of the tie and the rail and injured. The plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." It was held that the injury was the result of an accident in doing work of a simple nature, and a recovery should have been denied as a matter of law. Lloyd v. Southern Ry., 168 N.C. 646, 85 S.E. 10 (1915).

III. ASSUMPTION OF RISK.

Editor's Note. — After the passage of a similar federal statute applying to employees engaged in interstate commerce the North Carolina legislature enacted the statute that is now subsection (d) of this section. It is not as broad as subsection (a), for it applies only to common carriers.

General Consideration. — The doctrine of assumption or risk is that an employee assumes the risk of accidents and injuries incident to the business properly operated. He does not assume the risk caused by the negligence of the company, in not furnishing proper appliances or in any other respect. Horton v. Seaboard Air Line R.R., 175 N.C. 472, 95 S.E. 883 (1918).

The employee assumes no risk in the proper use of defective appliances after notifying the employer, who promises to remedy the defect; but the employee must use the appliances with proper regard to their known condition, and, failing in this, he would be guilty of contributory negligence. Britt v. Carolina & N.R.R., 144 N.C. 242, 56 S.E. 910 (1907).

It is not the mere working in the presence of an obvious defect in an appliance furnished by the master that will constitute contributory negligence on the part of the servant; and assurances on the part of the former that needed repairs will be made will frequently relieve the latter of this charge. Bissell v. Greenleaf-Johnson Lumber Co., 152 N.C. 123, 67 S.E. 259 (1910).

Defense of Assumption of Risk Eliminated. — In an action for negligence against a railroad company operating in this State, the defense of working on in the presence of a defective appliance or machine, usually dealt with under the head of assumption of risk, has been eliminated. Biles v. Railroad, 143 N.C. 78, 55 S.E. 512 (1906).

Under the construction of subsection (a) of this section the defense of assumption of risk is not available. Moore v. Rawls, 195 N.C. 125, 144 S.E. 552 (1928). See Coley v. North Carolina R.R., 129 N.C. 407, 40 S.E. 195 (1901).

Duty of Employer to Furnish Safe Tools. — It is the master's duty to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general use. Bissell v. Greenleaf-Johnson Lumber Co., 152 N.C. 123, 67 S.E. 259 (1910); Eplee v. Southern Ry., 155 N.C. 293, 71 S.E. 325 (1911). If he fails to do so he exposes the servant to extraordinary risks. Moore v. Railroad, 141 N.C. 111, 53 S.E. 745 (1906).

Acquiescence in Use of Inappropriate Appliance. — The master's acquiescense in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. Wallace v. Railroad, 141 N.C. 646, 54 S.E. 399 (1906).

Obviously Defective Machinery. — The use of machinery obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences. Coley v. North Carolina R.R., 129 N.C. 407, 40 S.E. 195 (1901).

When Plaintiff Causes Own Injury. — When under instructions from his superior officer the plaintiff, in repairing a piece of machinery, with knowledge of its defects, negligently caused an injury to himself in such manner as it was his duty in repairing to prevent, he cannot recover, and this section has no application. Mathis v. Atlantic Coast Line R.R., 144 N.C. 162, 56 S.E. 864 (1907).

Liability Not Affected by Act of Shipper. — The duty of the railroad company to have a

crosspiece used to keep steady lumber on flat cars secured in a reasonably safe manner for the use to which its servants customarily put it is not affected by the fact that the shipper puts it on in loading the car. Wallace v. Railroad, 141 N.C. 646, 54 S.E. 399 (1906).

Failure to Equip Car with Automatic Couplers. — Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant, in the absence of any evidence of recklessness, was whether plaintiff was injured in the course of his service and employment. Hairston v. Leather Co., 143 N.C. 512, 55 S.E. 847 (1906).

Defective Coupler. — In an action for an injury alleged to have been sustained from a defective coupler, the use of a defective coupler was a violation of a positive duty, and, in connection with an express order of the superintendent to make the coupling, was continuing negligence, and the causa causans of the injury. Liles v. Lumber Co., 142 N.C. 39, 54 S.E. 795 (1906); Sears v. Atlantic Coast Line R.R., 169 N.C. 446, 86 S.E. 176 (1915).

Engine without Handhold along Pilot Beam. — Where the plaintiff's evidence showed that he was at the time of the injury at the usual position provided for the purpose on the pilot of the engine by order of his superiors and in the necessary performance of his duties, and that he was thrown and injured because the engine did not have the usual handhold along the pilot beam, and that he did not know the handhold was lacking when he got on, and was guilty of no carelessness, his right of action was established. Biles v. Railroad, 143 N.C. 78, 55 S.E. 512 (1906).

Exposed Screw on Power Drill. — A power drill furnished by a master to a servant for boring holes in iron plates, having an exposed setscrew thereon dangerous in operating the drill and which is usually covered or countersunk, is not a proper tool for the purpose, and the master is liable in damages proximately caused by the defect. Eplee v. Southern Ry., 155 N.C. 293, 71 S.E. 325 (1911).

Improper Ladder. — Where it was the custom of a railroad company to furnish ladders to its painters, and the plaintiff, a painter, had not been furnished with a proper ladder, but with an ordinary ladder that extended beyond the steep roof of the building upon which he was at work, and the ladder fell over and struck the plaintiff, causing him to fall, and the injury would not have occurred if a proper ladder or appliance had been furnished, the evidence was sufficient to take the case to the jury upon the issue of the company's actionable negligence. Jones v. Atlantic Coast Line R.R., 194 N.C. 227, 139 S.E. 242 (1927).

Defective Handcar. — Where plaintiff was injured in consequence of using a defective handcar, which he had theretofore repeatedly reported to his employer as defective, and for which a replacement had been promised, the employer was liable. Boney v. Atlantic & N.C.R.R., 145 N.C. 248, 58 S.E. 1082 (1907).

Evidence. — Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Fitzgerald v. Railroad, 141 N.C. 530, 54 S.E. 391 (1906).

Question for Jury. — Where the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck for the service, the use of which would have avoided the injury, it is for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk on attempting to lift the trunk. Hines v. Atlantic Coast Line R.R., 185 N.C. 72, 116 S.E. 175 (1923). See also Horton v. Seaboard Air Line R.R., 175 N.C. 472, 95 S.E. 883 (1918); Wallace v. Tallahassee Power & Light Co., 176 N.C. 558, 97 S.E. 611 (1918).

IV. CONTRIBUTORY NEGLIGENCE.

Editor's Note. — The provisions of subsection (c) of this section apply only to employees engaged exclusively in intrastate commerce. There is a similar federal statute which applies to employees engaged in interstate commerce. See 45 U.S.C. § 53.

See 13 N.C.L. Rev. 256.

In General. — The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, and subsection (c) of this section, and then only for the purpose of mitigating the damages or as partial defense. Moore v. Chicago Bridge & Iron Works, 183 N.C. 438, 111 S.E. 776 (1922).

To What Employees Subsection (c) Applies. — Subsection (c) of this section applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N.C. 525, 168 S.E. 833 (1933).

Contributory Negligence and Assumption of Risk. — Under subsection (c) of this section, the plaintiff was entitled to have his cause submitted to the jury, for, as herein provided, contributory negligence is no longer a bar to an action by an employee against a railroad for injuries sustained during his employment, and the question of assumption of risk was for the jury, the

burden of proof being upon the defendant. Hines v. Atlantic Coast Line R.R., 185 N.C. 72, 116 S.E. 175 (1923).

There is a vital difference between contributory negligence and assumption of risk, which is thus stated, 1 Labatt on Master and Servant, secs. 305 and 306, as follows: "Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely matter of conduct." This distinction has often been approved by the United States Supreme Court in cases under the Employers' Liability Act. Seaboard Air Line Ry. v. Horton, 233 U.S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914).

When Jury Fails to Allow for Contributory Negligence. — Where the plaintiff's complaint demands damages in a certain amount in his action involving the issues of negligence and contributory negligence, and the application of the rule of comparative negligence under the provisions of subsection (c) of this section, the fact that the jury has rendered a verdict for damages to the full amount demanded in the complaint under a proper instruction does not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict will not on that ground be disturbed on appeal. Brooks v. Suncrest Lumber Co., 194 N.C. 141, 138 S.E. 532 (1927).

Evidence Raising Issue for Jury. — In an action for a deceased employee's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, is some evidence that the defendant's negligence proximately caused the employee's death, and raises the issue for the determination of the jury though the intestate might have been guilty of contributory negligence. Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924).

Negligence in Obtaining Improper Ladder. — The failure of railroad company to furnish to an employee engaged in the scope of his employment in painting a station house, a proper ladder or appliance, which failure caused the injury in suit, comes within the provisions subsection (c) of this section, and the contributory negligence of the plaintiff is not a complete bar to his recovery, but is only to be considered by the jury in diminution of the damages. Jones v. Atlantic Coast Line R.R., 194 N.C. 227, 139 S.E. 242 (1927).

Motion to Nonsuit. — Where plaintiff, while performing his duty, coupled a car attached to defendant's locomotive, while not in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to practice, though there was evidence of contributory negligence, its establishment would not be a complete defense, under subsection (c) of this section, and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. Lamm v. Atlantic Coast Line R.R., 183 N.C. 74, 110 S.E. 659 (1922).

Federal Statute. — The rule under the federal statute is substantially the same as that prescribed by subsection (c) of this section. Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company in an action brought under the Federal Employers' Liability Act, the admeasurement being that of comparative negligence by which the jury, under conflicting evidence, reduces the recovery in accordance with the relative negligence of the employee. Moore v. Atlantic Coast Line R.R., 185 N.C. 189, 116 S.E. 409 (1923); Ballew v. Asheville & E.T.R.R., 186 N.C. 704, 120 S.E. 334 (1923); Hinnant v. Tidewater Power Co., 187 N.C. 288, 121 S.E. 540 (1924); Cobia v. Atlantic Coast Line R.R., 188 N.C. 487, 125 S.E. 18 (1924).

V. CONTRACTS AND RULES EXEMPTING FROM LIABILITY.

Accepting Benefit from Relief Department. — A relief department for providing hospital care for employees, contributed to by the employees and the company and under the control and management of the company, is but an agency of the company; and a stipulation in the contract with its employee that in the case of accident he must accept the benefit of the contract and release the company from liability, is prohibited by the provisions of subsection (e) of this section. Barden v. Atlantic Coast Line Ry., 152 N.C. 318, 67 S.E. 971 (1910); Herring v. Atlantic Coast Line R.R., 168 N.C. 555, 84 S.E. 863 (1915).

VI. LOGGING ROADS AND TRAMROADS.

Editor's Note. — Before the enactment of subsection (f) of this section provisions of subsection (a) were held, by judicial construction, to apply to logging roads and tramroads. See Roberson v. Greenleaf-Johnson Lumber Co., 154 N.C. 328, 70 S.E. 630 (1911); Buckner v. Madison County R.R., 164 N.C. 201, 80 S.E. 225 (1913).

However, in Williams v. Kinston Mfg. Co., 175 N.C. 226, 95 S.E. 366 (1918), it was held that a logging road was not a common carrier within the meaning of subsection (c), and that the doctrine of comparative negligence was not applicable to actions for injuries sustained by employees of such roads. This decision seems to have engendered the legislative enactment enunciated by subsection (f), which was passed in 1919.

The provisions of subsections (a) and (c) are applicable to tramroads or logging roads under the provisions of subsection (f). Sampson v. Jackson Bros. Co., 203 N.C. 413, 166 S.E. 181 (1932). See Moore v. Rawls, 196 N.C. 125, 144 S.E. 552 (1928).

In Lilley v. Interstate Cooperage Co., 194 N.C. 250, 139 S.E. 369 (1927), the rule of subsection (f) as to tram railroads was applied, and it was held that subsection (c) was operative as to such railroads.

Comparative Negligence Rule Applies. — Contributory negligence is no longer a bar to injuries received in the operation of a logging road, but such negligence mitigates damages. In other words, comparative negligence is now, under the law, applicable to logging roads. Moore v. Rawls, 196 N.C. 125, 144 S.E. 552 (1928), citing McKinish v. Norwood Lumber Co., 191 N.C. 836, 133 S.E. 163 (1926).

The employee must be engaged in duties connected with or incidental to the operation of such roads. Gurganous v. Camp Mfg. Co., 204 N.C. 525, 168 S.E. 833 (1933).

Narrow-Guage Logging Road. — A small narrow-guage road running through the woods and used for the purpose only of transporting logs to the defendant's sawmill, with the cars loaded with logs pulled up a grade by means of a steam skidder, the wire cables operating around a drum upon the skidder, is a logging road within the intent and meaning of subsection (f) of this section and an employee negligently injured by such company is not barred of his right to recover damages when caused by a fellow servant; and contributory negligence is only considered in determination of the amount of damages the injured employee has sustained. Stewart v. Blackwood Lumber Co., 193 N.C. 138, 136 S.E. 385 (1927); Brooks v. Suncrest Lumber Co., 194 N.C. 141, 138 S.E. 532 (1927).

§ 62-243. Violation of rules causing injury; damages. — If any railroad company doing business in this State shall, in violation of any rule or regulation provided by the Commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this Chapter shall be brought within one year after the commission of the alleged wrong or injury. (1899, c. 164, s. 16; Rev., s. 1091; C. S., s. 1110; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

§ 62-244. Certain employees to wear badges. — Every conductor, baggagemaster, engineer, brakeman or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office. (1871-2, c. 138, s. 30; Code, s. 1958; Rev., s. 2604; C. S., s. 3414; 1963, c. 1165, s. 1.)

Cross Reference. — As to badge of railroad police, see § 74A-3.

§ 62-245. Duty to receive and forward freight tendered; penalty; regulations; charges. — (a) Agents or other officers of railroad companies whose duty it is to receive freight shall receive all articles of the nature and kind received by such carriers for transportation whenever tendered at a regular depot, station, terminal or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding. The railroad company shall forward such freight or cars by the route selected by the person tendering the freight under the existing laws. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment.

(b) The Commission shall make reasonable and just rules:

(1) For the handling of freight and baggage at stations of all railroad companies.

(2) As to charges by any person engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations.

(c) The railroad company represented by any person unlawfully refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars ($50.00) for each day such carrier refuses to receive such shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. (Code, s. 1964; 1899, c. 164, s. 2, subsecs. 2, 7; 1903, cc. 444, 693; Rev., ss. 1094, 2631; C. S., ss. 1053, 3515; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Cross References. — As to power of Utilities Commission to prevent discrimination, see § 62-140. As to venue of action against railroad, see § 1-81. As to regulation of shipment of inflammable substances and explosives, see § 62-211. As to penalty for failure to deliver freight upon tender of payment for carriage, see § 62-201.

This section is constitutional as applied to intrastate shipments. Corbett v. Atlantic Coast Line R.R., 205 N.C. 85, 170 S.E. 129 (1933).

Intrastate Shipments. — The penalty imposed by this section is not a burden upon interstate commerce when shipments are intrastate. Wampum Cotton Mills v. Carolina & N. Ry., 150 N.C. 608, 64 S.E. 588 (1909).

Interstate Shipments. — In Reid v. Southern R. Co., 150 N.C. 753, 64 S.E. 874 (1909), it was held that the penalty provided for by the provisions of this section would apply to interstate shipments, the same not being a burden on interstate commerce. In reviewing the same case the United States Supreme Court reversed this decision and held that the section could not apply to interstate shipments. Southern Ry. v. Reid, 222 U.S. 424, 32 S. Ct. 140, 56 L. Ed. 257 (1912).

Section Strictly Construed. — This is a penal statute and must be strictly construed. Cox v. Atlantic Coast Line R.R., 148 N.C. 459, 62 S.E. 556 (1908).

Requisites of Valid Tender. — This section provides that the tender be made at a regular station and that the articles tendered be of the nature and kind received by the carrier for transportation, and it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within its provisions. Olive v. Atlantic Coast Line R.R., 152 N.C. 279, 67 S.E. 583 (1910).

Same — Sufficiency of Allegations. — A complaint alleging that plaintiff tendered to a carrier at a certain station a certain quantity of loose lumber for shipment, etc., which the defendant wrongfully and unlawfully refused to receive, states a good cause of action since it would be inferred, to be thereafter shown by proof, that this station referred to was a regular station, and that loose lumber was an article usually received by the carrier. Olive v. Atlantic Coast Line R.R., 152 N.C. 279, 67 S.E. 583 (1910).

Meaning of "Whenever Tendered". — The words "whenever tendered" can only be qualified by supplying the ellipsis "within the usual hours adopted by the public for the transaction of such business at the place where the tender is made." Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Effect of Carrier's Regulation as to Time of Tender. — Where money was tendered to the agent of an express company at a regular station for shipment at 2 o'clock P.M., and the trains carrying express freight in the direction of the place to which it was to be consigned passed only at 12:55 o'clock P.M. each day, a regulation of the company that money would be received for shipment only on the morning before the train on which it was to be transported passed would not protect the company in an action brought to recover a penalty incurred by violation of this section. Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Tender of Freight Eight Minutes before Train. — Where the plaintiff tendered to the defendant 30 crates of strawberries at a small station requiring only one agent to attend to the various duties of express, telegraph, and railroad agent, and the tender was made at the time the train for which the shipment was intended was seen approaching the depot, about eight minutes before its arrival, a charge of the court that it was for the jury to determine whether, under the circumstances, the tender of the shipment for that train was in time was not open to plaintiff's objection. Shaw v. Southern Express Co., 171 N.C. 216, 88 S.E. 222 (1916).

Requisites for Daily Penalty. — In order for the daily penalty to attach to the carrier for continually refusing to accept freight for shipment under the provisions of this section, it is necessary for actual or constructive tender of the freight to be made to the carrier each day; and where cattle are the subject of shipment, evidence that the shipment had been refused and that the shipper kept the cattle near the depot and told the defendant's agent thereof, and that he would deliver them when notified that the

company would receive them is insufficient except as to the first penalty. Bane v. Atlantic Coast Line R.R., 171 N.C. 328, 88 S.E. 477 (1916).

When the common carrier permits a shipper to load a car with his goods and refuses to receive it for shipment or to issue a bill of lading, it is a refusal to receive the goods for shipment, under this section; and when the shipper leaves the goods in the car, with request for shipment, and by his conduct, understood by the railroad, makes his tender continuous, each day's delay is a separate refusal, within the meaning of the statute, to which the penalty will apply. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

Same — Placing Goods in Depot. — Placing a shipment of goods in the depot of the carrier, prepared for and with request for shipment, and thus leaving them there, makes his tender continuous, each day's refusal to ship, under this section, and the carrier, thus refusing, is responsible for the penalty. Burlington Lumber Co. v. Southern Ry., 152 N.C. 70, 67 S.E. 167 (1910).

Meaning of "Under the Existing Laws". — The words "under the existing laws," in this section, qualify the word "forward," and are used in reference to the rules governing the legal relations of consignor, consignee and the connecting lines. Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297 (1889).

Who Is the "Party Aggrieved". — The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in this section which arises from the wrongful refusal of the carrier's agent to accept the goods for transportation. Reid v. Southern Ry., 149 N.C. 423, 63 S.E. 112 (1908).

Same — Consignee of Goods Shipped on Approval. — A consignee to whom goods are shipped on approval owes a duty to the consignor to return them if they are unsatisfactory, and he must do so to relieve himself of liability to the consignor; and he is the party aggrieved, under this section, and may maintain his action thereunder for the penalty prescribed upon the refusal of the carrier to accept the goods for shipment. Burlington Lumber Co. v. Southern Ry., 152 N.C. 70, 67 S.E. 167 (1910).

Same — Agent of Attaching Creditor. — The penalty prescribed by this section is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the goods tendered by him for shipment, except as agent or attorney for an attaching creditor and surety on his attachment bond, after the debt has been paid and the goods released. McRackan v. Atlantic Coast Line R.R., 150 N.C. 331, 63 S.E. 1042 (1909).

Goods Not Delivered to Carrier. — When the plaintiff did not deliver the goods to the carrier, because they could not be transported by a train then getting ready to leave the station, but carried them back and shipped them the next day, a nonsuit should be allowed. Cox v. Atlantic Coast Line R.R., 148 N.C. 459, 62 S.E. 556 (1908).

Tender of Perishable Goods for Train Not Carrying Accommodations Therefor. — An express company is not liable for damages and the statutory penalties of this section for refusing to receive a shipment of 30 crates of strawberries for a certain train not carrying accommodations for shipments of this character, though it had taken, on occasion, a few berries thereon for the shipper, where the lack of accommodations was known to the public, and to the shipper, and accommodations on other daily trains were specially provided. Shaw v. Southern Express Co., 171 N.C. 216, 88 S.E. 222 (1916).

Refusal to Accept Loose Hay. — Where the Corporation Commission had authorized and fixed and approved the charges for the transportation of baled hay, without expressly requiring its acceptance by the carrier when unbaled or loose, and by express provision it did not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition, etc.," the carrier was not liable, for the penalty prescribed by this section, for refusing to receive for shipment a carload of loose hay, such shipments evidently being of such a character as to endanger not only the property of the carrier, but that of others received by the carrier for shipment. Tilley v. Norfolk & W. Ry., 162 N.C. 37, 77 S.E. 994 (1913).

Embargo on Consignee's Freight. — A railroad company may show, in defense to an action for refusal to receive goods for shipment when tendered, such matters as would excuse its failure to do so at common law, unavoidable conditions then existing, over which it had no control; when a carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, it is no defense for it to show that, for the reason of the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad on shipments tendered to be forwarded to him there. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

Embargo by Connecting Carrier. — The penalty imposed by this section is enforceable against a railroad company refusing to receive freight when tendered, though to reach the destination it was necessary for another road to receive and transport the freight beyond the junctional point; and it is no valid excuse that the connecting line had laid an embargo on the consignee, for it was the duty of the initial carrier to transport the goods and make a tender to the connecting line to be relieved of the penalty. Wampum Cotton Mills v. Carolina & N. Ry., 150 N.C. 608, 64 S.E. 588 (1909).

When Rate Unknown to Carrier. — Where the defendant carrier refused to receive for shipment goods tendered to it, basing its right to refuse upon the ground that it was necessary for the shipment to go over lines of connecting carriers in order to reach its destination and that no joint rate had been made, and the plaintiff offered to prepay the freight, and asked for a bill of lading, it was the duty of the defendant to accept the shipment, forward it to its connecting line; and to use reasonable means of ascertaining the rate of freight, by wire if necessary, for the issuance of a through bill of lading. Reid v. Southern Ry., 153 N.C. 490, 69 S.E. 618 (1910).

In an action to recover the penalties alleged to have been incurred under this section, for refusing to receive freight for transportation, where the plaintiff delivered freight for shipment at the defendant's station and tendered the charges, and an agent received the freight for storage, but refused to give a bill of lading because he did not know the freight rates, and kept the freight 12 days, there was a refusal "to receive for transportation," and the action is brought under the proper statute. Twitty v. Southern Ry., 141 N.C. 355, 53 S.E. 957 (1906).

Mismarking of Part of Shipment. — In an action to recover a penalty against a carrier for failing to ship one of four packages consigned for shipment under a single bill of lading, the defendant is estopped to claim as a defense that the mismarking of three of the packages was a sufficient excuse for failing to ship the fourth. Grocery Co. v. Railroad, 136 N.C. 396, 48 S.E. 801 (1904).

Freight Not Consigned to Regular Station. — A refusal of the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by this section, when the refusal is on the ground that the agent did not know where the given destination was, but it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom. Reid v. Southern Ry., 149 N.C. 423, 63 S.E. 112 (1908).

Conclusiveness of Referee's Findings. — Where in an action to recover the prescribed penalties under this section the referee finds upon ample evidence, in a hearing in which no error of law is committed, that the shipment came within a certain classification, and that the shipper tendered the correct amount for such classification, and the finding is approved by the trial court, such finding is conclusive on appeal, and the carrier may not successfully contend that the shipment came within another classification for which higher freight charges were prescribed, and where a higher tariff has been charged on one shipment the shipper is entitled to recover the excess paid. Corbett v. Atlantic Coast Line R.R., 205 N.C. 85, 170 S.E. 129 (1933).

Sufficiency of Evidence. — Evidence that the shipper's contract to deliver certain merchandise was canceled because of the carrier's wrongful refusal to accept the merchandise for shipment is sufficient to support the referee's finding of actual damages, profits which would have been certainly realized but for the carrier's wrongful refusal of the shipment being recoverable under this section. Corbett v. Atlantic Coast Line R.R., 205 N.C. 85, 170 S.E. 129 (1933).

§ 62-246. Partial charges for partial deliveries. — Whenever any freight of any kind shall be received by any railroad company in this State to be delivered to any consignee in this State, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for such carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. Such carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interfering with or depriving a consignor, or other person having authority, of his rights of stoppage in transit. (1893, c. 495; Rev., s. 2641; C. S., s. 3521; 1963, c. 1165, s. 1.)

§ 62-247. Commission to establish and regulate stations for freight and passengers; abandonment of station or other facility or diminution of accommodations. — (a) The Commission is empowered and directed to require, where the public necessity demands, and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations or terminals by any railroad company, to require the erection of depot accommodations commensurate with such business and revenue, and to require the erection of accommodations for loading and unloading livestock and for feeding, sheltering

and protecting the same in transportation. The Commission shall not require any railroad company to establish any station nearer to another station than five miles.

(b) The Commission is empowered and directed to require a change of any station or terminal or the repair, addition to, or change of any station or terminal by any railroad company in order to promote the security, convenience and accommodation of the public.

(c) A railroad company which has established and maintained for a year or more a passenger station, freight depot, team track, or other facility for serving the public at a point upon its road or route shall not abandon such station, depot or team track or other facility for serving the public nor substantially diminish the accommodations at said station, depot or team track by the stopping of trains or otherwise except by approval of the Commission which may be sought by the filing of an appropriate petition seeking the necessary authority. Freight or passenger depots may be relocated upon the written approval of the Commission. (1899, c. 164, s. 2, subsecs. 12, 13, ss. 19, 20; Rev., ss. 1097, 1098; 1913, c. 155; C. S., ss. 1040, 1041, 1051; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 552, s. 2.)

Cross References. — As to power of Utilities Commission to regulate building of shelters at railroad division points, see § 62-229. See note to § 62-118.

Liberal Construction. — Subsection (b) of this section is of a remedial nature, and will be liberally construed by the courts in favor of the exercise of the authority conferred. State ex rel. Corporation Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923). See State ex rel. Corporation Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928).

Power to Require and Regulate Depots. — The Commission can order new depots established wherever they are needed, and has the lesser power to require proper facilities at those already established. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

May Require Track Scales. — The Commission is empowered to require "depot accommodations commensurate with such business and revenue," which justifies the Commission in requiring "track scales" at points along the line. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

The court, or the jury upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Commission requiring track scales to be put in. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

Railroad Not Released from Private Contract. — The limitation on the powers of the Commission to require common carriers to establish stations within five miles of each other does not release the carriers from a contract, with an individual, to maintain a flag stop within the bounds of his plantation. Parrott v. Atlantic & N.C.R.R., 165 N.C. 295, 81 S.E. 348 (1914).

Orders Subject to Review by the Courts. — The power of the Commission, under this section, cannot be unreasonably exercised, and its orders are subject to review by the superior court and the Supreme Court. Corporation Comm'n v. Railroad, 139 N.C. 126, 51 S.E. 793 (1905).

§§ 62-248 to 62-258: Reserved for future codification purposes.

ARTICLE 12.

Motor Carriers.

§ 62-259. Additional declaration of policy for motor carriers. — In addition to the declaration of policy set forth in G.S. 62-2 of Article 1 of Chapter 62, it is declared the policy of the State of North Carolina to preserve and continue all motor carrier transportation services now afforded this State; and to provide fair and impartial regulations of motor carriers in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote and preserve adequate

economical and efficient service to all the communities of the State by motor carriers; to encourage and promote harmony among all carriers and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers; to foster a coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce. (1947, c. 1008, s. 1; 1949, c. 1132, s. 2; 1963, c. 1165, s. 1.)

Local Modification. — Cabarrus: 1947, c. 532; 1949, c. 1132, s. 39.

Editor's Note. — This Article combines the Bus Act of 1949, Session Laws 1949, c. 1132, and the North Carolina Truck Act, Session Laws 1947, c. 1008. For a discussion of the Bus Act of 1949, see 27 N.C.L. Rev. 467. As to application of former article of similar import, see City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947).

Purpose of Truck Act. — The North Carolina Truck Act was enacted to preserve and continue motor carrier transportation services. State ex rel. Utilities Comm'n v. Fredrickson Motor Express, 232 N.C. 178, 59 S.E.2d 580 (1950).

Policy of the Bus Act Stated. — The policy of the law controlling the granting of bus franchises is to provide adequate, economical and efficient bus service at reasonable cost to all communities of the State, without discrimination, undue privileges or advantages or unfair or destructive competitive practices, all to the end of promoting the public interest. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

This section does not require the Utilities Commission to adopt a rule of the Interstate Commerce Commission. — The Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972).

Cited in State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

§ 62-260. Exemptions from regulations. — (a) Nothing in this Chapter shall be construed to include persons and vehicles engaged in one or more of the following services by motor vehicle if not engaged at the time in the transportation of other passengers or other property by motor vehicle for compensation:

(1) Transportation of passengers or property for or under the control of the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State;

(2) Transportation of passengers by taxicabs when not carrying more than nine passengers or transportation by other motor vehicles performing bona fide taxicab service and not carrying more than nine passengers in a single vehicle at the same time when such taxicab or other vehicle performing bona fide taxicab service is not operated on a regular route or between termini; provided, no taxicab while operating over the regular route of a common carrier outside of a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in (8) of this subsection, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers;

(3) Transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations;

(4) Transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft;

(5) Transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service;

(6) Transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services or transportation of pupils and employees to and from private or parochial schools or transportation to and from functions for students and employees of private or parochial schools;

(7) Transportation of bona fide employees of an industrial plant to and from their regular employment;

(8) Transportation of passengers when the movement is within a municipality exclusively, or within contiguous municipalities and within a residential and commercial zone adjacent to and a part of such municipality or contiguous municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone;

(9) Transportation in bulk of sand, gravel, dirt, debris, and other aggregates, or ready-mixed paving materials for use in street or highway construction or repair;

(10) Transportation of newspapers;

(11) Transportation of insecticides, fungicides and the ingredients thereof; transportation of farm, dairy or orchard products from farm, dairy or orchard to warehouse, creamery, or other original storage or market;

(12) Transportation for and under the control of cooperative associations organized and operating under the Federal Agricultural Marketing Act, U.S.C.A. Title 12, § 1141(j), or under the State Cooperative Marketing Act, Chapter 54, Subchapter V, General Statutes of North Carolina, as amended, or for any federation of such cooperative associations; provided, such federation possesses no greater powers or purposes than such cooperative associations;

(13) Transportation of livestock, or fish, including shellfish and shrimp, but not including manufactured products thereof;

(14) Transportation of raw products of the forest, including firewood, logs, crossties, stave bolts, pulpwood, and rough lumber, but not including manufactured products therefrom;

(15) Pickup, delivery, and transfer service for railroads, express companies, water carriers and motor carriers in connection with their respective line-haul services within the commercial zone of any municipality, as defined by the Commission between their terminals and places of collection or delivery of freight;

(16) Transportation by a bona fide private carrier, as defined in G.S. 62-3(22);

(17) Transportation of any commodity anywhere of a character not hauled in the ordinary course of business by a common carrier by motor vehicle.

(b) The Commission shall have jurisdiction to fix rates of carriers of passengers operating as described in (5) and (8) of subsection (a) of this section in the manner provided in this Chapter, and shall have jurisdiction to hear and determine controversies with respect to extensions and services, and the Commission's rules of practice shall include appropriate provisions for bringing such controversies before the Commission and for the hearing and determination of the same; provided nothing in this paragraph shall include taxicabs.

(c) The Commission may conduct investigations to determine whether any person purporting to operate under the exemption provisions of this section is, in fact, so operating, and make such orders as it deems necessary to enforce compliance with this section.

(d) The venue for any action commenced to enforce compliance with the terms of this Article against any person purporting to operate under any of the exemptions provided in this section shall be in one of the counties of the judicial district wherein the violation is alleged to have taken place and such person shall be entitled to trial by jury.

(e) None of the provisions of this section nor any of the provisions of this Chapter shall be construed so as to prohibit or regulate the transportation of property by any motor carrier when the movement is within a municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities, as defined by the Commission. The Commission shall have the power in its discretion, in any particular case, to fix the limits of any such zone. Nothing herein shall be construed as an abridgment of the police powers of any municipality over such operation wholly within any such municipality. Nothing in this Chapter shall be construed to prohibit or regulate the transportation of household effects of families from one residence to another by persons who do not hold themselves out as being, and are not generally engaged in the business of transporting such property for compensation.

(f) Notwithstanding the exemptions for transportation of passengers and property provided under subsections (a) through (e) of this section, all motor carriers transporting passengers for compensation under said exemptions or under any special exemptions granted by the Utilities Commission under G.S. 62-261 as are established for regulated motor common carriers by the rules of the Utilities Commission pursuant to G.S. 62-268, and all such motor carriers transporting for hire under said exemption provisions shall further be subject to the same requirements for safety of operation of said motor vehicles as are required of regulated motor common carriers under the provisions of this Chapter and the regulations of the Commission adopted pursuant thereto. The Commission is authorized to promulgate rules and regulations for the enforcement of said requirements in the case of all such exempt operations, and the officers and agents of the Commission shall have full authority to inspect said exempt vehicles and to apply all enforcement regulations and penalties for violation of said security regulations and safety regulations as in the case of regulated motor carriers.

(g) The owners of all motor vehicles used in any transportation for compensation which is declared to be exempt under this section shall register such operation with the Utilities Commission and shall secure from the Utilities Commission a certificate of exemption. (1947, c. 1008, s. 4; 1949, c. 1132, s. 5; 1951, c. 987, s. 1; 1953, c. 1140, s. 2; 1955, c. 1194, ss. 1, 2; 1959, c. 102, c. 639, s. 14; 1963, c. 1165, s. 1; 1967, cc. 1135, 1203; 1969, c. 681; 1971, cc. 856, 1192; 1973, c. 175.)

Editor's Note. — The 1973 amendment added present subdivision (1) to subsection (a).

The Utilities Commission is not vested with power to require the operators of services enumerated in subdivisions (1) to (8) of subsection (a) to obtain a franchise from it and does not have any supervision or jurisdiction over such operation, except the operations set forth in subdivisions (5) and (8) of subsection (a), and as to them it retains jurisdiction to fix rates and "to hear and determine controversies with respect to extensions and services." City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

Commission Has Jurisdiction to Determine Exemptions. — The Commission has jurisdiction to determine whether or not the actual operations of a carrier are under the exemptive provisions of this section. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Jurisdiction of Commission over City Bus Lines. — The Commission has been given specific authority to fix city bus fares. State ex rel. Utilities Comm'n v. City of Greensboro, 244 N.C. 247, 93 S.E.2d 151 (1956).

An intracity carrier, holding a certificate of exemption issued by the Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission, except as to rates and controversies with respect to extensions and services. State ex rel. North

Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Any provisions with respect to rates and services contained in a franchise contract between a utilities company and a municipal corporation, authorizing the utilities company to transport passengers over its streets, are subject to the orders of the Utilities Commission in respect thereto. City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

Same — Dispute as to Curtailment of Services by Bus Carrier. — Where a municipality has granted a franchise to a utilities company to operate passenger buses over its streets, the parties may mutually agree upon extensions and services, changes in routes, or curtailment of services, when in the opinion of the governing board of the municipality such changes are, under the existing conditions, for the best interest of all concerned, including the public. However, when the parties are unable to agree to a proposed curtailment of existing services, the matter is within the exclusive jurisdiction of the Utilities Commission and the municipality may not enjoin the utility from the proposed curtailment of services, although the utility may not change its schedules or curtail its services unless given authority to do so by the Utilities Commission. City of Winston-Salem v. Winston-Salem City Coach Lines, 245 N.C. 179, 95 S.E.2d 510 (1956).

No Territorial Limitations on Intracity Carrier When Subsections (a)(1) and (a)(6) Apply. — An exempted intracity carrier under subsection (a)(8) has no territorial limitations as to the transportation of passengers under subsections (a)(1) and (a)(6) of this section, where the request for such services arises within the area for which such carrier holds a certificate of exemption from the Commission and a franchise from the municipality in which it operates or within any additional zone or zones adjacent thereto which have been fixed by the Commission. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Operations Devoted Exclusively to Transportation of Employees to and from Work. — The North Carolina Utilities Commission does not have regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the bona fide employees of industrial plants to and from the places of their employment even in cases where the persons conducting such operations are engaged at the same time or at other times in carrying on the callings of common carriers by motor vehicle. State ex rel. Utilities Comm'n v. Carolina Coach Co., 236 N.C. 583, 73 S.E.2d 562 (1952).

Transportation to and from Federal Military Reservation. — This section exempts from the regulation of the Utilities Commission carriers in intrastate commerce transporting passengers for hire to and from federal military reservations or bases only if such carriers have been procured by the United States government to carry passengers for it, or the transportation of such passengers is under the control of the United States. Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953).

As to motor vehicles carrying mail under former statute, see Winborne v. Browning, 206 N.C. 557, 174 S.E. 579 (1934).

Transportation of Athletic Teams and School Bands. — While it is true that the statute which governs the operation of school buses makes no provision one way or the other for the transportation of athletic teams or school bands, it is equally true that school bands and athletic teams are under the control of the school authorities. Therefore the board controlling such activities would have the inherent right to contract for such transportation as might be necessary to transport its athletic teams and its bands to and from such events which have been scheduled under the supervision of school authorities, and such transportation would be exempt under subsection (a)(1) of this section. State ex rel. North Carolina Util. Comm'n v. McKinnon, 254 N.C. 1, 118 S.E.2d 134 (1961).

Franchise for Limousine Service to Airport. — The provisions of §§ 63-2, 63-49, 63-50, 63-53, and this section authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

Action by Competing Carrier against Exempted Carrier Violating Section. — When an exempted carrier is operating in violation of the exemptive provisions of this section, any other carrier adversely affected thereby may institute an action in the superior court against such exempted carrier, pursuant to the provisions of subsection (d) of this section and § 62-279. State ex rel. North Carolina Util. Comm'n v. McKinnon, 256 N.C. 1, 118 S.E.2d 134 (1961).

Rate Scheme Held Unconstitutional. — The state regulatory scheme by which Utilities Commission sets rates for franchised carriers to charge the U.S. Army in transportation of household goods violates the national procurement policy and is an unconstitutional burden on the United States in the exercise of its constitutional powers. United States v. North Carolina Util. Comm'n, 352 F. Supp. 274 (E.D.N.C. 1972).

Cited in State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972), aff'd, 283 N.C. 104, 194 S.E.2d 859 (1973); State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

§ 62-261. Additional powers and duties of Commission applicable to motor vehicles. — The Commission is hereby vested with the following powers and duties:

(1) To supervise and regulate common carriers of passengers by motor vehicle and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage, newspapers, mail and light express, uniform systems of accounts, records and reports and preservation of records.

(2) To supervise the operation of passenger bus stations in any manner necessary to promote harmony among the carriers using such stations and efficiency of service to the traveling public.

(3) To prescribe qualifications and maximum hours of service of drivers and their helpers, and rules regulating safety of operation and equipment; and in the interest of uniformity of intrastate and interstate rules and regulations applicable within the State with respect to maximum hours of service of vehicle drivers and their helpers, and safety of operation and equipment, the Utilities Commission may adopt and enforce the rules and regulations adopted and promulgated by the United States Department of Transportation with respect thereto, insofar as the Utilities Commission finds the same to be practical and advantageous for application in this State and not in conflict with this Article. In order to promote safety of operation of motor carriers, the Utilities Commission may avail itself of the assistance of any other agency of the State having special knowledge of such matters and it may make such investigations and tests as may be deemed necessary to promote safety of equipment and operation of vehicles upon the highways.

(4) For the purpose of carrying out the provisions of this Article, the Utilities Commission may avail itself of the special information of the Board of Transportation in promulgating safety requirements and in considering applications for certificates or permits with particular reference to conditions of the public highway or highways involved, and the ability of the said public highway or highways to carry added traffic; and the Board of Transportation, upon request of the Utilities Commission, shall furnish such information.

(5) The Commission may, without prior notice and hearing, make and enter any order, rule, regulation, or requirement, not affecting rates, upon unanimous finding by the Commission of the existence of an emergency and make such order, rule, regulation or requirement effective upon notice given to each affected motor carrier by registered mail, or by certified mail pending a hearing thereon as provided in this subdivision. It shall not be necessary for the Commission to give notice to the carriers affected or to hold a hearing prior to a revision in the rules regarding procedures to be followed in filing rates. Any such emergency order, rule, regulation or requirement shall be subject to continuation, modification, change, or revocation after notice and hearing and all such emergency orders, rules, regulations and requirements shall be supplanted and superseded by any final order, rule, regulation or requirement entered by the Commission.

(6) The Commission shall regulate brokers and make and enforce reasonable requirements respecting their licenses, financial responsibility, accounts, records, reports, operations and practices.

(7) The Commission and its duly authorized inspectors and agents shall have authority at any time to enter upon the premises of any motor carrier, subject to the provisions of this Article for the purpose of inspecting any motor vehicles and equipment used by such motor

carriers in the transportation of passengers and property, and to prohibit the use by any motor carrier of any motor vehicle or parts thereof or equipment thereon adjudged by such agents and inspectors to be unsafe for use in the transportation of passengers and property upon the public highways of this State; and when such agents or inspectors shall discover any motor vehicle of such motor carrier in actual use upon the highways in the transportation of passengers and property to be unsafe or any parts thereof or any equipment thereon to be unsafe, such agents or inspectors may, if they are of the opinion that further use of such vehicle, parts or equipment are imminently dangerous, stop such vehicle and require the operator thereof to discontinue its use and to substitute therefor a safe vehicle, parts or equipment at the earliest possible time and place, having regard for both the convenience and the safety of the passengers and property. When an inspector or agent stops a motor vehicle on the highway, under authority of this section, and the motor vehicle is in operative condition and its further movement is not dangerous to the passengers and property and to the users of the highways, it shall be the duty of the inspector or agent to guide the vehicle to the nearest point of substitution or correction of the defect. Such agents or inspectors shall also have the right to stop any motor vehicle which is being used upon the public highways for the transportation of passengers and property by a motor carrier subject to the provisions of this Article and to eject therefrom any driver or operator who shall be operating or be in charge of such motor vehicle while under the influence of intoxicating liquors. It shall be the duty of all inspectors and agents of the Commission to make a written report, upon a form prescribed by the Commission, of inspections of all motor equipment and a copy of each such written report, disclosing defects in such equipment, shall be served promptly upon the motor carrier operating the same, either in person by the inspector or agent or by mail. Such agents and inspectors shall also make and serve a similar written report in cases where a motor vehicle is operated in violation of the laws of this State or of the orders, rules and regulations of the Commission.

(8) To determine, upon its own motion, or upon motion by a motor carrier, or any other party in interest, whether the transportation of property in intrastate commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation in this State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in intrastate commerce. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this Article, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in intrastate commerce performed by the carrier or class of carriers designated in such certificate will be, or shall have become, or is reasonably likely to become, or such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of intrastate transportation by motor carriers in effectuating the policy declared in this Chapter. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers

affected thereby, without further proceedings, the authority, if any, to operate in intrastate commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this paragraph, except after reasonable opportunity for hearing to interested parties.

(9) To inquire into the management of the business of motor carriers and into the management of business of persons controlling, controlled by or under common control with, motor carriers to the extent that such persons have a pecuniary interest in the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this Article.

(10) To relieve the highways of all undue burdens and safeguard traffic thereon by promulgating and enforcing reasonable rules, regulations and orders designed and calculated to minimize the dangers attending transportation on the highways of all commodities including explosives or highly inflammable or combustible liquids, substances or gases.

(11) The Commission may from time to time establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" or contract carrier by motor vehicle as the special nature of the service performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this Article, to be observed by such carriers so classified or grouped, as the Commission deems necessary or desirable in the public interest. (1947, c. 1008, s. 5; 1949, c. 1132, s. 6; 1953, c. 1140, s. 5; 1957, c. 65, s. 11; c. 1152, s. 7; 1961, c. 472, s. 9; 1963, c. 1165, s. 1; 1969, c. 723, s. 2; c. 763; 1973, c. 507, s. 5.)

Cross Reference. — As to revocation of license plates for violation of Chapter, see § 62-278.

Editor's Note. — The 1973 amendment substituted "Board of Transportation" for "State Highway Commission" in subdivision (4).

Rules and Regulations. — The Commission may impose upon the holder of a permit any reasonable rules and regulations with respect to the operations thereunder which are now in effect or which may be adopted hereafter for the regulation of motor vehicle carriers performing similar service. State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Commission Must Require Certificate Holder to Render Services Contemplated. — The Truck Act of 1947 and the amendments thereto placed upon the Commission the responsibility of requiring the holder of the certificate to render the service contemplated. State ex rel. Utilities Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

A substantial rather than a simulated performance is required to support a bona fide carrier operation. State ex rel. Utilities Comm'n v. Colter, 259 N.C. 269, 130 S.E.2d 385 (1963).

Contracts Subject to Commission's Authority. — Contracts between carriers affecting service to the public are subject to the Commission's regulatory authority. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Contract When Approved Is Order of Commission. — A contract between public utilities, when formally approved by the Commission, is in effect an order of the Commission binding on each of the parties. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The interchange of freight between an intrastate and an interstate carrier, even though the property is being moved in interstate commerce, is left to the state commissions. State ex rel. Utilities Comm'n v. Fox, 239 N.C. 253, 79 S.E.2d 391 (1954).

§ 62-262. Applications and hearings. — (a) Except as otherwise provided in G.S. 62-260 and 62-265, no person shall engage in the transportation of

passengers or property in intrastate commerce unless such person shall have applied to and obtained from the Commission a certificate or permit authorizing such operations, and it shall be unlawful for any person knowingly or wilfully to operate in intrastate commerce in any manner contrary to the provisions of this Article, or of the rules and regulations of the Commission. No certificate or permit shall be amended so as to enlarge or in any manner extend the scope of operations of a motor carrier without complying with the provisions of this section.

(b) Upon the filing of an application for a certificate or a permit, the Commission shall, within a reasonable time, fix a time and place for hearing such application. For bus applications, the Commission shall cause notice of the time and place of hearing to be given by mail to the applicant, to other motor carriers holding certificates or permits to operate in the territory proposed to be served by the application, and to other motor carriers who have pending applications to so operate. The Commission shall from time to time prepare a truck calendar containing notice of such hearings, a copy of which shall be mailed to the applicant and to any other persons desiring it, upon payment of charges to be fixed by the Commission. The notice or calendar herein required shall be mailed at least 20 days prior to the date fixed for the hearing, but the failure of any person, other than applicant, to receive such notice or calendar shall not, for that reason, invalidate the action of the Commission in granting or denying the application.

(c) The Commission may, in its discretion, except where a regular calendar providing notice is issued, require the applicant to give notice of the time and place of such hearing together with a brief description of the purpose of said hearing and the exact route or routes and authority applied for, to be published not less than once each week for two successive weeks in one or more newspapers of general circulation in the territory proposed to be served. The Commission may in its discretion require the applicant to give such other and further notice in the form and manner prescribed by the Commission to the end that all interested parties and the general public may have full knowledge of such hearing and its purpose. If the Commission requires the applicant to give notice by publication, then a copy of such notice shall be immediately mailed by the applicant to the Commission, and upon receipt of same the chief clerk shall cause the copy of notice to be entered in the Commission's docket of pending proceedings. The applicant shall, prior to any hearing upon his application, be required to satisfy the Commission that such notice by publication has been duly made, and in addition to any other fees or costs required to be paid by the applicant, the applicant shall pay into the office of the Commission the cost of the notices herein required to be mailed by the Commission.

(d) Any motor carrier desiring to protest the granting of an application for a certificate or permit, in whole, or in part, may become a party to such proceedings by filing with the Commission, not less than 10 days prior to the date fixed for the hearing, unless the time be extended by order of the Commission, its protest in writing under oath, containing a general statement of the grounds for such protest and the manner in which the protestant will be adversely affected by the granting of the application in whole or in part. Such protestant may also set forth in his protest its proposal, if any, to render either alone or in conjunction with other motor carriers, the service proposed by the applicant, either in whole or in part. Upon the filing of such protest it shall be the duty of the protestant to file three copies with the Commission, and the protestant shall certify that a copy of said protest has been delivered or mailed to the applicant or applicant's attorney. When no protest is filed with the Commission within the time herein limited, or as extended by order of the Commission, the Commission may proceed to hear the application and make the necessary findings of fact and issue or decline to issue the certificate or permit

applied for without further notice. Persons other than motor carriers shall have the right to appear before the Commission and give evidence in favor of or against the granting of any application and with permission of the Commission may be accorded the right to examine and cross-examine witnesses.

(e) If the application is for a certificate, the burden of proof shall be upon the applicant to show to the satisfaction of the Commission:

(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and

(2) That the applicant is fit, willing and able to properly perform the proposed service, and

(3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis.

(f) No certificate for the transportation of passengers shall be granted to an applicant proposing to serve a route already served by a previously authorized motor carrier unless and until the Commission shall find from the evidence that the service rendered by such previously authorized motor carrier or carriers on said routes is inadequate to meet the requirements of public convenience and necessity; and if the Commission shall find that the service being rendered by such certificate holder or holders on said routes is inadequate to meet the requirements of public convenience and necessity, such certificate holder or holders who have protested the application as provided in subsection (d) of this section, shall be given reasonable time to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate on such routes, unless the Commission finds that the previously authorized carrier, filing such protest, is either financially unable, or otherwise unqualified, or is unwilling to render, on a continuing basis, the service applied for or the service found by the Commission to meet the requirements of public convenience and necessity. In all cases in which applications affect local intracity bus service, the Commission shall give consideration to all interests involved and make appropriate provision for the protection thereof, and to that end local intracity operators shall have the right to be heard as protestants, or intervenors.

(g) A certificate for the transportation of passengers may include authority to transport in the same vehicle with passengers the baggage of such passengers, newspapers, express parcels or United States mail when authorized so to do by the government of the United States of America; or to transport baggage of passengers in a separate vehicle. The Commission, in its discretion, may require through joint routes and rates for the transportation of newspapers and express parcels.

(h) Common carriers by motor vehicle transporting passengers under a certificate issued by the Commission may operate to any place in this State, pursuant to charter party or parties, trips originating on such common carrier's authorized routes or in the territory served by its routes under such reasonable rules and regulations as the Commission may prescribe.

(i) If the application is for a permit, the Commission shall give due consideration to:

(1) Whether the proposed operations conform with the definition in this chapter of a contract carrier,

(2) Whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, or rail carriers,

(3) Whether the proposed service will unreasonably impair the use of the highways by the general public,

(4) Whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier,

(5) Whether the proposed operations will be consistent with the public interest and the policy declared in this Chapter, and

(6) Other matters tending to qualify or disqualify the applicant for a permit.

(j) After the issuance of a certificate or permit for the transportation of passengers, as provided in this section, such certificate or permit may thereafter be amended, changed or modified, by requiring the holder to furnish more or less transportation service, or by changing the routes over which service has been authorized, or by imposing other reasonable terms, conditions, restrictions, and limitations as public convenience and necessity or reasonable regulation of traffic upon the highways may require; provided, that the procedure in all such cases as to notice and hearing shall be the same as provided in this section for the issuance of a certificate or permit.

(k) The Commission shall by general order, or rule, having regard for the public convenience and necessity, provide for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate. (1947, c. 1008, s. 11; 1949, c. 1132, s. 10; 1953, c. 825, s. 3; 1957, c. 1152, ss. 8, 9; 1959, c. 639, s. 11; 1963, c. 1165, s. 1; 1965, c. 214.)

Requirements for Permit to Operate as Contract Carrier. — In addition to the statutory requirements of § 62-3 and this section, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission in Rule R2-15(b). State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

The procedure before the Commission is more or less informal, and is not as strict as in civil cases, nor is it confined by technical rules; substance and not form is controlling. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The power of the Commission is not restricted to the proceedings as commenced, but it may enlarge the scope of the inquiry beyond the issue raised by the pleadings where the parties to be affected are before the Commission, participate in the proceedings, have full opportunity to be heard, and are not misled as to the purpose of the hearing. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The Commission is not confined to the immediate scope of the pleadings on file. It may enlarge the scope of the inquiry, and where the parties to be affected are before it, participate in the inquiry and make defense, they cannot complain of a departure from the pleadings. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Application for New Authority Treated as Motion in Prior Cause. — An application for a new authority to carry passengers between two municipalities of the State along a new route made feasible by the improvement or construction of highways could be treated by the Utilities Commission as a motion in a prior cause in which the Commission approved an agreement of the carriers in regard to their respective services between the cities provided the carriers affected were given notice and an opportunity to be heard. The question of whether the prior order of approval could be collaterally attacked was thus obviated. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The convenience and necessity required by this section are those of the public and not of an individual or individuals. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The granting of franchise authority for the operation of buses over the highways of this State, for the transportation of persons and property for compensation, must be predicated upon public convenience and necessity. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

The doctrine of convenience and necessity is a relative or elastic theory. The facts in each case must be separately considered and from those facts it must be determined whether public convenience and necessity require a given service to be performed or dispensed with. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

"Necessity" means reasonably necessary and not absolutely imperative. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Any service or improvement which is desirable for the public welfare and highly important to the public convenience may be properly regarded as necessary. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

If a new service is necessary, and if there are carriers already in the field, there is always the vital question (in determining convenience and necessity) whether the new service should be rendered by the existing carriers or by the new applicant. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

The Utilities Commission properly granted an application for a contract carrier permit which would authorize the applicant to transfer bank documents and other commodities between banks in the State, notwithstanding the protest

by an existing contract carrier of bank documents that the granting of the application would adversely affect its business, where there were findings, supported by competent and substantial evidence, that banks needed the services offered by the applicant and that their need could not be met by any existing means of transportation. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Burden Is on Applicant to Show Public Convenience and Necessity. — The burden of proof is upon the applicant for franchise authority to show public convenience and necessity. State ex rel. North Carolina Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

Special Rule for Relocation of Existing Routes. — The Utilities Commission has developed a special rule for applications that seek only to relocate an existing route over a new highway. In these cases the Commission does not require such an extensive demonstration of public convenience and necessity as in other cases. Instead, the applicant is only required to show that the proposed route, as it now exists and with future improvements, will provide a much safer, quicker and improved service. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

By encouraging bus companies to make use of new and improved highways soon after they are opened, the special rule for relocation of existing routes serves "to promote, in the interest of the public, the inherent advantages of highway transportation" — which is one of the stated purposes of the motor carriers statute. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

What constitutes "public convenience and necessity" is primarily an administrative question with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969); State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

Test of "Public Need" Does Not Apply to Transfer Proceedings. — The showing of public need which subsection (e)(1) of this section requires of an application for a new authority is not applicable in a transfer proceeding under § 62-111 and was not written into it by § 62-111(a). State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

The criteria "if justified by the public convenience and necessity" in subsection (a) of § 62-111 is interpreted as a statutory basis for the test of dormancy. Where the authority has been abandoned or "dormant," the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in subsection (e)(1) of this section. Where the authority has been actively operated, the applicants for sale and transfer of motor freight carrier rights are under no burden to show through shipper witnesses that a demand and need exist. The rationale is that public convenience and necessity were shown to exist when the authority was granted or acquired, and the rebuttable presumption of law is that it continues. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Subsection (e) of § 62-111 does not indicate a policy change toward protecting existing certificate holders from lawful competition. Like the subsection (a) "public convenience and necessity" test, the requirement that the Commission find the transfer "in the public interest" does not write into the transfer approval procedure the new certificate test of public need in subsection (e)(1) of this section. State ex rel. Utilities Comm'n v. Associated Petroleum Carriers, 7 N.C. App. 408, 173 S.E.2d 25 (1970).

Duplication of Service. — Under a former article of similar import, it was held that the Commission might, in its discretion, grant a franchise which would duplicate in whole or in part a previously authorized similar class of service; and, when it was shown to the satisfaction of the Commission that the existing operations were not providing sufficient service reasonably to meet the public convenience and necessity and the existing operators, after 30 days' notice, failed to provide the service required by the Commission, it would be the duty of the Commission to do so. State ex rel. Utilities Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944); State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

The question of duplication of service must be determined under the provisions of the statute which was in effect at the time the order of the Commission was entered. State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951).

The factors denominated as imponderables, to wit: Whether the existing carriers can reasonably meet the need for the service and whether the granting of the application would endanger or impair the operations of existing carriers contrary to the public interest, are not solely determinative of the right of the Commission to grant the application. Both are directed to the question of public convenience and necessity. Nevertheless, if the proposed operation under the

certificate sought would seriously endanger or impair the operations of existing carriers contrary to the public interest, the certificate should not be issued. State ex rel. Utilities Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

"Route" Not Synonymous with "Territory". — "Route" as used in this Article means the highway or road traveled in serving communities, districts, or territories adjacent to it, and is not synonymous with "territory." State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951); State ex rel. Utilities Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

This section does not purport to protect against all competition but is designed to protect authorized carriers against ruinous competition, and the statute does not prohibit service of the same points by different carriers over separate routes when such duplicate service is in the public interest. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951); State ex rel. Utilities Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953).

There is no public policy condemning competition as such, between contract carriers, in the field of public utilities; the public policy only condemns unfair or destructive competition. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Application by carrier to serve communities being served by another carrier, who intervenes and protests the application, as distinguished from an application for duplication of routes, does not require the Utilities Commission to find that the existing carrier's service is inadequate and to afford such existing carrier opportunity to remedy the inadequacy. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951).

Granting of Application Not Prohibited by Fact That Competing Carrier's Business Would Be Adversely Affected. — The fact that the granting of a proposed application would adversely affect the business of a carrier corporation, is not a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970).

A contention that competition between contract carriers should not be allowed since the granting of a proposed application to a contract carrier would adversely affect the business of another carrier, is not a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

The Utilities Commission's action in authorizing the granting of the permit to an applicant as a contract carrier does not denominate the competition generated by that action unfair or against the "public interest." State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970).

Protection as to Duplication in Route. — This section prohibits the granting of a franchise over any part of the route of an existing carrier except upon the prescribed conditions, and not merely a duplication of the same route from terminus to terminus, but the application to serve communities being served by the intervening carrier need not be denied in toto because there would be a duplication of routes along a short distance, since the existing carrier may be protected as to the duplication in route by proper restrictions in the certificate. State ex rel. Utilities Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951). See §§ 62-113, 62-114.

Subsection (f) of this section does not forbid authority to two or more carriers to traverse the same segment of a highway so long as they do not render duplicate service. The mere fact that the two carriers will use the same highway for a distance does not require a denial of the application. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

A traversing of the same highways for certain distances by competing carriers may readily become necessary in the public interest and, in such an instance, more than one certificate may be granted, subject to such restrictions as will protect the authorized carrier in respect of that part of the highway to be traversed by both. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Commission May Grant "Closed Door" Authority Though Application Is for Authority to Duplicate Service. — Since the Utilities Commission is not confined to the immediate scope of the pleadings filed, and may enlarge the scope of the inquiry, it may grant a "closed door" authority even though the application is for authority to duplicate service. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When "Closed Door" Authority Proper. — Where the principal business of a carrier is the transportation of passengers between two cities of the State along a route serving a number of other cities, and the improvement and construction of highways makes feasible a new and more direct route between the termini, the Utilities Commission, upon appropriation findings of fact, may grant such carrier "closed door" authority along the new route, notwithstanding

that other carriers respectively, serve segments of the route in "open door" operations. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

Charter Service. — See State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Amendment Held Not to Enlarge Scope of Operation of Carrier. — See State ex rel. Utilities Comm'n v. Fleming, 235 N.C. 660, 71 S.E.2d 41 (1952).

Findings of fact by the Commission are conclusive and binding upon the reviewing court when supported by competent, material and substantial evidence in view of the entire record. State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 358, 174 S.E.2d 814 (1970); State ex rel. Utilities Comm'n v. American Courier Corp., 8 N.C. App. 367, 174 S.E.2d 808 (1970); State ex rel. Utilities Comm'n v. Kenan Transport Co., 10 N.C. App. 626, 179 S.E.2d 799 (1971).

Procedure Held Contrary to Statutory Requirements. — Where the Commission issued its directive without any notice or hearing whatever, simply instructing the parties peremptorily that they must enter into an agreement, such a procedure is entirely contrary to the statutory requirements, and any such order is invalid. State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

What Constitutes a Contract Carrier. — See State ex rel. Utilities Comm'n v. Petroleum Transp., Inc., 2 N.C. App. 566, 163 S.E.2d 526 (1968).

Applied in Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953).

Stated in State ex rel. Utilities Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utilities Comm'n v. J.D. McCotter, Inc., 16 N.C. App. 475, 192 S.E.2d 629 (1972), aff'd, 283 N.C. 104, 194 S.E.2d 859 (1973).

§ 62-263. Application for broker's license. — (a) No person shall engage in the business of a broker in intrastate operations within this State unless such person holds a broker's license issued by the Commission.

(b) The Commission shall prescribe the form of application and such reasonable requirements and information as may in its judgment be necessary.

(c) Upon the filing of an application for license the Commission may fix a time and place for the hearing of the application and require such notices, publications, or other service as it may prescribe by the general rule or regulation.

(d) A license shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this Article and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the license, is or will be consistent with the public interest and policy declared herein.

(e) The Commission shall have the same authority over persons operating under and holding a brokerage license as it has over motor carriers under this Article, and shall require a broker to furnish bond or other security approved by the Commission and sufficient for the protection of travelers by motor vehicle. (1949, c. 1132, s. 13; 1963, c. 1165, s. 1.)

§ 62-264. Dual operations. — Unless the Commission, in its discretion, finds that the public interest so requires, no person or any person controlling, controlled by, or under common control with such person, shall hold both a certificate as a common carrier and permit as a contract carrier. (1947, c. 1008, s. 16; 1949, c. 1132, s. 16; 1963, c. 1165, s. 1.)

§ 62-265. Emergency operating authority. — To meet unforeseen emergencies, the Commission may, upon its own initiative, or upon written request by any person, department or agency of the State, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed vehicle or vehicles, whether such owner holds a certificate or permit or not, to transport passengers or property, baggage, mail, newspapers and light express between such points, or within such area during the period

of the emergency and to the extent necessary to relieve the same, as the Commission may fix in its order granting such authority; provided, that unless the emergency is declared by the General Assembly or under its authority, the Commission shall find from such request, or from its own knowledge or conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. In all cases, under this section, the Commission shall first afford the holders of certificates or permits operating in the territory affected an opportunity to render the emergency service. Upon the termination of the emergency, the operating privileges so granted shall automatically expire and the Commission shall forthwith withdraw all operating privileges granted to any person under this section. (1947, c. 1008, s. 17; 1949, c. 1132, s. 17; 1963, c. 1165, s. 1.)

§ 62-266. Interstate carriers. — (a) This Article shall apply to persons and vehicles engaged in interstate commerce over the highways of this State, except insofar as the provisions of this Article may be inconsistent with, or shall contravene, the Constitution or laws of the United States, and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority or register their exempt operation and registration of their vehicles operated in the State, and to observe such reasonable rules and regulations as the Commission may deem advisable in the administration of this Article and for the protection of persons and property upon the highways of the State.

(b) The Commission or its authorized representative is authorized to confer with and to hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives, or any other federal or State agency in connection with any matter arising under this Chapter, or under the Federal Motor Carrier Act, or under any other federal law which may directly or indirectly affect the interests of the people of this State or the policy declared by this Chapter or by the Interstate Commerce Act.

(c) Any person operating a common carrier motor vehicle in interstate commerce over the highways of this State without filing with the Utilities Commission a copy of its respective interstate authority and registering each vehicle operated in the State with the Utilities Commission in accordance with rules and regulations of the Utilities Commission shall be subject to a penalty of twenty-five dollars ($25.00), which shall be added to the registration fees provided in G.S. 62-300(8) and G.S. 62-300(13), and said penalty shall be collected with said registration fee from any carrier operating on the highways of North Carolina without registering his interstate authority by inspectors and investigators of the Utilities Commission in accordance with rules and regulations duly adopted by the Utilities Commission before said vehicle shall be permitted to operate further upon the highways of North Carolina.

(d) No motor carrier, whether operating as a regulated carrier or exempt for-hire carrier, shall operate or cause to be operated in interstate commerce in this State any vehicle until he has filed evidence of required insurance with the Utilities Commission and has been issued an identification stamp for such vehicle, which stamp must be attached to the approved uniform cab card and carried in the vehicle at all times. The identification stamp herein provided for shall be issued on an annual basis as of January 1st each year and shall be valid through February 1st the next succeeding year. When any person is discovered in this State, operating a vehicle in violation of this section, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle until he shall pay to the Utilities Commission a penalty of twenty-five dollars ($25.00). Any person denying his liability for such penalty

may pay the same under protest. He may apply to the Utilities Commission for a hearing, and said hearing will be granted before a member of the Commission or a hearing examiner within 30 days after receipt of the request of such a hearing. If after said hearing the Commission determines that the person was not liable for the penalty, the amount collected shall be refunded to him. If after said hearing the Commission determines that the person was liable for said penalty, the person paying the penalty may bring an action in the Superior Court of Wake County against the Utilities Commission for refund of the penalty. No restraining order or injunction shall issue from any court of the State to restrain or enjoin the collection of the penalty or to permit the operation of said vehicle without payment of the penalty prescribed herein. (1947, c. 1008, s. 35; 1949, c. 1132, s. 32; 1963, c. 1165, s. 1; 1969, c. 645; c. 721, s. 1; 1971, c. 736, s. 3.)

§ 62-267. Deviation from regular route operations. — (a) A common carrier of passengers by motor vehicle operating under a certificate issued by the Commission may occasionally deviate from the routes over which it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(b) Any common carrier by motor vehicle, now or hereafter holding a certificate issued by the Commission authorizing the transportation of general commodities over regular routes between fixed termini, may, under such rules and regulations as the Commission may prescribe:

(1) Transport from origin to destination, over any convenient highway or highways, shipments in truck loads originating at or destined to points on the regular routes of such carrier, and

(2) Move shipments in truck loads from any point on its regular routes to any other points on its regular routes over any convenient highway or highways between such points, whether over the routes of another carrier or not, where such movement over the carrier's own routes would otherwise be unnecessarily circuitous.

(c) In no event shall the operation of empty equipment by any carrier over any route or highway be construed as a violation of the rights of any carrier. (1947, c. 1008, s. 18; 1949, c. 1132, s. 18; 1963, c. 1165, s. 1.)

§ 62-268. Security for protection of public; liability insurance. — No certificate, permit or broker's license shall be issued or remain in force until the applicant shall have procured and filed with the Commission such security bond, insurance or self-insurance for the protection of the public as the Commission shall by regulation require. The Commission shall require that every motor carrier for which a certificate, permit, or license is required by the provision of this Chapter, shall maintain liability insurance or satisfactory surety of at least fifty thousand dollars ($50,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, one hundred thousand dollars ($100,000) because of bodily injury to or death of two or more persons in any one accident, and fifty thousand dollars ($50,000) because of injury to or destruction of property of others in any one accident; and the Commission may require any greater amount of insurance as may be necessary for the protection of the public. (1947, c. 1008, s. 19; 1949, c. 1132, s. 19; 1963, c. 1165, s. 1; 1973, c. 1206.)

Editor's Note. — The 1973 amendment added the second sentence.

Applied in Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

Cited in American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

§ 62-269. Accounts, records and reports. — The Commission may prescribe the forms of any and all accounts, records and memoranda to be kept by motor

carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors, to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, stubs, correspondence, or documents of motor carriers, brokers, or lessors, as may after a reasonable time be destroyed, and prescribing the length of time they shall be preserved. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, brokers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, and lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, brokers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this section, and motor carriers, brokers, and lessors, shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, auditor, inspector, or examiner of the Commission upon demand and the display of proper credentials. (1947, c. 1008, s. 28; 1949, c. 1132, s. 25; 1959, c. 639, ss. 5, 6, 9, 10; 1961, c. 472, s. 10; 1963, c. 1165, s. 1.)

§ 62-270. Orders, notices, and service of process. — It shall be the duty of every motor carrier operating under a certificate or permit issued under the provisions of this Article to file with the Commission a designation in writing of the name and post-office address of a person upon whom service of notices or orders may be made under this Article. Such designation may from time to time be changed by like writing similarly filed. Service of notice or orders in proceedings under this Article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, or by certified mail with return receipt requested, addressed to it or to such person at the address filed. In proceedings before the Commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier. (1947, c. 1008, s. 29; 1949, c. 1132, s. 26; 1957, c. 1152, ss. 6, 11; 1963, c. 1165, s. 1.)

§ 62-271. Collection of rates and charges of motor carriers of property. — No common carriers of property by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in intrastate commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice; provided, that the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for the State, or political subdivision thereof. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver property transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond

those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (i) is an agent only and had no beneficial title in the property, and (ii) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper and consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (1947, c. 1008, s. 31; 1963, c. 1165, s. 1.)

§ 62-272. Allowance to shippers for transportation services. — If the owner of property transported under the provisions of this Article directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs or schedules filed in the manner provided in this Article and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (1947, c. 1008, s. 32; 1963, c. 1165, s. 1.)

§ 62-273. Embezzlement of C.O.D. shipments. — Property received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon delivery of such party, is hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, and upon failure of any such carrier to account for the property so received, either to the shipper to whom the collection is payable or the carrier making delivery to any carrier handling the property or making the collection, within 15 days after demand in writing by the shipper, or carrier, or upon failure of the delivering carrier to remit the sum so directed to be collected and remitted to the shipper, within 15 days after collection is made, shall be prima facie evidence that the property so received, or the funds so received, has been wilfully converted by such carrier to its own use, and the carrier so offending shall be guilty of a felony and upon conviction shall be punished by fine or imprisonment, or both, in the discretion of the court, and such carrier may be indicted, tried, and punished in the county in which such shipment was delivered to the carrier or in any other county into or through which such shipment was transported by such carrier. (1947, c. 1008, s. 33; 1963, c. 1165, s. 1.)

The lessor-holders of a certificate of convenience and necessity are liable and answerable jointly with the lessee-operator to the shipper for losses sustained by reason of wrongful conversion of C.O.D. moneys collected by the lessee-operator company. Hough-Wylie Co. v. Lucas, 236 N.C. 90, 72 S.E.2d 11 (1952).

§ 62-274. Evidence; joinder of surety. — No report by any carrier of any accident arising in the course of the operations of such carrier, made pursuant to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose in any suit or action for damages growing out of any matter mentioned in such report or investigation; nor shall the discharge by any carrier of any truck driver or other employee after any such accident be offered or admitted in evidence for any purpose, in any suit or action against such carrier for damages arising out of any such accident; nor shall any insurance company or surety executing any insurance policy, bond, or other security for the protection of the public, as provided in G.S. 62-268, or as provided in G.S. 62-112, be joined with the assured carrier in any action or suit for damages, debt, or claim thereby secured; nor shall evidence of any such policy, bond, or other security be offered or received in any such action or suit against the carrier, but the surety or insurer shall be obligated within the amount of such policy, bond or other security to pay any final judgment against the carrier. (1947, c. 1008, s. 34; 1949, c. 1132, s. 31; 1963, c. 1165, s. 1.)

This Is Only Section as to Suit against Liability Insurer by Injured Person. — No North Carolina statute other than this section authorizes or prohibits a suit against a liability insurer alone or jointly with its insured by a person allegedly injured by the negligence of the insured. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

§ 62-275. Depots and stations. — Upon notice and hearing and upon a finding by the Commission that public convenience and necessity so requires, the Commission is authorized and empowered to compel any common carrier of passengers by motor vehicle operating under the provisions of this Article and serving any municipality to establish and maintain a passenger depot or station for the security, accommodation and convenience of the traveling public. When two or more such carriers operating under the provisions of this Article shall serve any municipality, the Commission is authorized and empowered to require such carriers to establish and maintain a union passenger depot or station for the security, accommodation and convenience of the traveling public, and to unite in the joint undertaking and expense of securing, erecting, constructing and maintaining such union passenger depot or station, commensurate with the business and revenue of such motor carriers, on such terms, regulations, provisions and conditions as the Commission shall prescribe; and all union passenger depots or stations shall provide impartially all services incident to the comfort and convenience of the traveling public, including but not limited to the following basic union services: waiting rooms, comfort stations and rest rooms; loading and unloading of passengers; selling, changing and adjusting of tickets; furnishing information about tickets, schedules, routes, arrivals and departures; handling, checking and storage of baggage; receiving, handling, and delivering express: Provided that nothing herein shall be construed as limiting the right of any motor carrier operating under the provisions of this Article to sell its own tickets and furnish its own information about tickets, schedules, routes, arrivals and departures at any place separate, apart and away from the union passenger depot or station, but not upon the premises of the union station, so long as such motor carrier also continues to participate in the union sale of its and all other carriers' tickets and the union information facilities within the station premises under union station management: Provided that any of the aforementioned union services may be provided independently within the union station premises by each carrier utilizing the union passenger depot or station upon the unanimous agreement of all such carriers and the approval of the Utilities Commission: Provided, that whenever the Commission shall require that a union depot or station shall be provided, it shall first allow the carriers required to

provide such station an opportunity to submit to the Commission for approval any agreement between or among such carriers for the securing, construction, maintenance and operation of such station or depot. The Commission shall approve such agreement or agreements, if the same be, in the Commission's discretion, reasonable and just and in the public interest. (1949, c. 1132, s. 28; 1963, c. 1165, s. 1.)

Commission May Require Establishment of Union Stations. — The Commission has statutory authority to require bus companies to establish union stations. Such stations are unquestionably convenient to passengers who have to change from one bus line to another. They impose no undue burden on interstate commerce. The State may lawfully require all bus companies, both interstate and intrastate, to use such union stations. State ex rel. Utilities Comm'n v. Atlantic Greyhound Corp., 252 N.C. 18, 113 S.E.2d 57 (1960).

But May Not Prohibit Opening of Separate Ticket Office. — A rule of the Commission prohibiting a carrier from opening a ticket office separate and apart from the ticket office at union station is void as imposing an undue burden on interstate commerce. State ex rel. Utilities Comm'n v. Atlantic Greyhound Corp., 252 N.C. 18, 113 S.E.2d 57 (1960).

§ 62-276. Construction of Article. — Nothing herein contained shall be construed to relieve any motor carrier from any regulation otherwise imposed by law or lawful authority, and this Article shall not be construed to relieve any such motor carrier from any obligation or duty imposed by Chapter 20 of the General Statutes of North Carolina. (1949, c. 1132, s. 35; 1963, c. 1165, s. 1.)

§ 62-277. Commission investigators and inspectors given enforcement authority. — The transportation inspectors and special investigators employed by the Commission shall have the same enforcement authority and police powers as members of the State Highway Patrol in enforcing this Article and other provisions of this Chapter applicable to motor transportation, and they are empowered to make complaint for the issue of appropriate warrants, informations, presentments or other lawful process for the enforcement and prosecution of violations of the transportation laws against all offenders, whether they be regulated motor carriers or not, and to appear in court or before the Commission and offer evidence at the trial pursuant to such processes. (1963, c. 1165, s. 1.)

§ 62-278. Revocation of license plates by Utilities Commission. — (a) The license plates of any carrier of persons or property by motor vehicle for compensation may be revoked and removed from the vehicles of any such carrier for wilful violation of any provision of this Chapter, or for the wilful violation of any lawful rule or regulation made and promulgated by the Utilities Commission. To that end the Commission shall have power upon complaint or upon its own motion, after notice and hearing, to order the license plates of any such offending carrier revoked and removed from the vehicles of such carrier for a period not exceeding 30 days, and it shall be the duty of the Department of Motor Vehicles to execute such orders made by the Utilities Commission upon receipt of a certified copy of the same.

(b) This section shall be in addition to and independent of other provisions of law for the enforcement of the motor carrier laws of this State. (1951, c. 1120; 1963, c. 1165, s. 1.)

Editor's Note. — This section is in substance a reenactment of § 20-64.1.

§ 62-279. Injunction for unlawful operations. — If any motor carrier, or any other person or corporation, shall operate a motor vehicle in violation of any provision of this Chapter applicable to motor carriers or motor vehicles

generally, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall operate in violation of any rule, regulation, requirement or order of the Commission, or of any term or condition of any certificate or permit, the Commission or any holder of a certificate or permit duly issued by the Commission may apply to the resident superior court judge of any judicial district where such motor carrier or other person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provisions of this Article, or of any rule, regulation, requirement, order, term or condition of the Commission. Such court shall have jurisdiction to enforce obedience to this Article or to any rule, order, or decision of the Commission by a writ of injunction or other process, mandatory or otherwise, restraining such carrier, person or corporation, or its officers, agents, employees and representatives from further violation of this Article or of any rule, order, regulation, or decision of the Commission. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1.)

Restraining Illegal Operation Along Route. — A franchise carrier may maintain an action in the superior court to restrain another carrier from illegal operation along his route without a certificate or permit from the Utilities Commission when such illegal operation by such other carrier interferes with its franchise rights. Bryant v. Barber, 237 N.C. 480, 75 S.E.2d 410 (1953).

As to right of common carrier to apply to court for injunctive relief against wrongful acts of another carrier under former statute repealed and superseded by Bus Act of 1949, see Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297 (1948).

Cited in State ex rel. Utilities Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973).

§ 62-280: Reserved for future codification purposes.

§ 62-281. Safety regulations applicable to motor carrier vehicles. — The Utilities Commission is hereby authorized to promulgate highway safety rules and regulations for all for-hire motor carrier vehicles engaged in interstate commerce and intrastate commerce over the highways of North Carolina, whether common carriers, contract carriers or exempt carriers. (1969, c. 722, s. 1; 1971, c. 586.)

§§ 62-282 to 62-289: Reserved for future codification purposes.

Article 13.

Reorganization of Public Utilities.

§ 62-290. Corporations whose property and franchises sold under order of court or execution. — When the property and franchises of a public utility corporation are sold under a judgment or decree of a court of this State, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was made, to said property and franchises, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the

franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the State now or hereafter established with reference to trusts and contracts in restraint of trade. (Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99; Rev., s. 1238; 1913, c. 25, s. 1; 1919, c. 75; C. S., s. 1221; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§ 62-291. New owners to meet and organize; special rule for railroads. — (a) The persons for whom the property and franchises have been purchased pursuant to G.S. 62-290 shall meet within 30 days after the delivery of the conveyance made by virtue of said judgment or decree, and organize the new corporation, 10 days' written notice of the time and place of the meeting having been given to each of said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary.

(b) Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and acknowledge and file articles of association as prescribed by this Chapter. Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this Chapter.

(c) When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law. (1871-2, c. 138, s. 5; Code, ss. 1936, 2005; 1901, c. 2, ss. 100, 101, 102; Rev., ss. 1239, 1240, 2552, 2565; C. S., ss. 1222, 3462, 3463; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

Railroad May Be Sold. — A railroad is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the legislature; not the franchise, but the land itself constituting the road. State v. Rives, 27 N.C. 297 (1844).

Corporation Not Dissolved by Sale. — A railroad corporation is not dissolved by the sale of its road. State v. Rives, 27 N.C. 297 (1844).

Purchaser Takes Rights of Old Company. — On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right-of-way under its charter. Barker v. R.R., 137 N.C. 214, 49 S.E. 115 (1904).

Purpose of Subsection (c) — Property Associated with Franchises. — The legislative purpose, as clearly manifested in subsection (c) of this section, is that the property of railroads must be kept in association with their franchises, to preserve value, to give credit to such corporations, to secure creditors, and to keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. Bradley v. Ohio R. & C. Ry., 78 F. 387 (W.D.N.C. 1896).

When Sale Effects Dissolution. — In order that the sale of the franchise and property of a railroad corporation under mortgage shall have the effect of a dissolution of such corporation, another corporation must be provided to take its place and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist, and when it is done the new corporation will be a domestic corporation. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

Corporate Existence Not Extinguished by Sale under Second Mortgage. — The sale of a railroad under a second mortgage and a conveyance thereunder, subject to the first mortgage

upon its franchise and corporate property, did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which it is operated. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

Same — Rights of Purchaser — Liability of Old Corporation for Damages. — The effect of the sale of a railroad company's franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, is to place the purchaser in the place of the mortgagor in its relation to the trustee of the first mortgage, with the right to run and operate the road as agent of the mortgagor, but the old corporation was not extinguished, but is still in existence and liable for damages caused by the maladministration of its agent which liability can be enforced against the property which it allows the purchaser to use. James v. Western N.C.R.R., 121 N.C. 523, 28 S.E. 537 (1897).

§ 62-292. Certificate to be filed with Secretary of State. — It is the duty of the new corporation provided for by this Article, within one month after its organization, to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the Secretary of State, to be filed and recorded in his office. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation. (1901, c. 2, s. 103; Rev., s. 1241; C. S., s. 1223; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§ 62-293. Effect on liens and other rights. — Nothing contained in this Article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under a sale pursuant to this Article when by the terms of the judgment or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person or body politic not a party to the action in which the judgment or decree was made, nor of any party except as determined by the judgment or decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the cestui que trust are concluded by the decree. (1901, c. 2, s. 103; Rev., s. 1241; C. S., s. 1224; 1955, c. 1371, s. 2; 1963, c. 1165, s. 1.)

§§ 62-294 to 62-299: Reserved for future codification purposes.

ARTICLE 14.

Fees and Charges.

§ 62-300. Particular fees and charges fixed; payment. — (a) The Commission shall receive and collect the following fees and charges, and no others:

(1) Twenty-five dollars ($25.00) with each notice of appeal to the Court of Appeals, and with each notice of application for a writ of certiorari.

(2) Twenty-five dollars ($25.00) with each application for a certificate or permit for motor carrier operating rights, and with each application to amend such certificate or permit so as to extend or enlarge the scope of operations thereunder, or as filing fee for each broker who applies for a brokerage license under the provisions of this Chapter.

(3) Twenty-five dollars ($25.00) with each application for a general increase in rates, fares and charges and for each filing of a tariff which seeks general increases in rates, fares and charges. This fee shall not apply

to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations.

(4) Twenty-five dollars ($25.00) with each application for discontinuance of train service, or for a change in or discontinuance of station facilities and with each application by a motor carrier of passengers for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

(5) Twenty-five dollars ($25.00) with each application for a certificate of public convenience and necessity, or for any amendment thereto so as to extend or enlarge the scope of operations thereunder.

(6) Twenty-five dollars ($25.00) with each application for approval of the issuance of securities, or for approval of any sale, lease, hypothecation, lien, or other transfer of any property or operating rights of any carrier or public utility over which the Commission has jurisdiction.

(7) Ten dollars ($10.00) with each application, petition, or complaint not embraced in (2) through (6) of this section, wherein such application, petition, or complaint seeks affirmative relief against a carrier or public utility over which the Commission has jurisdiction. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations; nor shall this fee apply to applications, petitions, or complaints made by any county, city or town; nor shall this fee apply to applications or petitions made by individuals seeking service from a public utility.

(8) One dollar ($1.00) for the registration with the Commission of each motor vehicle to be put in operation by a motor carrier operating under the jurisdiction of the Commission, and a fee of twenty-five cents (25¢) for the annual reregistration of each such motor vehicle.

(9) Thirty cents (30¢) for each page (8½ x 11 inches) of transcript of testimony, but not less than five dollars ($5.00) for any such transcript.

(10) Fifteen cents (15¢) for each 100 words of copies of papers, orders, certificates or other records, but not less than one dollar ($1.00) for any such record, plus one dollar ($1.00) for certifying any such paper, order or record.

(11) Twenty cents (20¢) for each page reproduced by photostatic or similar process and for each page of an order which can be made available without the necessity of copying or reproduction.

(12) Twenty-five dollars ($25.00) for the filing with the Commission of the interstate motor carrier operating authority or for registration of interstate exempt operation of every motor carrier operating into, from, within, or through North Carolina and filed with the Commission under the provisions of G.S. 62-266, and five dollars ($5.00) for filing all subsequent amendments thereto to maintain said filing in a current status.

(13) One dollar ($1.00) for the registration with the Commission of each motor vehicle operated into, from, within or through North Carolina by interstate carriers and registered with the Commission under the provisions of G.S. 62-266, and a fee of twenty-five cents (25¢) for the annual reregistration of each such motor vehicle.

(b) All witness fees, officers' fees serving papers, and cost of serving notice by publication shall be paid by the party at whose instance or for whose benefit such fees and costs are incurred.

(c) No application, petition, complaint, notice of appeal, notice of application for writ of certiorari, or other document or paper, the filing of which requires the payment of a fee under this Article, shall be deemed filed until the fees herein required shall have been paid to the Commission.

(d) The fees and charges as set forth in subdivisions (1), (7), (9) and (10) of subsection (a) of this section shall not apply to the State of North Carolina or to any board, department, commission, institution or other agency of the State; and all applications, petitions or complaints submitted by the State of North Carolina or any board, department, commission, institution or other agency of the State shall be filed without the payment of the fees required by this section. All transcripts, papers, orders, certificates, or other records necessary to perfect an appeal, or to determine whether an appeal is to be taken, shall be furnished without charge to the Attorney General upon his request in cases in which the Attorney General appears in the public interest or as representing any board, department, commission, institution or other agency of the State. (1953, c. 825, s. 1; 1955, c. 64; 1957, c. 1152, s. 15; 1961, c. 472, ss. 2-4; 1963, c. 1165, s. 1; 1967, c. 1039; c. 1190, s. 7; 1969, c. 721, s. 2; 1971, c. 736, s. 2.)

§ 62-301. Fees and charges supplemental; disposition. — All fees and charges received by the Commission under G.S. 62-300 shall be in addition to any other tax or fee provided by law and shall be paid by the Commission to the State Treasurer to be credited to the Commission as an allotment deposit. (1953, c. 825, s. 2; 1963, c. 1165, s. 1.)

§§ 62-302 to 62-309: Reserved for future codification purposes.

ARTICLE 15.

Penalties and Actions.

§ 62-310. Public utility violating any provision of Chapter, rules or orders; penalty; enforcement by injunction. — (a) Any public utility which violates any of the provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense, to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the Utilities Commission; and each day such public utility continues to violate any provision of this Chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the Commission shall be a separate offense.

(b) If any person or corporation shall furnish water or sewer utility service in violation of any provision of this Chapter applicable to water or sewer utilities, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall provide such service in violation of any rule, regulation or order of the Commission, the Commission shall apply to the resident superior court judge of any judicial district where such person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provision of this Chapter or of any rule, regulation or order of the Commission. The court shall have jurisdiction to enforce obedience to this Chapter or to any rule, regulation or order of the Commission by appropriate writ, order or other process restraining such person, corporation, or their representatives from further violation of this Chapter or of any rule, regulation or order of the Commission. (1899, c. 164, s. 23; Rev., s. 1087; C. S., s. 1106; 1933, c. 134, s. 8; c. 307, ss. 36, 37; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 1073.)

Editor's Note. — The 1973 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

Action Ex Contractu. — It would seem that an action against a railroad company for a penalty for violation of statute is an action ex contractu for breach of an implied contract to perform a statutory duty. State ex rel. Carter v.

Wilmington & W.R.R., 126 N.C. 437, 36 S.E. 14 (1900).

Construction of Penal Statute. — The rule that a penal statute must be strictly construed means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

§ 62-311. Willful acts of employees deemed those of public utility. — The willful act of any officer, agent, or employee of a public utility, acting within the scope of his official duties of employment, shall, for the purpose of this Article, be deemed to be the willful act of the utility. (1933, c. 307, s. 29; 1963, c. 1165, s. 1.)

§ 62-312. Actions to recover penalties. — Except as otherwise provided in this Chapter, an action for the recovery of any penalty under this Chapter shall be instituted in Wake County, and shall be instituted in the name of the State of North Carolina on the relation of the Utilities Commission against the person incurring such penalty; or whenever such action is upon the complaint of any injured person, it shall be instituted in the name of the State of North Carolina on the relation of the Utilities Commission upon the complaint of such injured person against the person incurring such penalty. Such action may be instituted and prosecuted by the Attorney General, the district attorney of the Wake County Superior Court, or the injured person. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as provided by law in other civil actions. (Code, s. 1976; 1885, c. 221; 1899, c. 164, ss. 8, 15; Rev., ss. 1092, 1113, 2647; C. S., ss. 1062, 1111, 3415; 1933, c. 134, s. 8; c. 307, s. 30; 1941, c. 97; 1963, c. 1165, s. 1; 1973, c. 47, s. 2.)

Cross Reference. — As to venue of actions against railroads, see § 1-81.

Editor's Note. — The 1973 amendment substituted "district attorney" for "solicitor" in the second sentence.

The penalty prescribed by § 62-200 for failure to transport within a reasonable time is given directly to the party aggrieved, and an action therefor is not required to be brought in the name of the State. Robertson v. Atlantic Coastline R.R., 148 N.C. 323, 62 S.E. 413 (1908).

Duty of Attorney General under Former Statute. — See Southern Ry. v. McNeill, 155 F. 756 (E.D.N.C. 1907).

§ 62-313. Refusal to permit Commission to inspect records made misdemeanor. — Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the Commission, or a majority of said Commission, and under the seal of the Commission, to permit the Commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000). (1963, c. 1165, s. 1.)

§ 62-314. Violating rules, with injury to others. — If any public utility doing business in this State by its agents or employees shall be guilty of the violation of the rules and regulations provided and prescribed by the Commission, and if after due notice of such violation given to the principal officer thereof, if residing in the State, or, if not, to the manager or superintendent or secretary or treasurer if residing in the State, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person

as may be directed by the Commission shall not be made within 30 days from the time of such notice, such public utility shall incur a penalty for each offense of five hundred dollars ($500.00). (1899, c. 164, s. 15; Rev., s. 1086; C. S., s. 1105; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Validity. — A statute giving authority to the Commission after notice for failure of any railroad company to make full and ample recompense for the violation of rules and regulations to proceed in the courts, to enforce the penalties prescribed for such violation is valid without providing in detail the methods of procedure. Atlantic Express Co. v. Wilmington & W.R.R., 111 N.C. 463, 16 S.E. 393 (1892).

Duty of Commission to Enforce Rules and Orders. — While the Commission has no power to render a judgment for the payment of money, etc., it is their duty to enforce their rules and orders, and the power to do so is given by this section. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

Right to Investigate Complaint. — The Commission had the undoubted right and it was eminently proper for them to institute an inquiry and inform themselves as to whether a complaint was grounded in truth. They were not required to institute an action for the penalty simply because a citizen feeling himself aggrieved had made a complaint before them. They did right to investigate the matter for themselves, but the end of such investigation was simply to afford them information and enable them to act intelligently in determining whether they would sue for the penalty given by the statute. State ex rel. North Carolina Corp. Comm'n v. Southern Ry., 147 N.C. 483, 61 S.E. 271 (1908).

§ 62-315. Failure to make report; obstructing Commission. — Every officer, agent or employee of any public utility, who shall willfully neglect or refuse to make and furnish any report required by the Commission for the purposes of this Chapter, or who shall willfully or unlawfully hinder, delay or obstruct the Commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars ($500.00) for each offense, to be recovered in an action in the name of the State. A delay of 10 days to make and furnish such report shall raise the presumption that the same was willful. (1899, c. 164, s. 18; Rev., s. 1089; C. S., s. 1108; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1.)

Construction of Similar Statute. — In construing a statute (Code of 1883, s. 1960) which provided a similar penalty against corporations for failure to make the returns into court, in State ex rel. Hodge v. Marietta & N.G.R.R., 108 N.C. 24, 12 S.E. 1041 (1891), it was held that the penalty could only be recovered in an action brought by the State. A private relator could not maintain the action.

§ 62-316. Disclosure of information by employee of Commission unlawful. — It shall be unlawful for any agent or employees of the Commission knowingly and willfully to divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this Chapter, except as he may be directed by the Commission or by a court or judge thereof. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1971, c. 736, s. 1.)

§ 62-317. Remedies for injuries cumulative. — The remedies given by this Chapter to persons injured shall be regarded as cumulative to the remedies otherwise provided by law against public utilities. (1899, c. 164, s. 26; Rev., s. 1093; C. S., s. 1112; 1963, c. 1165, s. 1.)

§ 62-318. Allowing or accepting rebates a misdemeanor. — If any person shall participate in illegally pooling freights or shall directly or indirectly allow or accept rebates on freights, he shall be guilty of a misdemeanor and, upon

conviction, shall be fined not less than one thousand dollars ($1,000) or imprisoned not less than 12 months. (1879, c. 237, s. 2; Code, s. 1968; Rev., s. 3762; C. S., s. 3520; 1963, c. 1165, s. 1.)

§ 62-319. Riding on train unlawfully; venue. — If any person, with the intention of being transported free in violation of law, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars ($50.00) or imprisoned not more than 30 days. Any person charged with a violation of this section may be tried in any county in this State through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (1899, c. 625; 1905, c. 32; Rev., s. 3748; C. S., s. 3508; 1963, c. 1165, s. 1.)

Effect on Liability of Insurance Company. — A policy of accident insurance that excepts from the company's full liability "sickness due to immorality or the violation of law," does not of itself exclude such liability for an injury caused by the plaintiff's stealing a ride on a railway train, made a misdemeanor by this section, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. Poole v. Imperial Mut. Life & Health Ins. Co., 188 N.C. 468, 125 S.E. 8 (1924).

§ 62-320. Failure to place name on produce a misdemeanor. — Any person, selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without this State, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days: Provided, that this section shall not apply to railroads, express companies and other carriers selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other carriers, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce. (1915, c. 193; C. S., s. 3531; 1963, c. 1165, s. 1.)

§ 62-321. Penalty for nondelivery of intrastate telegraph message. — Any telegraph company doing business in this State that shall fail to transmit and deliver any intrastate message within a reasonable time shall forfeit and pay to anyone who may sue for same a penalty of twenty-five dollars. ($25.00). Such penalty shall be in addition to any right of action that any person may have for the recovery of damages. Proof of the sending of any message from one point in this State to another point in this State shall be prima facie evidence that it is an intrastate message. (1919, c. 175; C. S., s. 1704; 1963, c. 1165, s. 1.)

Sending Message through Another State to Avoid Liability for Damages. — A telegraph company accepting a telegram to be transmitted between points in this State, where a recovery for mental anguish is allowed, may not avoid such liability by unnecessarily sending the message through another state, when it could have reasonably been otherwise transmitted. Speight v. Western Union Tel. Co., 178 N.C. 146, 100 S.E. 351 (1919).

Same — Burden of Proof. — Where a telegraph company has direct available facilities for transmitting an intrastate telegram altogether within the State, and relays it at offices in another state, the burden of proof is upon it to show that it was not done to evade the jurisdiction of the State court. Speight v. Western Union Tel. Co., 178 N.C. 146, 100 S.E. 351 (1919).

§ 62-322. Unauthorized manufacture or sale of switch-lock keys a misdemeanor. — It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this State on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1909, c. 795; C. S., s. 3477; 1963, c. 1165, s. 1.)

§ 62-323. Willful injury to property of public utility a misdemeanor. — If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any public utility, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor. (1871-2, c. 138, s. 39; Code, s. 1974; Rev., s. 3756; C. S., s. 3478; 1963, c. 1165, s. 1.)

Cross Reference. — As to injury to property of railroads and other carriers, see §§ 14-278, 14-279.

§ 62-324. Disclosure of information as to shipments unlawful. — (a) It shall be unlawful for any common carrier engaged in intrastate commerce or any officer, receiver, trustee, lessee, agent, or employee of such carrier, or for any other person authorized by such carrier, to receive information, knowingly to disclose to, or permit to be acquired by any person other than the shipper or consignee without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for such transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

(b) Nothing in this section shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or any officer or agent of the State or of the government of the United States, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers. (1947, c. 1008, s. 30; 1961, c. 472, s. 8; 1963, c. 1165, s. 1.)

§ 62-325. Unlawful motor carrier operations. — (a) Any person, whether carrier, passenger, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this Chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulations as in this Chapter provided for motor carriers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than five hundred dollars ($500.00) for the first offense and not more than two thousand dollars ($2,000) for any subsequent offense.

(b) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this Article, or other applicable law, or to make specific and full, true, and correct answer to any question within 30 days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this Article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than five thousand dollars ($5,000). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. It shall be the duty of the Commission to prescribe and enforce such general rules and regulations as it may deem necessary to compel all motor carriers to keep accurate records of all revenue received by them to the end that any tax levied and assessed by the State of North Carolina upon revenues may be collected. Any agent or employee of a motor carrier who shall willfully and knowingly make a false report or record of fares, charges, or other revenue received by a carrier or collected in its behalf shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

(c) Any person who, at any bus terminal, solicits or otherwise attempts to induce any person to use some form of transportation for compensation other than that lawfully using said terminal premises by contract with the terminal operator or by valid order of the Commission shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than fifty dollars ($50.00) or imprisoned not to exceed 30 days, or both, in the discretion of the court. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1.)

§ 62-326. Furnishing false information to the Commission; withholding information from the Commission. — (a) Every person, firm or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall knowingly or willfully file or give false information to the Utilities Commission in any report, reply, response, or other statement or document furnished to the Commission shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

(b) Every person, firm, or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall willfully withhold clearly specified and reasonably obtainable information from the Commission in any report, response, reply or statement filed with the Commission in the performance of the duties of the Commission or who shall fail or refuse to file any report, response, reply or statement required by the Commission in the performance of the duties of the Commission shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1969, c. 765, s. 1.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

March 1, 1975

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina

PROPERTY OF
GOVERNOR'S OFFICE

STATE LIBRARY OF NORTH CAROLINA
3 3091 00829 5115

PROPERTY OF
GOVERNOR'S OFFICE